0024 9313 31 (Sept. 27, 2018) – Discharge was due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2). However, this was part-time, subsidiary, base period employment and at the time of her separation from the employer, she did not know of an impending qualifying separation from her full-time job. Pursuant to DUA regulations, the claimant is not denied benefits or subject to a constructive deduction due to her discharge from the employer.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0024 9313 31

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 we affirm in part and reverse in part.

The claimant was discharged from her position with the employer on February 11, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 24, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 18, 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, thus, she 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 remanded the case to the review examiner to obtain further evidence about the claimant's job with a different employer at the time she separated from the instant employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 deliberately used a store gift card that was not hers in wilful disregard of the employer's interest and, therefore, was disqualified from receiving any benefits, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a retailer. The claimant worked as a part-time cashier for the employer. The claimant worked for the employer from 10/02/17 to 2/11/18.

2. The employer paid the claimant $11.00 per hour. The employer paid the claimant $2,638.34 in the base period of her claim for unemployment insurance benefits.

3. The employer created a policy titled "Rules and Regulations." The policy read, "Rules and regulations are a necessary part of every Company. Although it is never a pleasant task to terminate an Associate's employment, the following actions may result in an immediate termination. The following rules and regulations are only examples and do not cover every situation…7. Dishonesty. Any deliberate act which results in the loss of Company, Associate vendor or visitor property, such as taking or keeping property, cash, merchandise, etc. (If in doubt as to what constitutes company property, see a member of Management)."

4. The Rules and Regulations policy featured an acknowledgement. The acknowledgement read, "I understand that I must satisfactorily meet all performance standards and comply with company policies and procedures in order to continue employment with [the employer]." The claimant signed this acknowledgement on 10/02/17.

5. On 1/18/18, an assistant manager assisted a customer with a return. Money was mistakenly placed on a store value card (Card X). The assistant manager left Card X on a register. Card X had $18.03 on it.

6. The employer never gave Card X to the claimant.

7. The claimant worked a shift on 1/18/18. She served a customer. The customer wanted to buy a $25.00 store value card. The claimant grabbed Card X for the transaction. She realized that Card X had money on it. She processed another card for the customer. She checked the balance on Card X and found that it had $18.03 on it. The claimant then placed Card X under a tape dispenser next to the register. Later, as the claimant went on break, she took Card X with her. At the end of her shift, the claimant used Card X to make an $11.00 purchase. She then used the balance on another purchase that she made on 1/25/18.

8. The employer did not allow workers to use store value cards that they found. The employer expected workers to give store value cards that they found to management.

9. The employer's district loss prevention manager reviewed video footage. Through the footage and a review of transaction records, she discovered that the claimant had used Card X.

10. On 2/11/18, the district loss prevention manager questioned the claimant about Card X. The claimant reported that she thought Card X was her card. The district loss prevention manager told the claimant that Card X was not the claimant's card. The claimant explained that she had brought her personal items to the register. She explained that these included her wallet, keys, a drink, and Card X. The district loss prevention manager had reviewed the video footage and the claimant had not brought any of these items to the register. The claimant admitted that she had used Card X.

11. The claimant signed a promissory note in which she agreed to pay $18.03 to the employer.

12. The employer discharged the claimant because it concluded that she took and used Card X when she knew that it was not her card.

13. The claimant worked for another employer (Business X). Business X is an insurance company. The claimant began work for Business X on 3/12/1999. Business X discharged the claimant on 2/26/18.

14. Business X paid a yearly salary to the claimant. At the end of her employment with Business X, the claimant's salary was $66,500.00 per year.

15. Business X paid the claimant $62,767.18 in the base period of her claim for unemployment insurance benefits.

16. The claimant had an automobile insurance policy with Business X. Her daughter was on the policy. The claimant's daughter's license was revoked. The claimant learned this on 2/20/18. The claimant then asked one of the employer's insurance agents to delete her daughter from the policy. The agent deleted the daughter from the policy. The employer discharged the claimant because it determined that the claimant followed the improper protocol when she sought to delete her daughter from the policy. The employer required the claimant to go through its customer service department to achieve the deletion.

17. When the employer discharged the claimant, the claimant did not know that she was in danger of losing her employment with Business X.

18. The claimant filed a claim for unemployment insurance benefits. When the claimant filed her claim, she reported that the employer laid her off.

Credibility Assessment:

> In the hearing held on 7/31/18, the claimant testified that she did not know that the gift card for $18.03 was not her gift card. She testified that she did not intend to use a gift card that was not her gift card. Given the totality of the testimony and evidence presented, all of the claimant's testimony about her employment (and separation from employment) with the employer is rejected as not credible. In the hearing, the claimant testified that the employer discharged her. However, when the claimant filed her claim for benefits, she reported that the employer laid her off. This submission was false and diminished the claimant's credibility. In the hearing, the claimant testified that she reported to the DUA that she was laid off because she did not know how to characterize her separation. This further diminished the claimant's credibility. The difference between "laid off" and "discharged" is self-evident.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is totally disqualified from receiving any unemployment benefits.

Because the employer discharged the claimant from her job, her eligibility for benefits must be analyzed pursuant to 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 . . . .

The employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

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). In order to evaluate the claimant's state of mind, we must "[T]ake 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) (citation omitted).

In the present case, there is no dispute that the claimant was aware that she was not permitted to use a store value card that was not her own. When brought to her attention, she did not deny purchasing merchandise with the store value card in question and she agreed to repay that sum to

the employer. *See* Consolidated Findings ## 10 and 11. During the remand hearing, she testified that at the time, she believed the card was her own, because she had earned customer value cards previously and the employer would leave them taped to the register. Ultimately, the review examiner did not believe her, rejecting her testimony as not credible. Such 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). As the review examiner explained, the claimant's credibility was diminished by incorrectly reporting to the DUA that she had been laid off. We also note that during the remand hearing, the claimant conceded that other store value cards that she had earned and which had been left at the register for her were in denominations of $10.00 or $25.00.[1] Card X had a balance of $18.03. On this record, the review examiner could reasonably conclude that the claimant knew at the time that she was using a store value card that the employer had not given to her.

Absent any mitigating circumstances, and the record includes none, we conclude as a matter of law that the claimant's discharge from the employer was due to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

However, our analysis does not end here. The consolidated findings provide that the claimant worked part-time for the present employer while working full-time at another job for Business X. During the claimant's base period, she earned $62,767.18 from Business X and only $2,638.34 from the employer. *See* Consolidated Findings ## 2 and 15. Based upon these figures, we conclude that the claimant's position with the present employer was subsidiary base period part-time employment.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction, not a full disqualification, should apply. DUA's constructive deduction regulation at 430 CMR 4.76 provides, in relevant part, the following:

> (1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:
>
> (a) if the separation is:
>
> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work. . . .

Here, the claimant separated from the employer on February 11, 2018, and from Business X on February 26, 2018. *See* Consolidated Findings ## 1 and 13. Both were base period jobs. The

[1] While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

DUA determined that the claimant was entitled to unemployment benefits based upon her separation from Business X. *See* Remand Exhibit 6. Consolidated Finding # 17 provides that, at the time the claimant separated from her part-time job with the employer, she did not know that she was in danger of losing her full-time job with Business X two weeks later. Therefore, a constructive deduction, pursuant to 430 CMR 4.76(1)(a)1, cannot be imposed.[2]

Although the introductory text of 430 CMR 4.76(1) appears to contemplate only two alternatives (either a constructive deduction or a full disqualification), in full context, we think the regulation means to impose no disqualification at all in the situations, like this one, that fall under 430 CMR 4.76 (1)(a)1 (Subsection (1)(a)1). *See* Board of Review Decision 0011 4858 86 (June 10, 2014) (no disqualification imposed upon claimant who quit base-period part-time subsidiary job without knowing of his impending separation from his full-time job).

As we explained in Board of Review Decision 0011 4858 86, the regulation does not expressly state what should happen in Subsection (1)(a)1 situations where no constructive deduction is warranted. Therefore, we are required to interpret the regulation. Chapter 151A, the Massachusetts Unemployment Statute, instructs us to construe the statute and, thus, any regulations promulgated pursuant to it, "liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." G.L. c. 151A, § 74. In addition, the general principles of statutory (and regulatory) construction favor harmonizing related regulations and avoiding nonsensical results. United States v. Turkette, 452 U.S. 576, 580 (1981); Champigny v. Commonwealth, 422 Mass. 249, 251 (1996). These principles strongly point toward an interpretation in which the claimant in the present situation would have no disqualification from benefits.

The Department's constructive deduction regulations impose a reduction in benefits rather than a complete loss of benefits in certain situations where an employee separates from subsidiary part-time employment for disqualifying reasons. It promulgated these regulations in response to the Supreme Judicial Court's decision in Emerson v. Dir. of Department of Employment Security, 393 Mass. 351, 352 (1984) (claimant who quits a part-time job after losing her full-time job should not be completely disqualified from benefits, because the effect is to "reward the idle and punish the ambitious" who take on part-time jobs).

Emerson itself did not directly address situations, like the instant one, in which a claimant has separated from a part time job *before* losing her primary or full time job. Subsection (1)(a)1 is thus designed to penalize an individual who quits gainful part-time employment when she knows she is about to lose her full time employment. The penalty, however, is a partial, not a complete, reduction of benefits. It would be an anomaly to interpret the regulation to impose upon an individual, who does something to terminate her employment from a part-time job without knowing of an impending separation from her full-time job, the even harsher penalty of a full disqualification. Faced with a choice between this inequitable — or even illogical — construction and a more reasonable one that comports with both the beneficent purposes of the unemployment compensation statute and the express purpose of the specific regulations under

[2] A constructive deduction cannot be imposed pursuant to any of the other provisions of 430 CMR 4.76 either. The other circumstances in which it can be imposed are if the separation from the part-time work happens in the benefit year or if the separation from the part-time work occurs *after* the separation from the full-time job. Neither circumstance occurred in this case.

scrutiny, we adopt the reasonable construction. We conclude that the claimant should not be penalized at all, but instead be eligible for full benefits.

We, therefore, conclude as a matter of law that although the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), she is not disqualified from receiving benefits because this was subsidiary, part-time, base period employment that preceded a qualifying separation from a full-time job.

The portion of the review examiner's decision that concluded that the employer met its burden under G.L. c. 151A, § 25(e)(2), is affirmed. The portion of the decision that imposed a disqualification from receiving benefits is reversed. The claimant is entitled to receive benefits for the week beginning February 25, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 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.

AB/rh