

Although it may have been reasonable for the employer to require authorization prior to employees using the company credit card, the claimant cannot be denied benefits under G.L. c. 151A, § 25(e)(2), where she saw other employees use the credit card to fill up gas in their personal vehicles and she did not believe she was engaging in theft by doing so herself.

**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**

Issue ID: 0023 2667 04

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny 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 October 13, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 16, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on December 30, 2017.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the final incident which led to the claimant's separation. Both parties 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 claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant used the employer's credit card to fill her personal vehicle with gas, but the consolidated findings of fact indicate that the claimant did not realize that such an action would be considered theft by the employer.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment benefits effective January 22, 2017. The claimant worked for two employers, neither of which were the instant employer, during the base period of the claim, which extended from January 1, 2016 through December 31, 2017. The Department of Unemployment Assistance (the DUA) determined the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$260.00, with an earnings exclusion of \$86.67.
2. The claimant filed a subsequent initial claim for unemployment benefits effective January 28, 2018. During the second quarter of 2017 (April 1st – June 30th), the employer paid the claimant gross wages in the amount of \$1,702.50. During the third quarter of 2017 (July 1st-September 30th), the employer paid the claimant gross wages in the amount of \$5,310.00. During the fourth quarter of 2017 (October 1st- December 31st), the employer paid the claimant gross wages in the amount of \$750.00.
3. The claimant worked part time as a bookkeeper/secretary for the employer, a boat sales and repair business, from June 7, 2017 until October 13, 2017, when she was discharged from employment.
4. The claimant worked an average of 32 hours each week. She was paid \$15.00 per hour.
5. The claimant's immediate supervisor was the Owner.
6. One of the claimant's job duties was making deposits at the bank.
7. The bank was located approximately 4 miles away from the employer's business.
8. The Owner permitted the claimant to leave work early with pay on days she needed to make bank deposits.
9. The Owner never reimbursed the claimant for gas she used to perform bank runs for the employer or any other errands for the employer.
10. Several times during the claimant's employment, the Owner lent the claimant money when she asked him for a loan to put gas in her personal vehicle.
11. When the Owner hired the claimant, he informed her his previous bookkeeper stole from him and theft would result in termination of her employment.
12. The employer's company credit card was stored in the claimant's desk. She was responsible for providing it to employees to make purchases for the company.

13. One employee's personal vehicle was equipped with a breathalyzer and he was not permitted to operate any other vehicle under the law. On occasion, the employee used the company credit card to purchase gas for his vehicle to perform work functions. The employee turned in receipts for the gas he purchased to the claimant.
14. Two other employees used the company credit card to purchase approximately \$10.00 worth of gas on one occasion to perform work functions. The employees turned in receipts for the gas to the claimant.
15. The Owner instructed the claimant to give another employee the company credit card to purchase gas for a company vehicle.
16. On October 12, 2017, while the claimant was picking up lunch for the office, she used the company credit card to purchase \$25.00 of gas for her personal vehicle, which is a truck.
17. The claimant needed gas to go to the bank and make a deposit for the business and commute to and from work the following day.
18. The Owner never gave the claimant permission to use the company credit card to purchase gas for her personal vehicle.
19. The claimant did not request permission from the Owner to purchase the gas because he wasn't at the workplace when she needed it on October 12, 2017.
20. The claimant never purchased gas for her personal vehicle with the company credit card in the past.
21. When she returned to the office after purchasing the gas, the claimant returned the credit card to her desk drawer and she input a \$25.00 gas charge in the employer's computer accounting system to reflect the amount of her gas purchase.
22. The claimant put the receipt for her gas purchase in a box on a shelf behind her desk where all receipts were stored.
23. After work on October 12, 2017, the Owner called the claimant and asked who purchased \$25.00 of gas on the company credit.
24. The claimant told the Owner she had and said she thought it was okay because other employees purchased gas on the company credit card.
25. On the morning of October 13, 2017, the employer told the claimant her employment was terminated.

26. The employer discharged the claimant for theft of employer funds by purchasing gas for her personal vehicle on the company credit card without permission.
27. The claimant didn't believe her use of the company credit card to purchase gas for her personal vehicle would be considered theft because other employees used the company credit card to purchase gas for their personal vehicles to run errands for the business.
28. The employer's Owner provided a written statement to the DUA that he investigated the claimant's claim that other employees used the company credit card for gas, and he found no other employee used it without his permission.

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. As discussed more fully below, based on the review examiner's new consolidated findings of fact, we conclude that the claimant is not subject to disqualification from receiving unemployment 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 relevant 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

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits.¹ At the first hearing, only the claimant offered evidence. Although the employer was not present, the review examiner concluded that there was sufficient evidence to conclude that the claimant should be disqualified under the above-cited statute.

As an initial matter, we assume for purposes of this decision that the claimant engaged in an act of misconduct by using the employer's credit card without permission. The employer's expectations regarding theft were communicated to the claimant at hire. *See Consolidated Finding of Fact # 11.* On October 12, 2017, the claimant used the company credit card to purchase gas for her vehicle. *Consolidated Finding of Fact # 16.* The employer's owner, who supervised the claimant, did not give the claimant permission to use the company credit card for this purpose. *Consolidated Finding of Fact #18.* The claimant was responsible for giving the

¹ Because the employer did not offer into evidence any written policies, we are concerned here with the deliberate misconduct portion of G.L. c. 151A, § 25(e)(2).

company credit card to employees who needed to use it “to make purchases for the company.” Consolidated Finding of Fact # 12. Although the claimant argued that the gas she purchased on October 12, 2017, was, in part, for a business reason (related to her need to make bank deposits), the fact remains that she bought gas for her own vehicle, at least in part to commute to work, without any authorization or knowledge of the owner. *See* Consolidated Finding of Fact # 17. Based on the owner’s initial indication to the claimant that the employer would not tolerate theft of any sort, using the credit card, in part, for personal reasons, does constitute an act of misconduct.

While the claimant may have engaged in misconduct, the findings of fact before us are insufficient to conclude that the claimant had the state of mind necessary to disqualify her pursuant to G.L. c. 151A, § 25(e)(2). “Deliberate misconduct in wilful disregard of the employer’s interest suggests intentional conduct or inaction which the employee knew was contrary to the employer’s interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). Thus, in order for the claimant to be disqualified, she must have known when she was using the credit card on October 12, 2017, that she was engaging in theft, or that it was wrong for her to use it on October 12, 2017, for the purpose of purchasing the gas.

As to the claimant’s state of mind, the review examiner explicitly found that she “didn’t believe her use of the company credit card to purchase gas for her personal vehicle would be considered theft because other employees used the company credit card to purchase gas for their personal vehicles to run errands for the business.” Consolidated Finding of Fact # 27. This finding is certainly supported by the claimant’s testimony from the hearings, and it is reasonably inferred from the other findings made by the review examiner. The claimant saw that other employees were using the company credit card to purchase gas for business reasons. *See* Consolidated Findings of Fact ## 13 and 14. She apparently thought that she was following this pattern, when she bought the gas on October 12 “while picking up lunch for the office” and “to go to the bank” and then put the receipt in a box where other receipts were stored. Consolidated Findings of Fact ## 16, 17, and 22. Although the owner and several employees testified during the remand hearing that they used the credit card only with the owner’s permission, the review examiner specifically did not find that other employees got the employer’s permission each time they used the credit card.² *See* Consolidated Findings of Fact ## 13, 14, and 15. Given that the claimant did not see the owner specifically approve each purchase on the credit card, she would not have necessarily known that such permission was needed prior to the use of the credit card. Consequently, even if it is reasonable for the employer to have expected that she obtain permission to use the credit card, her use of the credit card was not deliberately wrong or in wilful disregard of the employer’s interests.

² A credibility assessment accompanying the consolidated findings of fact would have been helpful to the Board. In cases such as this one, the review examiner is the sole person responsible for assessing the credibility of the parties. When no assessment is given, it is difficult to glean from the record what the findings of fact are based upon. Especially here, where the review examiner’s consolidated findings of fact point to a conclusion which differs from the original conclusion of the review examiner, and where there was some conflicting testimony as to when and how often employees received permission to use the company credit card, a credibility assessment would have aided the Board’s legal analysis. Based on the consolidated findings of fact, however, it is clear that the review examiner found the claimant’s testimony to be credible in certain key respects, including her state of mind as it related to the October 12, 2017, incident.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because the review examiner's consolidated findings of fact indicate that the claimant did not have the state of mind necessary to deny benefits pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 8, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 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.

SF/rh