

A claimant who was observed by his general manager to be misreporting the amount of time he was working and was discharged for falsifying time records is subject to disqualification under G.L. c. 151A, § 25(e)(2). The claimant did not attend the remand hearing, so was unable to specifically refute the employer's allegations.

**Board of Review
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Issue ID: 0023 9388 66

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 his position with the employer on September 8, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 30, 2018. 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 June 5, 2018.

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, 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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence regarding the claimant's separation from employment. 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 decision, which concluded that the claimant is not 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 review examiner's consolidated findings of fact show that the claimant was not accurately reporting when he worked.

Findings of Fact

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

1. The claimant was employed fulltime as a raw bar attendant by the employer, a restaurant, from February 1, 2017 until September 8, 2017 when the claimant quit.
2. The claimant worked a varied schedule for the employer.
3. The claimant's rate of pay was \$14.00 per hour.
4. As of July 2017, the employer's General Manager was the claimant's immediate supervisor.
5. About 2 weeks prior to September 8, 2017, the General Manager while reviewing payroll records observed that the claimant was not punching out consistently. The General Manager discovered that another employee would punch out the claimant one to two hours later from the time the claimant would leave the employer's premises. The claimant had another employee punch him in for work prior to the time he arrived at work. The General Manager monitored the claimant's attendance and personally observed that the claimant reported to work later than the time that he was punched in from work on several occasions.
6. The employer expects employees to not falsify company records in order for shifts to be properly covered, to pay employees for the time that they work and for employees to be honest and accurate about their time record.
7. The claimant was aware of the employer's expectation given that he was informed of it by the employer at the time of hire.
8. The employer discharged the claimant for falsifying his time clock records.
9. The claimant falsified his time clock records for unknown reasons.

Credibility Assessment:

The claimant, at the original hearing, denied that he falsified his timekeeping records with the employer. The claimant did not attend the remand hearing. At the remand hearing, the employer's General Manager offered detailed and specific testimony that another employee would punch out the claimant one to two hours later from the time the claimant would leave the employer's premises. The General Manager further offered that the claimant would also have another employee punch him in prior to the time he arrived at work. The General Manager, in addition, offered that he personally observed the claimant come in later than the time he was punched in for work.

Given the totality of the evidence presented, it is concluded that the employer's specific and detailed testimony is more 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. In Consolidated Finding of Fact # 1, the review examiner found that the claimant quit his position. However, there is not substantial and credible evidence in the record to find that the claimant quit his position, and it is inconsistent with Consolidated Finding of Fact # 8, where the review examiner found that the claimant was discharged. The latter finding is supported. Therefore, we reject the finding that the claimant "quit." However, the other portions of Consolidated Finding of Fact # 1, including the dates of employment, are supported. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's consolidated findings of fact support a conclusion that the claimant is subject to disqualification.

Because the claimant was terminated from his employment, his 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. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). After the first hearing, at which the employer did not attend, the review examiner concluded that the employer had not carried its burden. Following our review of the entire record, including the new consolidated findings of fact, we reach the opposite conclusion.

The claimant was discharged from his position for falsifying company records, specifically, records related to his punch in and out times. The employer expected employees to not falsify records. Logically, this extends to an expectation that employees would accurately and honestly punch in and out from work. Here, the review examiner found that the claimant violated this expectation in the weeks prior to his discharge. The employer's general manager personally observed the claimant reporting to work later than his punches reflected. The general manager noted that another employee would punch in or out for the claimant; therefore, the time records did not accurately reflect when he actually worked. See Consolidated Finding of Fact # 5. The review examiner found the general manager's testimony to be specific and credible. We see no reason to disturb the credibility assessment or the findings based on it. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). By not submitting accurate records of the times he worked, the claimant violated the employer's expectation that he not falsify records.

Although the employer has shown that the claimant did not comply with its expectations, in order for the employer to carry its burden under G.L. c. 151A, § 25(e)(2), the employer must also show that the misconduct was deliberate and done in wilful disregard of the employer's interest. See Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). The claimant's state of mind may be ascertained by analyzing whether the claimant was aware of the employer's expectation, whether the expectation was reasonable, and whether there were any mitigating circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Here, the general manager testified that the claimant was told about the expectations at hire. Thus, the review examiner found that the claimant was aware of the falsification expectations. Consolidated Finding of Fact # 7. The expectation itself is certainly reasonable, as the employer has a strong interest in paying its employees only for time they have worked. Otherwise, the employer could suffer unforeseen financial losses. Finally, no mitigating circumstances are apparent from this record. The claimant denied any misconduct during the initial hearing. He did not attend the remand hearing to further explain what was happening prior to his separation. From the findings, we conclude that the claimant's misconduct was deliberate and done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits under G.L. c. 151A, § 25(e)(2), is not based on substantial and credible evidence or free from error of law, because the review examiner has found that the claimant falsified company records and no evidence was presented to show that this misconduct was mitigated.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning September 3, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 24, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**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