Where claimant was fired for simply asking *if* his girlfriend went into labor and the claimant left work, would the supervisor put his time in as time worked, the claimant is not disqualified under G.L. c. 151A, § 25(e)(2). This was merely a hypothetical question. The claimant did not actually falsify any time records and the employer did not show that the claimant believed at the time that he was violating a policy or acting in wilful disregard of the employer's interest.

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Issue ID: 0025 2119 21

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 January 20, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 3, 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 July 11, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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. Both parties 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 knowingly violated a reasonable and uniformly enforced employer policy by asking his supervisor to misrepresent his time worked, 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. The claimant worked as a sheet metal worker for the employer, a heating and cooling contractor. The claimant began work for the employer in July 2017.

2. The employer maintains a Standards of Conduct policy which includes a list of inappropriate conduct. The list includes: "Individual integrity (*e.g.* employees will not falsify records, including time worked, or misrepresent reasons for absence, tardiness, or eligibility for benefits)."

3. The employer maintains a Payroll – Recording Hours of work/Time Cards policy which states in part: "Falsification of time records is a serious offence. Anyone found knowingly to have falsified a time record will be subject to discipline up to and including termination."

4. The claimant was aware of the employer's policies.

5. The employer will always discharge an employee for dishonesty.

6. The claimant's girlfriend was pregnant with their child. She was due in early January 2018.

7. On a day during the week beginning January 7, 2018, the claimant was speaking with his job site supervisor. He asked his supervisor if he missed work for a day would he represent to the employer that he did work. The supervisor said he would not.

8. The supervisor reported the claimant's inquiry to the employer.

9. On January 20, 2018, the VP met with the claimant. The VP asked the claimant if he asked his supervisor to cover for him. The claimant did not immediately answer. The VP asked the claimant if he asked his supervisor to cover for him. The claimant admitted he did.

10. The VP discharged the claimant.

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 light of Finding of Fact # 7, we accept Finding of Fact # 9 only insofar as it indicates that the claimant asked his supervisor to cover for him if the claimant missed work for a day. In adopting the remaining findings, we deem 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 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).

As a threshold matter, the employer must demonstrate that the claimant violated a policy or engaged in misconduct. Findings of Fact ## 2 and 3 set forth the relevant policy provisions that the claimant was fired for violating. Specifically, the employer alleges that the claimant violated its individual integrity provision. To clarify what "individual integrity" means, the policy provides examples, including not falsifying records of time worked. *See* Finding of Fact # 2. Similarly, its payroll policy prohibits falsification of time records. *See* Finding of Fact #3. However, nothing in the record shows that the claimant actually falsified his time records or time worked.[1] The employer fired the claimant for asking his job site supervisor *if* he missed work for a day in order to be with his girlfriend when she gave birth, *would* the supervisor represent to the employer that the claimant had worked. *See* Finding of Fact # 7. Thus, the employer fired him for asking a hypothetical question. In our view, the question posed to the supervisor does not violate the employer's policy, because it is neither an act nor omission which resulted in falsified time records or time actually worked.

The employer argues that the claimant's behavior demonstrates a lack of individual integrity, which the claimant knew the employer expected, as "individual integrity" is listed in its Standards of Conduct policy. *See* Exhibit 5. However, even if we looked at this phrase in isolation from the illustrative examples set forth in the policy, we must consider the claimant's state of mind. The issue is not whether the employer was justified in terminating the claimant's employment, but whether "the Legislature intended that . . . unemployment benefits should be denied in the circumstances of a case . . . ." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978). Under these circumstances, unemployment benefits should not be denied.

[1] The claimant testified that his girlfriend gave birth on a weekend after he separated from employment. 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).

To be a knowing violation at the time of the act under G.L. c. 151A, § 25(e)(2), the employee must have been "… consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, 423 Mass. at 813. Similarly, 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). Deliberate misconduct alone is not enough. Such misconduct must also be "in 'wilful disregard' of the employer's interest. This suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge, 375 Mass. at 436 (citations omitted.)

Nothing in the findings indicates that at the time the claimant spoke to his supervisor, he was consciously aware that the consequence of asking the question was a violation of an employer's policy. Rather, the claimant has consistently maintained that he did not do anything wrong. We, too, fail to see any harm done to the employer merely by posing this type of hypothetical question. Because there was no actual harm, the claimant could reasonably believe that he was not acting in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer failed to meet its burden to show that the claimant had the state of mind necessary to constitute either deliberate misconduct in wilful disregard of the employer's interest or a knowing policy violation 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 20, 2018, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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