

**Where only the claimant attended the remand hearing, the review examiner credited the claimant's version of events that she was laid off as part of a change in business direction rather than for any intentional misconduct. Lacking proof of misconduct, the employer failed to meet its burden under either prong of G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0030 4575 20**

## **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 following her separation from employment. Benefits were denied on the ground that the claimant was discharged for insubordination, which constituted deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on May 2, 2019. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on June 20, 2019. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On December 8, 2019, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional testimony and evidence from the claimant regarding her separation from employment. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was discharged for insubordination, and that it was deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a Billing Director for the employer, an ambulance service. The claimant began work for the employer in May, 2018. She worked Monday through Friday from 8:30 a.m. to 5:30 p.m. and earned an annual salary of \$110,000.
2. The claimant's job duties included managing the employer's billing department, including billing employees in the employer's [Town A] Base office and [Town B] branch site. When she was hired, her immediate supervisor was the Chief Financial Officer (CFO).
3. In December, 2019, the employer hired a consultant to assist in the implementation of new billing practices and procedures.
4. The claimant disagreed with some of the new practices because she believed they conflicted with Medicare and Medicaid rules. Over several meetings in early 2019, the claimant told the CFO she disagreed with the new practices and procedures.
5. The claimant was not told that her failure to follow the new practices and procedures would place her job in jeopardy.
6. In March, 2019, the claimant spoke with the owner about her concerns. The owner told her that she should report to him.
7. Two Collections Specialists at the employer's [Town B] branch site had ongoing conflicts with each other. The claimant and the employer's Human Resources Manager (HR Manager) counseled the two Collections Specialists but the conflict continued into late March, 2019.
8. The claimant was not told by the CFO that she should not take sides between the collection specialists. She was not aware of a meeting the CFO planned with the collection specialists.
9. On Wednesday, April 3, 2019, the claimant was at the [Town B] branch site. The Operations Manager told her that the Collection Specialists were fighting too much. He told her he was going to let one of them go. The claimant sat in the meeting where the Operations Manager discharged the Collections Specialist.
10. The claimant believed the Operations Manager had a close relationship with the CFO and ownership. For this reason she trusted his decision to discharge one of the Collections Specialists.

11. The claimant informed the HR Manager of the discharge.
12. On April 5, 2019, the CFO and the HR Manager spoke with the claimant on the telephone. They told her she was discharged. They told her the company was moving in a new direction and they did not see the claimant being a part of that. They did not mention the discharge of the Collections Specialist.
13. The claimant retained an attorney to provide legal advice on a potential wrongful termination claim and a proposed separation agreement.
14. On May 3, 2019, the claimant's attorney received [an] email from [sic] the employer's attorney which states in part: "We disagree that (Claimant) was separated for any reason other than a [sic] legitimate business reasons."
15. On May 7, 2019, the claimant's attorney spoke on the telephone with the employer's attorney. The employer's attorney told the claimant's attorney that the claimant's termination was "a business needs layoff."

#### Credibility Assessment:

There were some conflicts between the claimant's testimony and the employer's testimony. It is also noted that neither party was present at the hearings at the same time as the other and therefore were not subject to cross examination by the other party. However, the claimant's knowledge of what occurred at the employer was firsthand. The employer witnesses were the CFO and the HR Manager. Their testimony regarding what occurred at the [Town B] branch site was hearsay. There is no other circumstance which gives the testimony of either side additional weight. Therefore, the claimant's direct testimony is more credible than the employer's hearsay statement.

#### 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 ultimate 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 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, . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. *See Still v. Comm'r of Employment and Training*, 423 Mass. 805, 809 (1996). Based on the employer's undisputed testimony at the initial hearing, the review examiner concluded the employer had met its burden. The District Court remanded the case to take testimony and evidence from the claimant. After remand, we conclude that the employer has not met its burden.

As a threshold matter, the employer must demonstrate that the claimant engaged in some sort of misconduct. The review examiner initially found that the claimant was cautioned that her job was in jeopardy and was suspended for refusing to follow directions. She was told to work with and not take sides in a conflict between two collection specialists in [Town B], and she was discharged for insubordination after she allegedly discharged one of the collection specialists without authorization. The review examiner concluded that the conduct for which the claimant was discharged constituted deliberate misconduct in wilful disregard of the employer's interest. *See* Remand Exhibit 1.

After remand, the review examiner revised his consolidated findings almost entirely, accepting as credible the claimant's testimony that the employer never warned her that her job was in jeopardy, she was never suspended, and she did not discharge the two quarreling, [Town B]-based collections specialists herself. *See* Consolidated Findings ## 5, 8, and 9.

More significantly, the review examiner found that when the employer discharged the claimant by telephone on April 5, 2019, the claimant was told the company was moving in a new direction, and they did not see her being a part of that. The review examiner further found that the employer did not mention the claimant's alleged discharge of the collection specialist during her discharge. *See* Consolidated Finding # 12.

The review examiner also credited sworn testimony from one of the claimant's attorneys, who was informed via email by counsel for the employer on May 3, 2019, that the claimant was separated for "legitimate business reasons" (*see* Consolidated Finding # 14; Remand Exhibit 5); and that the employer's counsel told him by telephone on May 7, 2019, that the claimant's separation was a "business needs layoff." *See* Consolidated Finding # 15; Remand Exhibit 6.

Along with his consolidated findings, the review examiner made a credibility assessment accepting the claimant's direct testimony regarding the discharge of the [Town B] collections specialist over the employer's hearsay testimony from the initial hearing and accepting the claimant's version of events regarding other disputed issues of fact. 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 that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

In addition to the review examiner's assessment of the parties' relative credibility, we note that one of the claimant's attorneys provided undisputed testimony regarding his communications with counsel for the employer. Part of his testimony was corroborated by an email thread between counsel for the parties. This supported the claimant's assertion that the employer did not tell her she was discharged for intentional wrongdoing but merely let her go because the employer wanted a change in direction to meet its own business needs.

Where the review examiner has not issued any findings indicating that the claimant engaged in any conduct contrary to a defined employer policy or interest, we cannot conclude that the claimant was discharged for disqualifying misconduct. We, therefore, conclude as a matter of law that the claimant's discharge was neither for deliberate misconduct in wilful disregard of the employer's interest, nor for a knowing violation of a reasonable and uniformly enforced rule or policy 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 April 13, 2019, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 25, 2020**



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](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.

JPC/rh