A claimant who clocked in to work, and then waited in the cafeteria to begin working, engaged in deliberate misconduct in wilful disregard of the employer's interest, as he knew that such conduct was wrong and constituted time theft, yet did it anyway.

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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 affirm.

The claimant was discharged from his position with the employer on January 19, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 2, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 4, 2018.

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 employer's expectations and the claimant's state of mind. 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 decision, which concluded 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 review examiner has found that the claimant was aware that he was supposed to report to his work station after he clocked in for work, he failed to follow this expectation on January 18, 2018, and testified that he knew his actions were wrong but did not care about the job.

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 full time as a kitchen mixer for the employer, a convenience store, from approximately 2014 until January 19, 2018, when he was discharged from employment.

2. The claimant worked five days a week from 4:00 a.m. to 12:30 p.m.

3. He was paid approximately $18.49 per hour.

4. The claimant was assigned to work at the employer's culinary center preparing fresh food for its stores. The claimant prepared salads.

5. The claimant worked in the employer's production department.

6. The claimant's immediate supervisor was the Production Manager.

7. A supervisor at the center began work at 5:00 a.m.

8. On December 2, 2015, the claimant signed an acknowledgement for receipt of the employer's General Rule for All Team Members. The employer maintained a rule which advised employees falsification of information or company records is prohibited. The employer maintains this rule to ensure employees aren't paid for time not worked. The consequence for violation of the policy is disciplinary action up to and including termination of employment at the discretion of the Director of the Culinary Center and the Human Resource Department based on the severity of the infraction.

9. The employer maintained an expectation the claimant would report to his workstation immediately after he clocked in for work. The purpose of the employer's expectation was to ensure the productively of the employer's product for delivery and sale and to ensure the claimant was not paid for time not worked. The claimant was aware of the employer's expectation.

10. Sometimes the production/kitchen area would not be ready for the claimant and the other production/kitchen staff to begin work because the Q&A (quality assurance) technicians had to inspect the cleanliness of the work area and resolve any issues in relation to cleanliness.

11. The claimant worked for the Q&A department 6 months prior to working for the production department. The claimant and other Q&A technicians would prevent production staff from entering the production area, if their inspection was not complete or an area of production was not properly cleaned or sanitized. They would tell the production staff to wait in the boot room, where they would put on protective clothing. One of the Q&A technicians would tell the staff when the production area was ready for them to enter.

12. The Q&A technicians would perform pre-op work for approximately 1 to 1.5 hours in the production area. They would then perform work in the packaging and receiving department and later complete paperwork in the office. After production begins, the Q&A technicians reported to the packaging department for observation. The Q&A technicians worked from 2:00 a.m. to approximately noon or 1:00pm.

13. Once or twice a week the kitchen was not cleared by the Q&A technicians prior to 4:00am, when the claimant began work.

14. The Production Managers reported to work between 5:30 a.m. and 6:00 a.m.

15. Several times the claimant complained to two Production Managers that the work area wasn't always ready when he arrived for work and the production material wouldn't arrive for him to work until 5:00–5:15 a.m.

16. The Production Managers did not respond to the claimant's complaints.

17. For a couple of days after the complaints were made, the Q&A employees would make more of an effort to have the production area ready when the claimant reported for work.

18. The claimant was never notified by a member of management that he was not permitted to enter the kitchen area when he reported to work.

19. Months prior to his termination, the claimant and some of his co-workers decided they would punch in for work and wait until a Q&A technician told them the kitchen was clear for them to work. The claimant decided to wait in the cafeteria instead of standing in the boot room for 10 to 30 minutes waiting.

20. The claimant did not inform any member of management he and his co-workers adopted the procedure.

21. You cannot view the production room from the cafeteria.

22. You can view the production room from the boot room and from the office which is next to the cafeteria.

23. The claimant expected the Q&A technicians to notify him the production area was ready for him to enter because 2 or 3 days a week it would not be ready when he arrived for work.

24. The claimant did not ask any of the Q&A technicians to notify him in the cafeteria when the production area was ready.

25. Some Q&A technicians would notify the claimant when the production was ready for him to enter.

26. The claimant did not expect the Q&A technicians to notify him when the production area was ready prior to 4:00 a.m.

27. If the Q&A technicians were in the office, the claimant would ask if the production area was clear to enter. If it was clear, he would punch in and report straight to work.

28. On the morning of January 18, 2018, at 4:00 a.m., the kitchen area was cleared by the Q&A technicians.

29. On January 18, 2018, the claimant clocked in for work at 3:58 a.m. He did not proceed to the kitchen for work. The claimant observed the Q&A technicians writing pre-operative reports in the production area through the office window that morning. The claimant and his co-workers did not ask the Q&A technicians if they could enter the production area. They proceeded to the cafeteria and sat.

30. While the Q&A technicians wrote their reports in the production area, the claimant could enter the production area and begin his work, if his area was clean and sanitized.

31. The claimant did not ask the Q&A technicians that day if his area was clean and sanitized because he and his co-workers adopted the process of waiting to be informed that the area was ready before trying to enter the production area.

32. It was typically 20 to 40 minutes after the claimant's shift started that a Q&A technician would tell the claimant the production area was clear to enter.

33. The claimant stayed in the cafeteria with two other employees until 4:48 a.m. when the claimant proceeded to his work station after he saw a Q&A technician exit the kitchen.

34. The other two employees also clocked in for work and did not report to their workstation.

35. On January 18, 2018, the Production Manager and the Director of the Culinary Center notified the claimant he was suspended from work.

36. The employer discharged the claimant for theft of company time.

37. The employer discharged the two other employees who sat in the cafeteria after punching in for work on January 18, 2018.

[Credibility Assessment:]

> It is not disputed the claimant was discharged for stealing company time by sitting in the cafeteria and not reporting to his workstation after he punched in for work for almost an hour.
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> The claimant testified that he was aware he was stealing company time, knew it was wrong, but he didn't care about the job.

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. We further believe that the review examiner's credibility assessment is supported and reasonable in relation to the evidence presented. As discussed more fully below, we conclude, as the review examiner did, that the claimant is not eligible to receive unemployment benefits.

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. The review examiner concluded in her decision that the employer had carried its burden. We agree.

The claimant was discharged for "theft of company time." Consolidated Finding of Fact # 36. Generally, the claimant was aware that he was supposed to report to his workstation after he clocked in for work. Consolidated Finding of Fact # 9. The expectation was in place, in part, to ensure that the claimant was not paid for time in which he was not working. As noted in the review examiner's credibility assessment, there was no dispute that, on January 18, 2018, the claimant reported to work just prior to 4:00 a.m., he clocked in, and then he went to the employer's cafeteria. Consolidated Finding of Fact # 29. He did not report to his workstation (the kitchen production area), nor did he attempt to see if the production area was ready for him to start working. Consolidated Findings of Fact ## 29, 30, and 31. The claimant sat and did no work for about fifty minutes before he proceeded to his work station. Consolidated Finding of Fact # 33. Because the claimant knew he should report to his workstation after he clocked in, he did not attempt to report to his workstation, and, therefore, he was paid for time not worked on January 18, 2018, the claimant did violate the employer's expectation as stated in Consolidated Finding of Fact # 9.

However, a conclusion that the claimant violated the employer's expectation is insufficient to deny benefits under G.L. c. 151A, § 25(e)(2). The employer must also show that the claimant had a disqualifying state of mind at the time of the conduct. The misconduct must have been both deliberate and done in wilful disregard of the employer's interest. 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). As noted above, the review examiner found that the claimant was aware of the employer's expectation that the claimant report to his workstation after clocking in to avoid time theft. The expectation is, of course, reasonable, as the employer has an important financial interest in not paying its employees when they are not doing productive work.

As to mitigation, it was not clear from the review examiner's decision whether the claimant deliberately knew that what he was doing was wrong. The production area where the claimant worked was not always ready for him at the start of his shift. Thus, he adopted a procedure of waiting in the employer's cafeteria until a time when the production area would be ready. It may have been that the claimant thought that his actions were the best response to the production area not being ready and that he did not deliberately intend to steal time from the employer. After all, he had received no specific instructions from management regarding what to do when the production area was not ready at 4:00 a.m., when his shift was supposed to start. We remanded the matter, in part at least, to clarify whether the claimant thought that his actions were permissible.

Any doubts about the claimant's state of mind have been resolved by the claimant's testimony during the remand hearing. Although we could, perhaps, interpret some of the review examiner's findings of fact to indicate that the claimant took what he thought were reasonable actions, the review examiner also noted that the claimant testified that he knew what he was doing was wrong and he did not care about his job. Indeed, the claimant's testimony during the remand hearing was, in part, as follows:

> **Review Examiner**: Did you think it was going to be an issue for the employer if you waited . . . if you clocked in and then waited for a Q&A technician to come and notify you that you could report to work rather than checking yourself?
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> **Claimant**: I mean, to be completely honest with you, there were times when we would check. But, I mean, if I'm going to be honest, there were a lot of times when we wouldn't check . . . . Like I said earlier, it just became a constant thing, a couple times a week. So, we just started that practice and doing that. I'm not going to deny that I did that.
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> **Review Examiner**: Did you think it would be an issue with the employer that you were doing that?
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> **Claimant**: I mean, I knew it wasn't the right thing to do. But, as far as it being an issue with the employer, I mean, there were security cameras, so, I mean, if it had been that big of an issue, I think they honestly would have caught it earlier and fired us earlier.

Review Examiner: OK and when you say that you knew it wasn't the right thing to do, what specifically are you speaking about? Why?

Claimant: Well, I got fired for stealing company time. I'm aware that I did that. I'm aware of everything I did. I'm not denying anything. I have no reason to deny anything or lie about anything. I'm fired, I'm no longer working there. I have no reason to. I know it was wrong. I don't deny that one bit.

Review Examiner: OK. So, if you knew it was wrong, why did you continue to do it?

Claimant: Because I honestly didn't really care about the job, ma'am.

Review Examiner: OK. And any particular reason?

Claimant: Umm…I won't get into specifics. I just didn't like the job.

Thus, the claimant's own testimony indicates that he knew that what he did was wrong, he did it anyway, and his reason for doing it does not amount to a mitigating circumstance. The fact that the claimant had adopted this procedure for a period of time without any discipline is not, on its own, sufficient to show that he did not have a disqualifying state of mind. Nothing in the findings indicates that a manager told the claimant that it was permissible to clock in, go to the cafeteria, and then wait to start working. Moreover, the claimant's testimony indicates that his state of mind was not affected by the fact that the employer had not "caught" him prior to January 18, 2018. Had the claimant testified that he thought that what he was doing was permissible, because he had done it for so long without employer intervention, then, perhaps, he might not have had a disqualifying state of mind. *See* New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004) (holding that, where the employer had overlooked the claimant's prior absences, and then discharged the claimant for excessive absences, the employer led the claimant "to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements"). However, here, it is clear from the claimant's testimony that he knew what he was doing was wrong, regardless of the employer's actions.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the claimant knew that clocking in and not reporting to his workstation was wrong, he did it anyway (thereby engaging in time theft), and no circumstances mitigated his deliberate actions.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 14, 2018, 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 - September 27, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
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