Claimant restaurant server who drank wine left by a customer against policy is qualified for benefits. Employer restaurant failed to appear at the remand hearing to answer questions about its investigation into the incident & uniformity of enforcement regarding discipline for other employees who drank from the same bottle of wine.

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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 31, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 4, 2019. 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 24, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant both engaged in deliberate misconduct in wilful disregard of the employer's interest, and knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, 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 take additional evidence regarding the employer's investigation into the incident that led to the claimant's discharge, including whether the employer imposed discipline on anyone else for the same incident. 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's discharge for consuming alcohol at work constituted both a knowing violation of a reasonable and unfirmly enforced policy of the employer's, as well as deliberate misconduct in wilful disregard of the employer's interest, 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 Note to the Board are set forth below in their entirety:

1. The claimant worked full-time for the employer, a restaurant, from February 18, 2002 to January 24, 2019 as a Server.

2. The employer had a policy that prohibited "consuming alcoholic beverages during work hours, during a meal or break period (including between split shift), or within such period of time before work so that your manager/supervisor concludes that you are impaired or unable to perform your job."

3. The claimant admittedly knew the policy.

4. The employer had a system of discipline consisting of a verbal warning, a written warning, suspension without pay, probation, termination, and restitution. The procedure stated that the employer "will determine, in its sole judgment and discretion, if an employee's conduct or behavior warrants disciplinary action and the disciplinary action to be imposed."

5. The claimant knew of an employee who was discharged in late 2018 for consuming alcoholic beverages at work.

6. The claimant never before consumed alcohol while at work.

7. On January 24, 2019, close to the end of the claimant's shift, the Bartender asked the claimant if he would like to have some wine that was going to be thrown out. The claimant initially declined because he knew it was against the rules, but decided to taste it in order to be able to recommend the wine when serving to customers.

8. The claimant suggested a paper cup initially, but the Bartender insisted on a glass, with which the claimant agreed.

9. The Bartender poured wine into a glass for the claimant's consumption.

10. The claimant finished some tasks and then came back to the bar, at which time he consumed the wine.

11. The Team Manager arrived into the area and observed the claimant taking a drink of wine. The Team Manager observed that the glass was half full.

12. The Team Manager was taken aback and asked him what he was drinking. The claimant responded, "Wine."

13. The Team Manager went to the office and texted the General Manager (GM) asking him what she should do. The GM directed the Team Manager to confirm again that it was wine that the claimant was drinking.

14. The Team Manager approached the claimant again and confirmed that he was drinking wine.

15. Shortly after, the claimant clocked out and left.

16. On January 25, 2019, at approximately 1:30 p.m., the claimant received a call from a Bartender, which he missed. Between approximately 1:30 p.m. [sic], the General manager called the claimant, which he missed. At approximately 3:00 p.m., the Bartender called the claimant, which the claimant answered. The Bartender told the claimant that the General Manager tried to call him and she explained that she told the General Manager that it was only a taste of wine and that the wine was already paid for. The claimant then contacted the General Manager, who asked him what happened and was he drinking wine. The claimant explained that he was tasting the wine for the purpose of being able to better recommend the wine to customers. The General Manager indicated that the matter will be investigated.

17. The claimant did not tell the General Manager (or any other member of management) that the two Bartenders also tasted some of the wine because he did not want to get them in trouble. The claimant believed that the employer may find out on its own by reviewing video surveillance footage.

18. On January 31, 2019, the employer discharged the claimant from employment for consuming an alcoholic beverage at work.

19. The claimant learned from the Bartender (who poured the wine) and the General Manager that she received a warning for her part.

[Note to Board:] The employer failed to participate in the remand hearing. Therefore, many of the questions posed by the Board could not be answered.

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 consolidated findings of fact and deems them to be supported by substantial and credible evidence.

The review examiner initially denied benefits after analyzing the claimant's separation under 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 . . . .

This section of law disqualifies a claimant from benefits if his or her separation was attributable to either a knowing violation of a reasonable and uniformly enforced policy or deliberate and wilful misconduct. Under G.L. c. 151A, § 25(e)(2), the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). After the first hearing, the review examiner concluded that the employer had met its burden, and denied benefits to the claimant. Following our review of the record from both the initial and remand hearings, as well as the consolidated findings of fact and the documentary evidence, we now conclude that the employer has failed to meet its burden.

Initially, the review examiner found that the employer's policy prohibits the consumption of alcohol by employees during work hours. *See* Finding of Fact # 2. The policy is reasonable, both to ensure that employees remain able to serve the employer's guests without being intoxicated themselves, and to ensure that the employees do not consume the employer's property. Arising from the policy is an expectation that employees not drink during working hours, which is also reasonable for the same underlining reasons. The claimant was aware of the policy and expectation. *See* Finding of Fact # 3. He was also aware that another employee had been disciplined in late 2018 for consuming alcoholic beverages at work. *See* Finding of Fact # 5.

The review examiner found that, toward the end of the claimant's shift on January 24, 2019, a bartender asked if he would like to have some wine from a bottle purchased by a guest, which was going to be thrown out. The claimant declined initially because he knew it was against the rules but decided to taste it so that he could recommend it to customers in the future. *See* Finding # 7. The bartender poured wine for the claimant's consumption, he finished some tasks before returning to the bar, and drank the wine. *See* Findings ## 9–10. The manager observed the claimant drinking the wine, saw that his glass was half full, and confirmed the claimant was drinking wine. Thereafter, the claimant clocked out and left. The review examiner found that the claimant was discharged for consuming an alcoholic beverage on January 31, 2019. *See* Finding of Fact # 18.

We remanded the matter, in part, to determine the type of disciplinary procedures used by the employer when implementing its policies, and whether they would satisfy the uniform enforcement requirement of G.L. c. 151A, § 25(e)(2). Even without the employer present on remand, the review examiner was able to find that the employer has a multi-step progressive discipline policy which permits its use of judgment and discretion when deciding whether an employee's conduct warrants discipline, and what specific discipline is to be imposed. *See* Finding of Fact # 4 and Hearing Exhibit # 8. Because this policy contemplates an array of

disciplinary possibilities for policy violations, we conclude that the employer failed to meet its burden to prove that its policy prohibiting employees from consuming alcohol during their shifts is uniformly enforced.

Our second inquiry for remand was to ask the employer questions regarding the scope, conduct, and substance of its investigation into the incident for which the claimant was ultimately discharged. Where the claimant alleged at the original hearing that two bartenders had also consumed wine from the same bottle from which he was served, we questioned whether the employer investigated anyone else involved in the incident for which the claimant was discharged, and what discipline they received (if any).

Although there are no specific findings that anyone other than the claimant had consumed wine on the night in question, the record contains information supplied by the employer's representative where he acknowledged that at the time of the incident, the bartender had "tasted" the wine, but "did not drink it." *See* Hearings Exhibit # 3, p. 2. Our remand order specifically asked the employer to explain this distinction in view of its policies and investigation into the incident that prompted the claimant's discharge.[1] *See* Remand Exhibit # 3, Question # 3c. Again, the employer's absence precluded any explanation of this distinction.

In view of the claimant's testimony, and the admission by the employer's agent that a bartender "tasted" wine on the same night the claimant did, it is reasonable to infer that the bartender also "consumed" an alcoholic beverage that night.[2] Despite her similar conduct (and her pouring the wine for the claimant to drink), the review examiner found that the claimant was told by the bartender that she was only issued a warning "for her part" of the incident.[3]

We next consider whether the claimant's conduct in consuming wine while on duty constitutes deliberate and wilful misconduct within the meaning of G.L.c.151A, § 25(e)(2). The Massachusetts Supreme Judicial Court has held that "[d]eliberate misconduct in wilful disregard of the employer's interest suggest intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.) Thus, 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).

[1]The policy submitted by the employer at the initial hearing makes no distinction between "drinking" and "tasting" an alcoholic beverage during work hours. The policy prohibits "consuming" alcoholic beverages, with no nuanced distinction for "drinking" versus "tasting." *See* Hearings Exhibit # 8.

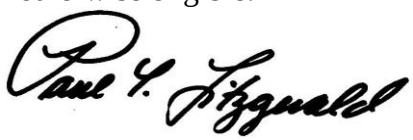
[2]The claimant's allegation that a bartender had also consumed wine on the night at issue, while not explicitly incorporated into the review examiner's consolidated findings, was confirmed in part by the employer's representative to an adjudicator. This was part of the unchallenged evidence introduced by the claimant at the remand 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).

[3]The review examiner's finding does not elaborate as to what the bartender's "part" of the incident was. It is unknown whether she was warned for pouring wine for the claimant; or for "drinking," "tasting," or for the "consumption of" alcoholic beverages during work hours; or any combination of these actions.

As discussed above, the employer had a reasonable expectation that employees not consume alcohol on duty. The claimant was aware of this expectation and violated it when he consumed the wine. The review examiner found, however, that the claimant did not consume the wine in order to thwart the employer's expectation, but rather to be able to recommend the wine to the employer's customers. The claimant's action in this regard may have been misguided but it was not done with wilful disregard of the employer's interest. It appears rather to have been a good faith mistake in judgment. "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citations omitted.)

Discharging the claimant may have been an appropriate decision for the employer to make. However, the review examiner's abbreviated consolidated findings of fact, due to the employer's absence from the remand hearing, lead us to conclude that the employer failed to meet its burden to support disqualification from benefits. We, therefore, conclude as a matter of law that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer 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 ending February 16, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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

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.

JPC/rh