

Claimant engaged in deliberate misconduct for remotely logging onto the employer's ADP time keeping system without the employer's permission to do so.

**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 his position with the employer on January 29, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 20, 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 May 18, 2018. 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 an opportunity to present evidence. 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 initial decision, which concluded that the employer failed to establish that the claimant was discharged deliberate and wilful misconduct is free from error of law, where, following remand, the review examiner has found that the claimant did not receive permission to work remotely, yet logged in more than 27 hours during his unpaid leave of absence.

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 Monday through Friday, from 8am to 4:30pm, as a Customer Service Representative for the employer, from 10/27/14 to 1/29/18.
2. The Customer Service Supervisor supervises Customer Service Representatives. The Director of Customer Service supervises the Customer Service Supervisor.
3. The claimant was paid hourly. He earned \$16 per hour from the time he was hired to 3/27/16, when he received an increase in pay to \$19.44 per hour. He received another increase in pay on 3/11/18, to \$20.64 per hour.
4. The claimant was required to report the hours he worked each day on the employer's online timekeeping system, "ADP", before he received his paycheck.
5. The claimant was required to log onto a separate online system, "inContact", to view the work he was to complete, including telephone calls in a queue, and e-mails sent to his work e-mail address.
6. The inContact system allows the employer to run reports to show work completed by Customer Service Representatives, by date, and by representative.
7. ADP does not show the work Customer Services Representatives are assigned to complete.
8. Employees are required to obtain permission from a supervisor to work remotely.
9. The employer has a written Business Ethics and Conduct policy which states that the employer's reputation for integrity and excellence requires careful observance of the spirit and letter of all applicable laws and regulations, as well as a scrupulous regard for the highest standards of conduct and personal integrity.
10. The above policy states that employees are expected to be honest and fair in all business dealings with customers, regulators, vendors, competitors, and each other. The claimant acknowledged receipt of the above policy on 8/12/16.
11. Employees who violate the above policy may receive discipline, up to and including termination from employment, depending on the circumstances surrounding the violation.
12. On 10/30/17, he claimant e-mailed his supervisor, the Director of Customer Service, and a Workforce Management employee who performs scheduling

duties, and requested time off from 1/5/18 to 1/20/18, to visit relatives in [City A], Uganda.

13. The above Workforce Management employee was not one of the claimant's supervisors.
14. The above request for time off was approved. The claimant did not have vacation or personal time available for the above timeframe; he took unpaid time off from 1/5/18 to 1/20/18.
15. The claimant logged onto ADP on 1/17/18, 1/18/18, and 1/19/18, and reported that he worked from 10am to 6:01pm; 10:01am to 7:02pm; and 10am to 8:19pm, respectively.
16. The claimant did not receive permission to work remotely while he was away from work between 1/5/18 and 1/20/18.
17. The claimant performed no work on 1/17/18, 1/18/18, or 1/19/18.
18. The next time the claimant logged onto ADP was 1/26/18. He reported that he worked from 8:12am to 4:45pm.
19. Employees are paid biweekly, on Fridays. Employees were paid on 1/19/18, for the pay period 12/31/17 to 1/13/18, and on 2/2/18, for the pay period 1/14/18 to 1/27/18.
20. On 1/26/18, the claimant met with the Human Resources Director and Human Resources Generalist, and was asked to explain why he punched in and out of the timekeeping system on 1/17/18, 1/18/18, and 1/19/18.
21. The claimant said he punched into ADP, looked for work and saw there was none, and forgot to punch out. He said that he tried multiple times and could not connect to the system, and he said that the employer does not have to pay him for this.
22. On 1/29/18, the claimant met with the Human Resources Director and the Human Resources Generalist, and was told that his employment would end that day. He was told he was not approved to work remotely between 1/5/18 and 1/20/18, and that he reported to the employer that he worked on 1/17/18, 1/18/18, and 1/19/18, when he performed no work on those dates.
23. The claimant left the room before the employer could give him a packet with his separation documents, including a termination letter, information about benefits, EAP, and his right to file an unemployment insurance claim.
24. The employer mailed the above packet to the claimant on or about 1/29/18.

Credibility Assessment:

Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence presented by the employer was more credible than the evidence presented by the claimant, as the evidence presented by the employer was more consistent and logical as compared to the evidence presented by the claimant. When the claimant filed his unemployment insurance claim, he reported to DUA that he quit his position. In his initial Fact Finding Questionnaire, he stated that he quit due to harassment and discrimination. At the hearing, the claimant stated that on his last day of work, he was accused of time theft, and refused to take a packet of documents the employer offered to him, because he believed the employer gave these packets to employees when the employer terminated their employment. The claimant stated at the hearing that there are e-mails between himself, his supervisor, and the Workforce Management employee regarding approval to work remotely while traveling abroad. He did not provide these e-mails, nor did he subpoena the e-mails or any witnesses to testify about the e-mails or any other communication about working remotely. The claimant did not provide detailed information about the content of these e-mails, such as the specific dates he was allegedly permitted to work remotely, while abroad. The claimant stated that he logged onto inContact and performed some work while abroad. He did not provide specific information such as what dates he performed this work, the nature of the work, and how long the work took to complete. The employer provided documentation, including the claimant's time punches in ADP on 1/17/18, 1/18/18, and 1/19/18; and screen shots of inContact for the time period between 1/14/18 and 1/27/18, that show that he did not perform work while logged into inContact during that timeframe. Additionally, if the claimant had permission to work remotely, it does not make sense that no work was available to the claimant when he signed onto inContact, while abroad. If he had permission to work remotely, it would make sense for his supervisor to assign him work on the agreed-upon dates. The claimant also stated that electricity and internet services are intermittent at the location he stayed in Uganda. It does not make sense that the claimant would request to work remotely if he was traveling to a location that he knew had intermittent access to electricity and internet. Ultimately, the claimant was able to log into inConnect using the internet at 10am, three days in a row while abroad, and logged out at 6:01pm, 7:02pm, and 8:19pm each respective day. When asked about the time punches on 1/17/18; 1/18/18; and 1/19/18, the claimant told the Human Resources Generalist that on those dates he logged onto ADP, looked for work in inContact, and saw there was no work, and forgot to punch out of ADP. The claimant made no attempts to contact the employer to report that he made a mistake regarding these time punches; the employer initiated the conversation about these time punches on 1/26/18.

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 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.

The review examiner analyzed the claimant's qualification for benefits under 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 . . . ¹

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). The claimant was initially disqualified by the DUA for intentionally falsifying employer records by remotely logging into the employer's payroll system. After the first hearing, which the employer did not attend, the review examiner concluded that the employer had not carried its burden. After remand, following our review of the entire record, including the new consolidated findings of fact, we reach the opposite conclusion.

Following remand, the consolidated findings of fact establish that the claimant was discharged for logging onto the employer's online timekeeping system, "ADP", indicating that he had worked during an unpaid time-off, while abroad visiting relatives. The employer requires employees to obtain permission from a supervisor to work remotely. The review examiner found that the claimant did not receive permission to work remotely during his trip abroad. The findings also establish that the claimant, without the employer's permission to work remotely during his approved time-off, logged onto the employer's timekeeping system on three consecutive days and remained logged in for a total of more than 27 hours.

The employer's written Business Ethics Policy requires observance of all applicable laws and regulations, and regard for the highest standards of conduct and personal integrity. It also states that employees are expected to be honest and fair in all business dealings. The claimant was aware of the employer's policy which he received at hire. When after his return to work, the claimant was questioned by the employer, the claimant contended that he had punched into the system to look for work, saw that there was no work, attributed the more than 27 hours logged into the employer payroll system to forgetting to punch out, and said that he could not connect to the system. The claimant told the employer that he did not have to pay him for the time he had

¹ At initial hearing, no evidence was offered regarding any knowing violation on the claimant's part of a reasonable and uniformly enforced employer policy. Consequently, the review examiner did not consider claimant's eligibility for benefits under the "knowing policy violation" provision of G.L. c. 151A, § 25(e)(2). At the remand hearing, while the employer presented a copy of its Business Ethics and Conduct Policy, it did not offer evidence as to the uniform enforcement of this policy. Thus, we also decline to consider the claimant's eligibility under the "knowing policy" provision.

entered in the system. On January 29, 2018, the claimant was discharged, and told that he was not approved to work remotely, but that he had reported to the employer that he worked on January 17, 2018, January 18, 2018, and January 19, 2018, when in fact he had performed no work on any of those days.

The review examiner provided a compelling, lengthy, and detailed credibility assessment finding the employer to be more credible than the claimant, as the employer's evidence was more consistent and logical. Such credibility 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). In her credibility assessment, the review examiner noted that, although the claimant testified that he received emails from both his supervisor and a workforce management employee approving him to work remotely, he did not provide the emails or describe their specific content. The review examiner further observed that the claimant testified that he had performed some work while abroad, but again provided no specific information regarding the nature of the work, when it was done, or how long it took. Evidence provided by the employer shows that he did not perform any work as alleged. As noted above, we believe the review examiner's credibility assessment is reasonable in relationship to the evidence in the record. Therefore, we see no reason to disturb either the credibility assessment or the findings based on said assessment.

Although the employer has shown that the claimant committed misconduct when he did not comply with the employer's reasonable 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 record indicates that the claimant was made aware of the employer's ethics and conduct expectations at hire, when he received and acknowledged receipt of the relevant employer's policy.

We also note that no mitigating circumstances are apparent from this record. The claimant denied any misconduct during both the initial hearing and the remand hearing. The defense of mitigation is not available to employees who deny engaging in the behavior leading to 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.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2), where, without permission to do so, he logged into the employer's timekeeping system for more than 27 hours.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning January 28, 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 - October 30, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

SPE/rh