

The claimant was discharged for theft of the employer's product to which he had admitted. He is disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0025 3461 39

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 March 20, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 25, 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 August 2, 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 or knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 the opportunity to testify. 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 employer, who did not attend the initial hearing, failed to establish that the claimant was discharged for stealing, is supported by substantial and credible evidence and is free from error of law, where, following remand, the consolidated findings establish that the claimant admitted to concealing the employer's cheese with the intent of stealing it.

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 selector for the employer, a supermarket company, from June 7, 2010 until March 20, 2018, when he was discharged from employment.
2. The claimant worked Sunday, Monday, Wednesday, Thursday and Friday from 8:30 p.m. to approximately 5:00 a.m. He was paid \$19.70 per hour.
3. The claimant worked at the employer's distribution center in the perishable warehouse.
4. The claimant was responsible for picking orders of product to ship to the employer's stores.
5. Pilers and Porters are responsible for the sanitation of the warehouse and the replenishment of the product in the warehouse.
6. Pilers and Porters determine if product is damaged. If a product is damaged, they place the product in a machine for it to be recycled into energy.
7. The claimant's immediate supervisor was the Operations Manager.
8. On June 7, 2010, the claimant signed an acknowledgement for receipt of the employer's policies. The employer maintains a Professional Conduct policy, which advises employees that "Dishonesty, theft, or unauthorized removal or possession of Company property" is prohibited. The employer maintains this policy to prevent the employer from incurring a financial loss. Within the Professional Conduct policy, it states that infractions of the policy "may result in disciplinary action, including suspension or termination of employment." The employer maintains a zero tolerance for theft of employer property. The employer terminates all employees who steal company property. The employer has terminated two to three employees a year for theft.
9. At approximately 12:00 a.m. on March 20, 2018, the Operations Manager observed the claimant place employer product into the side pockets of his cargo pants.
10. The Operations Manager called out to the claimant.
11. The claimant put his hands up in "mock surrender." The claimant said "I fucked up."
12. The Operations Manager instructed the claimant to report to the claimant's supervisor's office.
13. The Operations Manager, the supervisor, the claimant, and a union steward met in the office. The claimant was asked to empty his pockets. He took two

- packages of wine-soaked cheese from his pockets. The claimant said he screwed up. He also said he didn't even really like cheese.
14. The Operations Manager told the claimant he was terminated for stealing company property.
 15. On March 21, 2018, the claimant called the employer's Facility Manager. The Facility Manager asked the Human Resource Manager to sit in on the call. The Facility Manager listened in during the call, but did not speak to the claimant.
 16. The claimant told the Facility Manager that he "fucked up" and lost his mind. He said he didn't even like cheese. He asked her for another opportunity and said it was the first time he had ever taken anything. He told her it would never happen again. He also told her he had children and wasn't thinking of them at the time.
 17. The Facility Manager told the claimant he could plead his case at the hearing with his union representative the following day.
 18. On March 22, 2018, the claimant attended the hearing with a Business Agent from the union, the Facility Manager, the Human Resource Manager and the Operations Manager.
 19. At the hearing, the Facility Manager asked the claimant to describe what took place on March 20, 2018.
 20. The claimant said he picked up the two packages [sic] cheese from the floor and placed them in his pocket to give to the Piler.
 21. The Business Agent said that the claimant didn't steal anything.
 22. The Human Resource Manager interrupted the meeting and asked the claimant to confirm that he had already admitted to stealing.
 23. The claimant responded, "Yes, I said that."
 24. The Business Agent said the claimant didn't steal because he didn't leave the building with the cheese and he didn't consume it.
 25. After the hearing, the claimant's discharge was upheld by the employer.
 26. The claimant attended another hearing on March 29, 2018 to contest his discharge. The employer upheld the claimant's discharge.
 27. The union did not proceed to arbitration.

28. The employer discharged the claimant for theft of employer product.

29. On May 16, 2018, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 25(e)(2) of the Law beginning March 18, 2018.

[Credibility Assessment:]

At the initial hearing, the claimant testified that he put the cheese into his pockets to give to the Piler after he found it on the floor and did not to steal it. However, the Operations Manager's written statement entered in as evidence states that the claimant put his hands up in the air and said he "fucked up" when he was addressed by the Operations Manager immediately after placing the cheese into his pockets.

At the remand hearing, the claimant testified that he did not tell the Facility Manager that he "fucked up;" lost his mind; didn't even like cheese; that it was all his fault; that it was the first time he had taken anything; that it would never happen again; or that he wasn't thinking of his three children at the time. However, he did not dispute that he called the Facility Manager on March 21, 2018 to discuss his termination from employment.

The employer's witness, the Human Resource Manager who heard the phone conversation between the claimant and the Facility Manager on March 21, 2018, testified at the remand hearing that the claimant had made all of the statements to the Facility Manager, which he denied he made. The employer's testimony was supported by notes recorded by the Facility Manager in March, which contain the contents of the conversation between herself and the claimant on March 21, 2018.

Although the claimant testified that he couldn't recall telling the Operations Manager he "fucked up," the Operations Manager recorded that the claimant made the statement, which is the same statement the Human Resource Manager heard him make to the Facility Manager during their telephone conversation.

Based on the testimony and evidence presented in this case relative to the claimant's actions and statement on March 20, 21 and 22, 2018, this examiner concludes that the employer's testimony that the claimant admitted to guilt for concealing the cheese in his pants with the intent to steal it is deemed more credible than the claimant's testimony that he placed it in his pockets to give to a Piler.

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 reasonable in relation to the evidence presented. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant was attempting to steal the employer's product when he placed it into his pockets, as outlined below.

The review examiner analyzed the claimant's separation from work as a discharge, and accordingly, 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

The employer bears the burden to prove that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or deliberate misconduct in wilful disregard of the employing unit's interest under G.L. c. 151A, § 25(e)(2). Based solely on the claimant's testimony at the initial hearing, the review examiner concluded that the employer had not met its burden. We remanded the case to allow the employer to present testimony and evidence. After remand, we conclude that the employer met its burden.

The consolidated findings of fact establish that, on March 20, 2018, the claimant picked up two packages of cheese from the floor of the employer's warehouse and placed them in the pockets of his cargo pants. The claimant was observed by his supervisor, the Operations Manager who called out to the claimant. The claimant put his hands up in mock surrender, and responded that he "fucked up." The claimant was instructed to go to his supervisor's office. The claimant then met with the Operations Manager, and a union steward, and was asked to empty his pockets. The claimant took the two packages of cheese from his pockets and said that he had screwed up. The employer maintains a Professional Conduct Policy, a copy of which the claimant signed. The policy prohibits dishonesty, theft, or unauthorized possession or removal of the employer's property. The employer maintains a zero-tolerance for theft of the employer's property and terminates all employees who steal company property. The Operations Manager discharged the claimant for stealing company property.

The next day, the claimant telephoned the Facility Manager. The HR manager listened in to the call. The claimant said that he "fucked up" and "lost his mind" and requested another chance. He said that it was the first time he had ever stolen anything, and that it would never happen again. The claimant was told he could plead his case the next day at a hearing with his representative, the union Business Agent, the Facility Manager, the HR Manager, and the Operations Manager. The claimant told them he picked up the cheese to give to the Piler. The HR Manager who had heard the claimant admit that he was stealing the cheese during the

claimant's phone conversation with the Facility Manager, asked the claimant whether he had already admitted to stealing, and the claimant agreed that he had.

The review examiner provided a credibility assessment setting forth in substantial detail her reasons for accepting the testimony of the employer over that of the claimant. 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). We believe her assessment is reasonable in relation to the evidence and supports her findings that he admitted to stealing and that he knew it was wrong.

Therefore, we conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employing unit's interest and for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2), when, with the intention of stealing, he placed the employer's cheese packages in his pockets.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning April 1, 2018, and for subsequent weeks, until such time as he has had eight weeks of work, and in each of those weeks has earned an amount equivalent to, or in excess of, his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – December 21, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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