

GPS records support the employer's assertion that the claimant deliberately reported starting her home health care at clients' home when she was still several miles away. She is ineligible under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member**

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rorie Brennan, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from her position with the employer on June 5, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 27, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 16, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to participate in the hearing and present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued consolidated findings of fact. However, we remanded a second time so that the review examiner could address discrepancies between certain consolidated findings and her credibility assessment. A final set of consolidated findings has been issued. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original conclusion that any inaccuracies in the claimant's time reports were due to problems with the her smart phone's application for logging in time and not deliberate misconduct is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's final consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked full time as a Certified Nursing Assistant (CNA) for the employer, a home health care provider, from 10/24/16 until 06/05/17. The claimant's rate of pay was \$15.80 per hour.
2. The employer has a written policy that prohibits falsification of employer records. The policy states:

“Falsifying employment or other [employer] records. This includes, but is not limited to, employment applications, official time sheets or the completing of another employee's time sheet, accounting reports and records, mileage sheets, medical documentation, or any electronic document, file or record, etc. Also refusing to cooperate with, or providing false or misleading statements and/or information to [employer], including during any [employer] conducted investigation.”
3. The claimant was provided a copy of the policy and training on the policy at her on-board orientation when hired.
4. The purpose of the policy is to ensure accurate record keeping.
5. The text of the policy states that violators of the policy are subject to “corrective action, up to and including termination.”
6. The claimant used a smart phone app to report her time worked.
7. The app relied on GPS.
8. The employer expected employees to record their time worked via the smart phone app when they arrived at a client's home and upon leaving.
9. The employer expected employees to use the client's landline to record their time if the app was not working.
10. Several weeks prior to her separation from employment, the claimant (and other employees) experienced difficulty getting the app to record their time.
11. The claimant reported the difficulty to the employer, who contacted the app's developer, who corrected the problem.
12. Prior to the claimant's discharge, the Scheduler noticed discrepancies between the claimant's log-ins and the app's GPS.

13. The Scheduler reported the discrepancies to the Director, who compared the log-ins to the GPS maps. The Director observed multiple instances of the claimant logging in from her house or en route to a client's home.
14. The Director suspected the claimant was logging in from home or en route to make it appear as if she reported to clients' homes on time.
15. The Director confronted the claimant, who denied she ever logged in anywhere but from a client's home.
16. From 05/10/17 through 05/24/17, the employer's app's navigation was functioning properly.
17. On 05/30/17, the employer suspended the claimant pending investigation due to "discrepancies logging in and out."
18. On 06/05/17, the employer discharged the claimant for "falsely record[ing] her start time for a client on many occasions, when she was not at the client's home, which is the standard of telephony log-in documentation."
19. On 06/06/17, the claimant filed a claim for unemployment benefits with an effective date of 06/04/17.

Credibility Assessment:

The claimant attended the initial hearing. Both parties attended the remanded hearing. The employer was represented by an agent. The employer produced credible and persuasive testimony and documentary evidence at the remand hearing that showed the claimant engaged in falsification of her time sheets when she logged in from home or en route to a client's house. Although the claimant argued that her phone's GPS was not properly working, the employer testified that the log-in app relied on its own GPS and those maps were submitted into evidence to show the claimant's locations when she logged in while not at a client's house. The employer's testimony and documentary evidence is found more credible and more reliable than the claimant's.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the consolidated findings do not support the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In the present case, the employer fired the claimant for falsely reporting that she was at a number of clients' homes at a certain time. The claimant denied doing so, asserting that any discrepancies in her reports were due to a malfunctioning smart phone application (app), which the employer required that she use to log in her time. Ultimately, the review examiner discredited the claimant's assertion. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). “The test is whether the finding is supported by ‘substantial evidence.’” Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted.)

As explained in her credibility assessment, the review examiner believed the employer's testimony that described how the smart phone app relied upon its own GPS system and not anything in the claimant's smart phone. As a result, the review examiner found that the navigation app in question was functioning properly during the two weeks at issue, May 10 through May 24, 2017. *See Consolidated Finding # 16.* The employer's testimony is supported by GPS records from various dates between May 10–24, 2017, showing that the claimant was not at a client's home at the times she reported but was still several miles away. *See Exhibit 6.* Since the review examiner's assessment and finding are supported by substantial evidence, we will not disturb them on appeal.

Although the employer has shown that the claimant violated a policy prohibiting the making of false time entries, there is no evidence that the employer uniformly disciplined employees who did the same. For this reason, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may satisfy its burden under G.L. c. 151A, § 25(e)(2), by showing that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

During the hearing, the claimant did not deny knowing the employer's expectation for logging in. She testified that she did not realize there was a problem with her smart phone. If the inaccurate entries were due to a problem with her smart phone, then the claimant's false entries would not be deliberate or in wilful disregard of the employer's interest but would be attributable to mitigating circumstances, a technological problem over which she had no control. Indeed, Consolidated Findings ## 10 and 11 note that, several weeks earlier, a number of employees were having difficulty getting the app to properly record their time. However, the employer contacted the application developer and the problem was fixed. Thereafter, specifically during the period May 10–24, 2017, when GPS records show the claimant logging in start times miles from client homes, the app was functioning properly. Consolidated Finding # 16. Since the incorrect time entries were not attributable to technological problems, the only reasonable inference is that the claimant deliberately logged in before she arrived at the client locations.

In sum, the employer has met its burden under G.L. c. 151A, § 25(e)(2), to prove that the claimant deliberately logged client start times that were inaccurate, and that she did so in wilful disregard of the employer's interest, not due to mitigating circumstances.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning May 28, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh