

Claimant is denied benefits based on employer direct testimony and video evidence that she engaged in theft.

**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 reverse.

The claimant was discharged from her position with the employer on September 29, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 9, 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 19, 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 and, thus, 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 provide the employer with the opportunity to present evidence. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. 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 employer did not meet its burden to establish that the claimant was discharged for theft is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings of fact establish that the claimant voided or deleted a number of customer transactions and later admitted to the employer that she had taken money derived from these transactions.

Findings of Fact

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

1. The claimant worked part time as a shift leader for the instant employer, a sandwich restaurant, from 04/26/16 until 09/29/17.

2. The employer maintains a Code of Conduct Policy that states in part:

The following policies and guidelines are set forth to assist you in determining what is appropriate personal and professional conduct.

- Team Members must follow the Company Cash handling and register policies and procedures at all times. This policy includes but is not limited to: ringing in sales, voids, cash paid-outs, coupon handling, delivery driver cash drops, and all other situations involving cash.
3. The employer maintains this policy to protect company assets and to ensure proper cash handling procedures are followed.
 4. The claimant was aware of the policy as she signed an acknowledgement that she received the policy on 04/26/16.
 5. All employees are subject to the policy.
 6. Disciplinary action imposed is at the discretion of the employer based on the nature and severity of the incident.
 7. The employer expects employees to properly handle cash transactions.
 8. The claimant was aware of the expectation because she signed the policy on 04/26/16. The claimant also attended a mandatory training regarding proper cash handling procedures and voids in order to become a certified shift leader.
 9. The employer maintains a Disciplinary Action Policy that states in part:

The nature of the offense and the particular circumstances determine whether or not all the steps in the sequence are followed. A team member can be discharged for violation of any rule, policy or procedure which is a serious enough breach of responsibility to [Employer] that prior warnings are not required.

Examples of such conduct which may result in termination without prior warning include, but are not limited to:

Theft, attempted theft, or removal from the premises without proper authorization of company, guest, client, or team member property.
 10. The employer maintains this policy to prevent theft and protect company assets.
 11. The claimant was aware of the policy as she signed an acknowledgement that she received the Team Member handbook on 04/26/16.

12. All employees are subject to the policy.
13. The employer has suspended and immediately terminated all employees who have committed theft regardless of prior discipline.
14. On 09/22/17, the General Manager (GM) was reviewing the claimant's daily paperwork regarding register activity. The GM noticed a void that looked suspicious. The GM couldn't prove it was a legitimate transaction.
15. The GM notified the Area Manager (AM) and the AM also looked into the void but could not determine if it was valid.
16. On 09/22/17, the GM and AM asked the claimant about the suspicious void. The claimant denied any wrong doing and immediately became defensive. The AM and GM told the claimant that if she wasn't going to talk to the employer they were handing it over to the loss prevention for further investigation.
17. The Internal Auditor (IA) reviewed all of the claimant's voids between the dates of 07/02/17 through 09/19/17. The IA was to determine if the voids were valid. The employer also viewed surveillance footage that corresponded with the transactions.
18. The IA found 38 transactions totaling a minimum dollar amount of \$556.00 where the claimant had either voided transactions or deleted orders and used the no sale option to collect the money from the customers.
19. The employer determined that when the claimant cashed out at the end of her shift, the claimant altered the totals and took the surplus cash from all the voids and deleted transactions during her shift.
20. On 09/29/17, the IA met with the claimant to discuss his investigation. The claimant was very combative and not cooperative initially. The claimant eventually sat with the IA to have a discussion.
21. The IA asked the claimant about all the voids that he had researched through electronic records and video surveillance. The claimant told the IA that she had taken money from the employer. The claimant also admitted to incorrectly voiding and deleting orders and keeping the money.
22. The IA asked the claimant to prepare a written statement after she verbally admitted to the theft. The employer was not able to read the written statement because it was sloppily written.
23. The claimant was extremely agitated and the employer felt like the claimant was going to leave the building that day. The employer called the State Police and they spoke with the claimant and filed a report for the theft.

24. On 09/29/17, the IA informed the claimant that she was suspended pending the completion of the investigation.
25. On 10/02/17, the IA gave his information to Human Resources and they processed the termination information.
26. On 10/02/17, the claimant was notified that she was terminated for theft.
27. The employer pressed charges against the claimant and is seeking restitution in the amount of \$556.00.

Credibility Assessment

At the initial hearing, which the employer did not attend, the claimant provided unrefuted testimony that she did not commit theft against the employer.

At the remand hearing, which the claimant did not attend, the employer presented direct testimony and video evidence in the record regarding the reason for discharge.

Based on the testimony and evidence presented, it is concluded that the claimant's testimony cannot be deemed credible.

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. We further believe that the review examiner's credibility assessment is reasonable in relationship to the evidence presented. As discussed more fully below, we conclude that the consolidated findings do not sustain the review examiner's decision to award the claimant benefits.

The claimant was terminated from her employment, and accordingly, 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

Under the foregoing provision, it is the employer's burden to establish that the claimant was discharged either 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. In order to deny benefits under G.L. c. 151A, § 25(e)(2), it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97(1979).

The consolidated findings indicate that the employer has an expectation that its employees will properly handle cash transactions. The employer maintains a policy which prohibits theft and provides that theft may result in termination without prior warning. The claimant signed for the policy and attended a mandatory training on proper cash handling procedures and voids.

The findings further establish that, in reviewing the claimant's daily register activity, the General Manager became suspicious about a voided transaction, which he could not prove to be legitimate. When the employer asked the claimant about the suspicious void, the claimant denied any wrongdoing, became defensive, and would not talk about it. The employer referred the issue to the loss prevention department for further investigation. The Internal Auditor reviewed all of the claimant's electronic voided transactions for the period from July, 2, 2017, to September 19, 2017. He also viewed the corresponding video surveillance footage. He discovered 38 transactions where the claimant had either voided transactions or deleted orders and had used the no sale option to collect the money from the customer. He determined that at the end of the claimant's shift when she cashed out, she altered the totals and took the surplus cash from the voided transactions.

The Internal Auditor met with the claimant to discuss his investigation. The claimant became very combative and uncooperative. After he questioned the claimant about all the voids that he had researched through electronic records and video surveillance, the claimant admitted to the Internal Auditor that she had taken money from the employer, that she had incorrectly voided and deleted orders, and that she had kept the money. The employer called the State Police, who, after speaking with the claimant, filed a report of the theft. The claimant was discharged and the employer pressed charges against the claimant, seeking restitution for the \$556.00 which the claimant misappropriated.

In rendering her findings, the review examiner made a credibility assessment in favor of the employer, stating that, at the remand hearing, the employer presented direct testimony and video evidence regarding the reason for the claimant's discharge, and that, based on the testimony and evidence presented, the claimant's initial testimony cannot be deemed credible. 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. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Although the review examiner did not explain the basis for discrediting the claimant's testimony, we can infer that the employer's explicit testimony about the results of its investigation in combination with corroborating video evidence rendered it more credible. Her assessment is reasonable in relationship to the evidence in its entirety, and we see no reason to disturb it.

The record establishes that the claimant voided or deleted a number of the employer's customer sales and pocketed the monies derived from said sales. Because the consolidated findings do not explicitly describe how this violates the employer's cash handling and register procedures, we

cannot conclude that this claimant's behavior constituted a knowing violation of the employer's policy under G.L. c. 151A § 25(e)(2).

The consolidated findings, however, show that the claimant took money from the employer by incorrectly voiding or deleting customer orders and keeping the money. *See* Consolidated Finding # 21. Because she offered no explanation for this misconduct, the only reasonable inference is that it was deliberate and in wilful disregard of the employer's prohibition against theft.

Finally, we note that, at the initial hearing, the claimant had denied stealing anything, and was not present at the remand hearing to provide further testimony. Thus, there is nothing in the record to suggest circumstances which might have mitigated the willfulness of her conduct. The defense of mitigation is not available to employees who deny engaging in the behavior leading to the discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found). In the absence of an acknowledgment that the conduct occurred, a defense of mitigation may not be considered. Thus, there is nothing in the record to suggest circumstances which might have mitigated the willfulness of her conduct.

The record before us establishes that claimant voided or deleted a number of the employer's customer sales and pocketed the monies derived from said sales. We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending September 24, 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 - April 25, 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.

SPE/rh