

Claimant customer service representative's discharge did not constitute deliberate misconduct or a knowing violation, where the review examiner credited her testimony that her work site experienced persistent telephone and internet service problems that caused problems with customer calls and that she complained to her supervisor and to the employer's IT department, to no avail. The review examiner did not credit the multi-level hearsay testimony of the employer's human resources manager, who had no direct involvement with the employer's investigation and no direct knowledge of the telephone and internet problems at the claimant's work site or her unsuccessful efforts to remedy the problems.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 affirm.

The claimant was discharged from her position with the employer on June 27, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 29, 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 December 2, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, was entitled to benefits pursuant to 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 take the employer's testimony. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant's discharge for allegedly intentionally hanging up on customers did not constitute deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable

and unfirmly enforced rule or policy of the employer is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full time customer service representative for the employer, an auto glass company, between 07/06/2015 and 06/27/2017, when she separated.
2. The employer had general policies of unacceptable behavior including "deliberate verbal and/or physical misconduct toward a customer or an employee" and "any act intended to deceive a customer or the company."
3. Per the general policies, "the form of corrective action...will be determined on an individual case-by-case basis."
4. The claimant acknowledged receipt of the employee handbook containing these general policies on 07/07/2015.
5. The employer expected employees not to intentionally hang up on customers.
6. The purpose of this expectation was to ensure that customers are being assisted.
7. This expectation was communicated to the claimant during her employment.
8. The claimant worked at the employer's [Town A], Massachusetts location and was the only customer service representative at said location.
9. The claimant's direct supervisor was the business unit manager ("manager"). The claimant's upper level manager was the vice president of operations.
10. Upon hire, the former business unit manager ("former manager") informed the claimant of problems with the telephone system and to submit incident tickets to the IT department if she experienced problems with the telephone system or the computer system.
11. Throughout the claimant's employment, she experienced problems with the telephone system and computer system. The claimant made reports at least once per week of problems with the telephone lines in the [Town A] location. The claimant reported these problems to the former manager, the manager, and the IT department.

12. The telephone line servicer was at the [Town A] location multiple times during the claimant's employment to perform service on the telephone lines.
13. At times during the claimant's employment, she would receive a call, answer the call, and the telephone system and computer system would freeze, disconnecting the call. The claimant did not hear customers saying "hello" during the call.
14. The claimant was still experiencing telephone system problems through 06/27/2017.
15. The contact center manager noticed several hundred calls less than ten (10) seconds in length on unknown dates.
16. The employer received "several" customer complaints on unknown dates that they were being hung up on.
17. The contact center manager, chief financial officer and vice president of operations began an investigation, finding seven hundred (700) dropped calls from the claimant's extension in the months of May and June 2017.
18. The investigation comprised only of days the claimant was working.
19. On occasions when the claimant was not working, she received telephone calls and text messages from other employees' personal telephone numbers expressing frustration with the employer's telephone system and computer system, including that vehicles were arriving for appointments of which the technicians were unaware because the computer system was down.
20. The claimant was not interviewed during the investigation. It is unknown whether the IT department was contacted during the investigation. It is unknown whether the telephone line servicer was contacted during the investigation.
21. The human resources manager listened to an unknown number of the recordings of dropped calls being investigated. A "good portion" of these calls ended in disconnections or the claimant transferring the call to someone else.
22. The human resources manager listened to recordings of dropped calls. The calls would pick up, there would be silence, the customers would say "hello," there would be no response, and the call would disconnect.
23. The claimant did not intentionally hang up on customers during telephone calls.

24. On 06/27/2017, the regional manager and human resources representative terminated the claimant's employment for allegedly intentionally hanging up on customers during telephone calls in May and June 2017.

Credibility Assessment:

The human resources manager who testified during the remand hearing offered hearsay testimony about the investigation. While the human resources manager listened to an unknown number of recorded calls being investigated, she admittedly was not a member of the team conducting the investigation. The human resources manager offered multi-level hearsay testimony that the manager was unaware of telephone system problems at the [Town A] location. This multi-level hearsay testimony is not credible in light of the claimant's detailed, direct testimony to the contrary. The human resources manager also did not have information about the extent of the investigation to rebut the claimant's assertions that she did submit incident tickets to the IT department and observed the telephone line servicer at the [Town A] location multiple times to perform service on the telephone lines. During the original and remand hearings, the claimant provided consistent, detailed, direct testimony about her own experiences with the telephone system and computer system during her employment, specifically regarding her difficulties and problems. The claimant also offered direct testimony about her observations that the telephone line servicer was at the [Town A] location multiple times during the claimant's employment to perform service on the telephone lines. Moreover, the claimant offered detailed testimony about receiving communication from other employees' personal telephone numbers on her days off regarding the telephone and computer systems. The claimant's direct testimony that she was not intentionally hanging up on customers is deemed to be more credible than the human resources manager's multi-level hearsay testimony alleging the claimant was intentionally hanging up on customers.

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 ultimate 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. Moreover, as discussed more fully below, we agree with and affirm the review examiner's legal conclusion that the employer failed to establish that the claimant intentionally hung up on customers.

The review examiner initially awarded benefits after analyzing the claimant's separation under 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 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

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Based solely on the claimant's testimony at the initial hearing, the review examiner concluded that the employer had not met its burden. We remanded the case to take the employer's testimony. After remand, we also conclude that the employer has not met its burden.

The review examiner initially found that while the claimant was discharged for allegedly hanging up on customers during telephone service calls, the claimant did not intentionally hang up on customers during the calls at issue. While acknowledging that the employer had general policies prohibiting "unacceptable behavior," including deliberate verbal misconduct toward a customer or employee and any act intended to deceive a customer or the company¹, the review examiner credited the claimant's testimony that there were ongoing problems with the telephone lines at the site where she worked, the claimant reported these problems at least once a week to her manager and the employer's IT department, and the telephone line provider made multiple visits to the work site trying (apparently unsuccessfully) to resolve the problems. Since the employer failed to attend the initial hearing, the review examiner concluded that it failed to meet its burden under G.L. c. 151A, § 25(e)(2).

After remand, the review examiner's consolidated findings provided more detail about the circumstances surrounding the employer's decision to discharge the claimant. These new findings included the employer's logical expectation that its employees would not intentionally hang up on customers, that the employer noticed several hundred calls of less than ten seconds in length and received complaints from customers that they were being hung up on, that the employer reviewed 700 "dropped calls" from the claimant's extension in May and June 2017, and that the employer chose not to interview the claimant during its investigation. At the remand hearing, it was unknown whether the employer contacted its IT department or the telephone service provider as part of its investigation.

Although the review examiner's consolidated findings provided more detail, the crucial findings remained undisturbed from the initial hearing. The claimant had ongoing problems with the telephone lines at the site where she worked, she reported these problems at least once a week to her managers and the employer's IT department, and the telephone service provider made multiple visits to the claimant's work site trying to resolve the problem.

Most importantly, the review examiner did not modify the most critical finding from the initial hearing. She found that the claimant did not intentionally hang up on customers during telephone calls. *See Consolidated Finding # 23.*

¹ *See* Hearings Exhibits # 5a–5b. The claimant's acknowledgement of receipt of the relevant policies was entered into evidence as Hearings Exhibit # 5d.

In addition to providing more detailed findings upon remand, the review examiner also provided a detailed credibility assessment to support her findings that the claimant had experienced telephone line problems throughout her employment, she raised the problems with her supervisors, and she did not intentionally hang up on customers. The review examiner noted that the claimant provided “consistent, detailed, direct testimony” at the initial and remand hearings, while the employer’s witness — its human resources manager — offered only hearsay testimony regarding an investigation in which she admittedly played no part. 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). Her assessment is reasonable in relation to the evidence in the record.

Where the review examiner found that the employer meted out discipline for policy violations on a case-by-case basis, we conclude that the employer failed to establish that it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

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). Although the employer’s customers complained that they were being hung up on when they called, the review examiner’s findings establish that the claimant did not intentionally hang up on any customers. Thus, she lacked the requisite state of mind to support disqualification from benefits.

We, therefore, conclude as a matter of law that the claimant was discharged without evidence of deliberate misconduct in wilful disregard of the employer’s interest or of a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

The review examiner’s decision is affirmed. The claimant is entitled to receive benefits for the week ending July 1, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2018



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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.

JPC/rh