

**Claimant did not intentionally go over his break time or steal time, as his car broke down during his break and he informed a supervisor about the problem. Claimant also believed, based on past practice, that he was allowed to go home as soon as he finished his work.**

**Board of Review  
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**Issue ID: 0026 6121 37**

## **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 affirm.

The claimant was discharged from his position with the employer on July 24, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 3, 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 March 13, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 give the employer an opportunity to testify and present other evidence. Only the employer 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 claimant did not violate any employer rule or policy or fail to comply with the employer's expectations, 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 assessment are set forth below in their entirety:

1. The claimant worked as a temporary worker at the employer, a warehouse, through a staffing firm, from August, 2017, until November 20, 2017, when it hired him as a permanent employee.
2. The claimant worked as a fork truck driver for the employer, a warehouse, from November 20, 2017, until July 24, 2018.
3. The claimant worked the overnight shift, from 6 p.m. to 2 a.m., Monday through Friday.
4. The claimant's immediate night shift warehouse manager (the Manager) (sic).
5. Throughout his employment, the claimant saw his coworkers take longer than 15 minutes for their 15-minute breaks.
6. Throughout his employment, the [claimant] took longer than 15 minutes for his 15-minute breaks.
7. The claimant did not receive any warnings during his employment for taking longer than 15 minutes for his 15-minute breaks.
8. Throughout the claimant's employment, he and his coworkers left their shifts prior to their scheduled end time when they finished their assigned tasks for the shift.
9. The claimant did not receive any warnings for leaving prior to the end of his scheduled shift during his employment.
10. On July 14, 2018, there were approximately four to five team leads scheduled.
11. The Manager was on vacation on July 14, 2018.
12. On July 14, 2018, the claimant began his 15-minute break around 12:06 a.m. He left the employer's location to put gas in his vehicle. While at the gas station, his car would not start, and he called his wife assistance [sic]. When his wife arrived at the gas station, they jump started the claimant's car, and he left the gas station.
13. The claimant returned to work from break around 12:30 a.m. When he returned, he told his team lead (the Team Lead 1) that he returned late from his break, because he had car trouble.
14. Around 12:45 a.m., the claimant completed his assigned tasks, punched out from work and left work for the day.
15. On July 18, 2018, the claimant received a written warning for using all his sick time.

16. On July 18, 2018, the claimant received a final warning for damaging cafeteria doors on June 25, 2018, when the claimant pushed the locked cafeteria doors open and a screw came out of the door.
17. On an unknown date, the Manager returned to work from vacation.
18. When the Manager returned to work from vacation, he told the HR Director a second team lead (the Team Lead 2) told him that, on July 14, 2019, the claimant left for break around 12:06 a.m., returned at 12:49 a.m., punched out and left work. The Team lead 2 told the Manager the claimant did not notify anyone that he was leaving.
19. The HR Director told the [Manager] to review the camera footage from July 24, 2019.
20. The Manager told the HR Director that he saw on video from July 14, 2019, that the claimant left for break around 12:06 a.m., returned at 12:49 a.m., punched out and left work.
21. On July 24, 2018, the HR Director and the Manager met with the claimant. During the meeting, the claimant told the HR Director and the Manager that he had car trouble during his 15-minute break on July 14, 2019. The HR Director and the Manager discharged the claimant for misuse of time when [he] arrived back from break late and left before his scheduled shift ended on July 14, 2018.
22. The HR Director did not view the videotape recording before she discharged the claimant.
23. The HR Director was not aware if the Manager spoke with the Team Lead 1 before she and the Manager discharged the claimant.

#### Credibility Assessment:

The HR Director offered the Manager's hearsay testimony from the Team Lead 2 at the hearing that the claimant left for break around 12:06 a.m., returned at 12:49 a.m., punched out and left work. The HR Director admitted she did not witness the claimant actually leave for break around 12:06 a.m., return at 12:49 a.m., punch out and leave work. Although the Manager viewed the video recording from July 14, 2018, the HR Director did not. Further, the HR Director was unaware if the Manager spoke with the Team Lead 1 prior to discharging the claimant. Also, the HR Director admitted that employees were allowed to leave work early upon completion of job duties, although they were to notify a supervisor. The HR Director did not have any first-hand knowledge regarding the claimant leaving for break around 12:06 a.m., returning at 12:49 a.m., punching out and leaving work.

Although the claimant was not at the remand hearing, he offered testimony at the original hearing that rebutted the HR Director's hearsay testimony. The claimant offered direct testimony that although he returned from break late, he did so because he had car trouble. He also testified he notified the Team Lead 1 when he returned from [break] why he was late returning. Additionally, the claimant testified that he was allowed to leave work when his work was completed. The claimant's testimony is reasonable given his testimony about his and his [coworkers'] previous work habits.

Based on the HR Director's hearsay testimony at the remand hearing that relied on what the Team Lead 2 told the Manager and what the Manager viewed on video, the totality of the claimant's direct testimony at the initial hearing outweighs the employer's testimony given in the remand hearing. Therefore, the claimant is deemed more credible.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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.

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 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 . . . .

Under this section of law, the burden rests with the employer 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). Following the first hearing, where only the claimant offered evidence, the review examiner concluded that the employer had not carried its burden. After reviewing the entire record, including the employer's testimony from the remand hearing, as well as the consolidated findings of fact, we agree.

The claimant was discharged for his misuse of time when he arrived back from break late and left before his scheduled shift ended on July 14, 2018. Finding of Fact # 21. Both the consolidated findings and credibility determination establish that the employer had a reasonable expectation that its employees not exceed the time allowed for breaks or leave a shift without a supervisor's permission. In order to deny unemployment benefits, however, it must be shown

that the claimant acted with “intentional disregard of [the] standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus, “the critical issue in determining whether disqualification is warranted is the claimant’s state of mind in performing the acts that cause his discharge.” Id. Here, the review examiner found that, based on past practice, the claimant understood that he could decide to leave on his own as soon as he finished his assigned tasks for a shift. The review examiner also found that, throughout the claimant’s employment, employees, including the claimant, routinely went over their allotted 15-minute breaks without consequences.

As noted by the review examiner in her credibility determination, the employer’s witness agreed that employees are allowed to leave work early upon completion of their job duties, but she argued that the claimant failed to comply with the employer’s expectation, because he did not notify a supervisor that he was leaving. Since the review examiner found that the claimant believed he could leave of his own accord when he was done with his work, we cannot conclude that the claimant was acting in wilful disregard of the employer’s interest when he left early on July 14<sup>th</sup>.

With respect to the claimant’s failure to limit his break time to 15 minutes, the review examiner found that the claimant went over his break time on July 14<sup>th</sup> due to a problem with his car, and he notified a team lead about the issue as soon as he got back to work. In light of these findings, we cannot conclude that on the day in question the claimant deliberately exceeded his break time or that he intended to engage in time theft.

We, therefore, conclude as a matter of law that the claimant’s discharge is not attributable to deliberate misconduct in wilful disregard of the employer’s interest.

The review examiner’s decision is affirmed. The claimant is entitled to receive benefits for the week ending August 11, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 14, 2019**



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](http://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.

SVL/rh