Although claimant had permission to step into the parking lot to get his lunch without punching out, he did not have permission to ignore the employer's expectation that employees punch their own timecards. Asking his girlfriend to punch him out for lunch so he could get a microwave to heat his soup was deliberate misconduct in wilful disregard of the employer's interest.

Board of Review
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Issue ID: 0027 6753 33

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 October 28, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 4, 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 January 17, 2019. 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, he 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 afford the employer an opportunity to present evidence as to why it discharged the claimant. Only the employer attended the remand hearing. Thereafter, the review examiner issued consolidated findings of fact. However, upon review of these initial consolidated findings, we remanded a second time for further subsidiary findings of fact from the record to clarify whether the employer fired the claimant for more than one rule infraction and whether the claimant knew his behavior was wrong. In response to our questions, the review examiner again reviewed the record and has issued revised 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 original decision, which concluded that the claimant was eligible for benefits because his supervisor had given him permission to

engage in the conduct for which he had been fired, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a linen rental company, as an ironer and general laborer, from January 22, 2018 until October 28, 2018. The claimant worked 5:00 a.m. to 1:30 p.m. or 6:00 a.m. to 2:30 p.m. The claimant was paid $12.35 per hour.

2. The claimant's lunch period is 10:00 a.m. to 10:30 a.m.

3. It is the employer's expectation employees punch-in and punch-out for themselves every time they arrive at or leave the production floor, otherwise it is theft of employer time.

4. The expectation is in the interest of the employer to have accurate records so employees are paid for time they are working.

5. The claimant was aware of the employer's expectation.

6. On October 25, 2018, the claimant left the production floor to go out to his car in the parking lot to get his lunch.

7. The claimant was given permission by his supervisor to go to his car in the parking lot to get his lunch without punching out.

8. On October 25, 2018, the claimant was recorded in the parking lot at 9:51 a.m. (Remand Exhibit 9)

9. At about 9:59 a.m., the claimant returned to the premises and left for the lunchroom to be able to secure a microwave to heat his lunch.

10. The claimant asked his girlfriend, an employee, to punch him out for lunch so he could go directly to the lunchroom to be able to secure a microwave to heat his lunch.

11. At 10:01 a.m. the claimant's girlfriend punched the claimant out for lunch. (Remand Exhibit 10)

12. The claimant's girlfriend punching out the claimant for break was contrary to the employer's expectation.

13. The claimant did not think he was doing anything wrong having his girlfriend punch out for him because he was given permission by his supervisor to go to his car in the parking lot to get his lunch without punching out.

14. On October 28, 2018, the claimant was terminated for going to the parking lot on company time without punching out and for having his girlfriend punch him out for break at 10:01 a.m.

15. Either offense alone would have resulted in the claimant's termination.

16. The employer suffered a financial loss of about $40.00 due to the claimant's absence from the production floor and by paying the claimant for time he did not work.

Credibility Assessment:

The employer did not enter into the record any written policy. The employer's witness, the General Manager, testified the claimant was trained in the on-boarding process he must punch-in and punch-out for himself every time he arrives at or leaves the production floor, otherwise it is theft of employer time. The General Manager did not attend the claimant's on-boarding nor did he know who conducted the on-boarding. The claimant was aware of the employer's expectation having requested his girlfriend to punch-out for him for him his break. The General Manager further testified he did not have any knowledge of the claimant being given permission to leave the production floor without punching out. The claimant's supervisor did not testify at the hearing. The claimant's testimony he was given permission by his supervisor to go to his car in the parking lot to get his lunch without punching out is not refuted. The claimant's testimony is deemed credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 final set of consolidated findings of fact and deems them to be supported by substantial and credible evidence. With the exception of the first sentence of the review examiner's credibility assessment, we believe it is reasonable in relation to the evidence presented.[1] However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

[1] The first sentence states that the employer did not enter into the record any written policy. This is incorrect. *See* Exhibit 8, which is a page showing the employer's Timekeeping policy. 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).

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 remanded this case a second time in order to clarify why the employer terminated the claimant's employment. The consolidated findings now show that it was for two reasons: (1) going to the parking lot on company time; and (2) having another person punch him out for his lunch break. *See* Consolidated Finding # 14. Because the employer has not shown that it has terminated other employees for the same behavior, it has not sustained its burden to show that the claimant knowingly violated a reasonable and *uniformly* enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer can meet its burden by showing that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. 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 "take 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).

As for going to the parking lot without punching out, the review examiner found that the claimant was aware that the employer expected employees to punch in and out every time they leave the production floor. *See* Consolidated Findings ## 3 and 5. However, the findings also state that, on October 25, 2018, the claimant had obtained his supervisor's permission to go to the parking lot without punching out. *See* Consolidated Findings ## 6 and 7. Since the claimant had his supervisor's express permission to step into the parking lot without punching out, he could reasonably believe that he was not acting in wilful disregard of the employer's interest. *See* Ocean State Job Lot of Hyannis v. Comm'r of Department of Employment and Training, No. 2003-P-1406, 2004 WL 1497692 (Mass. App. Ct. July 6, 2004), *summary decision pursuant to rule 1:28* (claimant was not aware that her conduct violated the employer's policy, where her supervisors knew of and consented to use of her employee discount for unauthorized purchases).

The same cannot be said for having someone else punch him out for his lunch break. The employer's policy states that employees are to punch their own timecards, and the review examiner found that the claimant was aware of this expectation. *See* Consolidated Findings ## 3, 5, and Exhibit 8. Nonetheless, on October 25, 2018, the claimant had a coworker, his girlfriend, punch his timecard out for lunch so that the claimant could go directly to the lunchroom from the parking lot to get a microwave to heat his soup. *See* Consolidated Findings ## 10 and 11. Nothing in the record indicates that the claimant's supervisor knew of or condoned this. Consolidated Finding # 13 states that the claimant believed that there was nothing wrong with this because he had been given his supervisor's permission to go to the parking lot without punching out. His belief is unreasonable. First, the two acts are not the same, and it is evident that the claimant was aware of this. He had permission not to punch out for the parking lot, but he knew that he was still expected to punch out for lunch. Otherwise, he would not have bothered to make sure that his timecard was punched out for the lunch break. The fact that he had someone else do it for him demonstrates a wilful disregard of the employer's interest in having employees punch their own timecards.

We further conclude that the claimant's reason for having his girlfriend punch his timecard, so that he could warm up his soup, is not a mitigating circumstance. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control). On October 25, 2018, the claimant could have taken a few extra moments to punch his own timecard and, if necessary, waited his turn for a microwave.

We, therefore, conclude as a matter of law that the employer has satisfied its burden to show that it discharged the claimant for 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 denied benefits for the week beginning October 28, 2018, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2019

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