Where the claimant was discharged for theft of merchandise, but the findings show that a coworker gave him permission to take it, the claimant believed it was not in a saleable condition, and the coworker was not discharged, the employer failed to prove either a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest.

Board of Review
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Issue ID: 0024 5901 37

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 his position with the employer on February 2, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 5, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 27, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 ineligible for benefits because he took merchandise from the employer without paying for it, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. In 2003, the claimant began working for the employer's grocery store.

2. English is not the claimant's primary language. The employer understood that the claimant's first language was Haitian Creole. However, throughout his employment the claimant did communicate with the employer in English. The employer never had any difficulty communicating with the claimant in English.

3. At the time of hire, the claimant acknowledged in writing that he received and understood the employer's General Information Guide (the GIG).

4. The GIG was provided to the claimant in English. At no time did the claimant ask for the GIG to be translated. The employer would have had provided translation if the claimant asked.

5. The employer's theft policy, contained within the GIG book, states that team members who take merchandise, without authorization or paying for it, will be subject to discharge.

6. The employer discharges all employees who have been found to have engaged in theft.

7. The employer encouraged employees to be familiar with the items sold. The employer's product sampling policy states, in part: "Many departments in our stores provide samples of our products to our customers. We encourage you to sample these products so as to educate yourself so that you in turn can encourage our customers to try them." The policy defined a sample as a teaspoon of product or product within a sample container of no more than 2 ounces. The policy further states: "You may receive a sample only from a tray or other area designated as customer samples, or from a fellow Team Member with the express permission of the department Team Leader."

8. The employer's corrective action policy, also contained within the GIG book, states major infractions may lead to discharge. Included in the listing of major infractions is: "Theft of any kind, including but not limited to violation of the Team Member Theft policy; violation of the Team Member Purchases policy; violation of the Team Member Product Sampling Policy."

9. The employer's team member Investigations policy, which is contained within the GIG book, states in relevant part that it is necessary at times to investigate a team member's behavior. It further states: "As a condition of continued employment, Team Members subject to such investigations are required to reasonably cooperate with [the employer's] efforts to obtain relevant information. Refusal to actively and honestly participate in an investigation and/or refusal to allow inspection will be considered a voluntary resignation without notice...Willful omission of relevant information will be considered failure to cooperate and may lead to corrective action up to and including discharge."

10. In 2014, the claimant signed another acknowledgement that he had been instructed on how to access the GIG book on-line; and that he was expected to read the GIG book in its entirety and abide by its policies.

11. The claimant had a commonsense understanding of the employer's policy against theft. The claimant understood that he was required to purchase all items from the store unless expressly told otherwise.

12. The employer expects employees to scan and document all products, which have been deemed unsaleable before throwing it out.

13. The employer's expectation helps the employer to track its financial loss ("shrinkage") due to a product being unsaleable.

14. The employer's expectation was explained to the claimant and the claimant had abided by it in the past.

15. In May 2017, the claimant was given a written warning for using a derogatory word when speaking with a colleague. The claimant signed the written warning, which described the incident.

16. On January 25, 2018, while talking to a coworker in the produce department, the claimant asked the coworker for a sample of a fruit. The coworker did not provide the claimant with a sample.

17. During his employment, the claimant had never taken a sample from the sales floor. That [sic] claimant had taken products from the break room that were labeled free.

18. The claimant then handed the coworker a soursop fruit that he indicated was not in saleable condition. The coworker agreed with the claimant. The claimant then placed the fruit in the coworker's "shrinkage" box, meaning the produce would be thrown out.

19. The claimant continued with his work.

20. Approximately 10-15 minutes later, the coworker brought the shrinkage box into the employer's receiving areas.

21. A few moments after doing so, the claimant heads to one of the employer's register[s] to get a bag. The claimant then went into the employer's receiving area where he again asked the coworker for the soursop fruit. At that time, the coworker told the claimant, "take it" and indicated he was going to throw it away.

22. The coworker had no[t] scanned the fruit to document it as shrinkage.

23. The claimant put the soursop fruit in the bag. The cost of the soursop fruit is unknown. He then took it into the employer's break room and placed the fruit with his personal belongings.

24. Prior to this, the claimant had never taken a product that was going to be thrown out because he knew the products were no good. This time, the claimant believed that, although not in saleable condition, a portion of the fruit remained edible.

25. The claimant the fruit [sic] because he had not had it in a long time.

26. A team leader observed the claimant with the bag, followed him to the break room and observed the claimant putting it with his personal belongings. The team leader found the claimant's behavior suspicious and reported the incident to the store manager.

27. The employer reviewed its records to see whether the claimant had used his employee discount to make a purchase on January 25, 2018. The employer had no record of the claimant making a purchase on January 25, 2018 using his discount.

28. On January 27, 2018, the store manager spoke to the claimant and asked him if he had taken anything from the store on January 25, 2018. The claimant stated he had made some purchases, but could not remember what he bought. He showed the manager a receipt from January 24, 2018. The manager reiterated he was looking for a receipt from January 25, 2018.

29. The claimant then stated he had never taken anything from the company but "if something was given to him what was he supposed to do." The manager asked if someone had given him something on January 25, 2018. The claimant did not answer the question.

30. On January 27, the store manager suspended the claimant and said he would contact him.

31. That day, the claimant went home and asked his wife about the items he had brought home from work. The claimant's wife reminded him about the soursop fruit.

32. On January 28, the store manager called the claimant and asked if he had any more information to provide about the item in the bag on January 25, 2018. The claimant replied that he forgot about a sample he had gotten from work.

33. The store manager asked the claimant how he got the sample. The claimant replied he saw the fruit in the coworker's shrink box and asked for it.

34. On January 29, 2018, the assistant store manager reviewed videos of the interaction between the claimant and the coworker. He also interviewed the coworker who admitted the claimant asked for the fruit and he gave it to him in the receiving area. The coworker stated he had told the claimant he could not give it to him; but when the claimant asked a second time, he gave him the fruit.

35. On February 2, 2018, the store manager discharged the claimant for violating the employer's theft policy by taking the soursop fruit on January 25, 2018.

36. The employer did not discharge the claimant [sic] because he did not engage in theft. However, the coworker was issued an "egregious final warning."

37. The claimant filed a claim for benefits effective February 4, 2018.

[Credibility Assessment:]

In this case there is dispute over the fact of whether or not the claimant engaged in theft. The claimant testified that he was given a sample from a coworker. However, the claimant's testimony is not credible. At first the claimant testified that he had not received any warnings from the employer. He later testified he was in fact given a written warning but he signed it without knowing what it said and did not understand it was for using a derogatory term. At the time the written warning was issued, the claimant had an established employment history with the employer. A degree of familiarity comes with that length of employment. As such, it is not credible the claimant would have signed a written warning without knowing or understanding what it said. While the claimant may not read English, he was able to speak and understand English, as indicated by the assistant store manager's testimony he never had any difficulty verbally communicating with the claimant. The claimant's assentation that the employer did not inform him the warning was for using a derogatory term is not credible.

Similarly, the claimant testified he did not understand what the store manager was telling him on January 27, 2018 and did not realize he was suspected of having stolen something on January 25, 2018. Yet, he agreed the store manager suspended him after asking about his recent purchases and asking for a receipt. These types of questions logically suggest the store manager suspected the claimant had taken an item without purchasing it. The store manager memorialized the January 27, 2018 conversation with the claimant in an email to human resources on February 1, 2018. That summary, along with the claimant's own testimony that he went home and asked his wife about the items he brought home suggests he understood he was being asked about taking something from the store. Since the email was written just a few days after the event, was created as a business document, and was very detailed, the version of the conversation described in the email is considered substantial and credible evidence of the conversation between the store manager and the claimant on January 27, 2018.

> The claimant's testimony of not understanding why he was sent home on January 27, 2018 is not credible.
>
> Also included in the store manager's email to human recourse is a summary of the video surveillance from January 25, 2017. While the assistant manager's testimony during the hearing regarding the events of January 25, 2018, was hearsay testimony, it is accepted as credible given its consistency with the store manager's email and the employer's response to the DUA's questionnaire. Where the claimant's testimony regarding the events of January 25, 2018, were vague and inconsistent. The claimant testified that he was given the fruit as a sample in the employer's receiving department. However, it is difficult to understand why the claimant took a bag from the register before walking to the back and taking the fruit if he was not planning on [sic].
>
> Based on the above, I find the claimant knew his actions, in taking the fruit from the employer without paying was a violation of the employer theft policy and the claimant knew he was engaging in a violation of such policy as he made attempts to conceal his conduct. The claimant waited until the fruit was in the employer's receiving area before asking to take it again, placed it in a bag and was evasive and unresponsive during his interview with the store manager.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. In Finding of Fact # 36, we believe the statement that the employer did not discharge the "claimant" is a typographical error, as the rest of the finding indicates that she was referring to the "coworker." We reject Finding of Fact # 6, as it is inconsistent with Finding of Fact # 36, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for 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 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

We first consider whether the employer has shown a knowing violation of a reasonable and uniformly enforced policy. The review examiner found that the employer fired the claimant for violating the employer's theft policy, specifically, by taking a soursop fruit on January 25, 2018. Finding of Fact # 35. As a threshold matter, the employer must prove that the claimant's actions on that date violated its theft policy.

Finding of Fact # 5 sets forth the employer's definition of theft under its policy as taking merchandise without authorization or paying for it. There is no dispute that the claimant did not pay for the soursop fruit at issue on January 25, 2018. There is also no dispute that he was told that he could "take it." *See* Findings of Fact ## 21 and 34. Although not in the findings, the record further indicates that this coworker had authority to grant such permission.[1] Simply put, since the record shows that claimant had authorization to take the soursop fruit, he did not violate the employer's theft policy.

Even if we assume that the coworker had no authority to give the claimant permission to take the soursop fruit, and that the act of taking it did violate the employer's theft policy, the question before us is not whether the employer was justified in ending the claimant's employment, it is whether he is eligible for benefits. To satisfy the knowing violation prong of G.L. c. 151A, § 25(e)(2), the employer must establish that its policy is uniformly enforced. Finding of Fact # 36 shows that the coworker was not discharged; he was simply issued an "egregious final warning." In her credibility assessment, the review examiner accepts the employer's argument that the coworker did not engage in theft and, therefore, asserts that there is no evidence that the employer treated the coworker differently. We disagree. By encouraging the claimant to take the soursop fruit without paying for it — or simply telling him that it was okay to take it — the coworker actively participated in the appropriation of merchandise without paying for it.[2] Because the employer did not impose the same discipline, it has not established that its theft policy was uniformly enforced.

The review examiner also concluded that the claimant's conduct constituted deliberate misconduct in wilful disregard of the employer's interest. Again, for purposes of analysis, we shall assume that, by taking the fruit, the claimant engaged in misconduct. In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). There is no question that the claimant took the fruit deliberately in the sense that it was not an accident. However, "[d]eliberate misconduct

[1] During the hearing, the claimant's attorney asked the employer's assistant manager whether the coworker had authority to grant permission to the claimant to take the unsellable product. He answered, "Yes." We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2] *See* Exhibit 4A, the employer's policy which also defines theft as "Giving Away, Bartering or "hooking" others up with product." This is also part of the unchallenged evidence before the review examiner.

alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. 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).

Here, the findings show that the claimant believed the fruit was not in a saleable condition, and the coworker had indicated that he was going to throw it away. *See* Findings of Fact ## 21 and 24. He asked twice for permission, and he did not take the fruit until the coworker told him it was okay. *See* Findings of Fact ## 21 and 34. The only reasonable inference from these findings is that, at the time, the claimant saw no harm in taking the soursop fruit. For this reason, the employer has not established that the claimant was acting in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant's discharge was either a due to a knowing violation of a reasonable and uniformly enforce policy or to 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 entitled to receive benefits for the week beginning January 28, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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.

MJA/AB/rh