

Employer failed to show that the claimant was made aware of its expectation not to place auto parts in his locker without first paying for them. Thus, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2) for doing so.

**Board of Review
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Issue ID: 0031 4020 15-05

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 June 19, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 19, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant and a representative for the employer, the review examiner reversed the agency's initial determination and awarded benefits in a decision rendered on October 16, 2019.

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 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 accepted the employer's application for review and remanded the case to the review examiner in order to take additional evidence from the employer. Both parties 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 is not subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the consolidated findings show that the claimant did not intend to steal an auto part from the employer and did not know that his actions were impermissible.

Findings of Fact

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

1. On 11/28/18, the claimant began full-time work as a non-union Order Picker at this employer's auto parts warehouse.
2. The claimant frequently purchased auto parts from the employer for his vehicle as there was an employee discount. Each time the claimant purchased parts there has been a problem with some of the ordered parts not being the correct part for the claimant's vehicle.
3. When the employer provided the wrong part to the claimant they would refund the money the claimant paid but the refund process took about two weeks to accomplish and have the money returned to the claimant.
4. In June, 2019, the claimant had completed another auto-part order for an oxygen sensor for his Honda Accord (the part cost approximately \$25.00). The claimant was able to pick-up the part he had ordered on 06/19/19.
5. Because of the many returns of parts, the claimant was determined to be certain this was the correct part before he made the purchase. The claimant intended to take the part he had ordered to his shift supervisor on 06/19/19 and have her check that this was the correct part for his car before he purchased the part.
6. On 06/19/19, the claimant was working the second shift from 4:00PM to 12:30AM. The claimant picked up the ordered part for his vehicle intending to verify if it was the correct part for his car before purchasing the item.
7. On 06/19/19, when the claimant went looking for his supervisor for her to verify that this was the correct part, she could not be located.
8. On 06/19/19, the claimant placed the part in his unlocked work locker while he went on his break, intending to locate his supervisor after his break to verify if it was the correct part for his vehicle before purchasing it at the end of his shift.
9. The claimant understood that he could place parts in his locker to purchase at the end of his shift. The claimant understood that as long as he purchased the parts before taking them out of the building, the employer would have no issues with the claimant.
10. The claimant was aware that the employer's warehouse has many security cameras watching the activities in the warehouse. When taking the part at issue to his locker, the claimant made no attempt to conceal his actions.
11. Later on 06/19/19, when the claimant returned from his break, he was called in to meet with management and he was immediately told that he was being discharged for theft because he had an auto part in his work locker.

12. The claimant attempted to explain why the part that he had ordered was in his unlocked work locker and his need to have the part verified because of all the problems and refund issues he had previously, but the second shift management told the claimant that it did not matter what he said because a part was in his locker and he was terminated for that reason.
13. The employer has no written policy prohibiting staff from placing parts in their work locker to verify if they are the correct part prior to final purchase. Prior to his discharge from employment, no one had ever told the claimant that he could not place a part in his locker until he located his supervisor to obtain her assistance in verifying if the part delivered to him for purchase was the correct part.
14. The claimant denied any intentional wrongdoing and noted that he had not removed any parts from the building, and had never tried to steal anything, but [sic] the decision to discharge was final. The employer second shift management did not listen to the claimant's explanation as to why he had the part in his locker. The decision to discharge was made by second shift management on the spot on 06/19/19 without any input from any investigator, the General Manager or Human Resources.
15. On 08/21/19, the claimant filed a claim for unemployment benefits effective 08/18/19.

Credibility Assessment:

The claimant's testimony denying any intentional wrongdoing was credible. The claimant had ordered many parts from the employer using his employee discount and on several occasions, he had received the wrong part and had to endure a lengthy refund process to get his money back so that he could get the correct part. For this reason, the claimant was reasonable in wanting his supervisor on 06/19/19 to verify the part prior to its final purchase. It does not make sense that the claimant would fill out an order form for this part and then attempt to steal it. The claimant was aware that many security cameras followed his actions but he made no attempt to conceal his action of carrying the part to leave in his unlocked work locker after he was unsuccessful in his initial attempts to locate his supervisor for his assistance. The claimant did not attempt to hide his actions or to lock his work locker because he understood that he had done nothing wrong and had nothing to hide. The only employer witness, the General Manager, did not work on the claimant's shift, had no personal knowledge of the final events leading to the discharge and he was not involved in the decision to discharge the claimant.

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 of fact are supported by

substantial and credible evidence; and (2) whether the conclusion that the claimant is entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact. In adopting these findings, we deem 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. As discussed more fully below, we conclude that the claimant is not subject to disqualification from the receipt of unemployment benefits.

Since the claimant was discharged, 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).

Consolidated Findings ## 11 and 12 show that the employer discharged the claimant for theft by placing an auto part in his locker without paying for it. As the review examiner found, the employer does not have any written policy addressing this particular conduct. *See* Consolidated Finding # 13. Since it does not have such a policy, the employer cannot meet its burden under G.L. c. 151A, § 25(e)(2), to show a knowing violation of a reasonable and uniformly enforced policy.

Alternatively, the employer may demonstrate that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The legislative intent behind G.L. c. 151A, § 25(e)(2), is “to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, 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, 377 Mass. at 97. Here, the consolidated findings of fact support a conclusion that the claimant did not deliberately engage in misconduct. The review examiner found that the claimant intended to purchase the auto part in question, as he had filled out a purchase order for the part. *See* Consolidated Findings of Fact # 4. Prior to the purchase, however, the claimant intended to verify with his supervisor that the auto part was, in fact, the proper part for his vehicle. *See* Consolidated Finding # 8. No one have ever

told the claimant that he could not put a part in his locker before paying for it while he located a supervisor to verify that it was the correct part. Consolidated Finding # 13. This tends to support the review examiner's other finding that the claimant believed this was acceptable as long as he paid for the part before removing it from the building. *See* Consolidated Finding # 9.

In his credibility assessment, the review examiner explains why he credited the claimant's testimony denying any intentional wrongdoing. It was up to the review examiner to assess the parties' testimony and accompanying evidence and make findings about what happened on June 19, 2019. At this stage of the administrative process, "[t]he responsibility for determining the credibility and weight of that testimony rests with the hearing officer," not with the Board. Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31 (1980). We will not disturb the review examiner's credibility assessment, unless it is unreasonable in relation to the evidence presented. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). As noted above, we have accepted the review examiner's credibility assessment. There was nothing unreasonable about the review examiner accepting the direct testimony of the claimant over the testimony of the employer's witness, who was not present at the time the incident.

The employer has not met its burden to prove that the claimant intended to steal an auto part or that it made the claimant aware of an expectation not to place items in his locker before paying for them. Thus, we cannot conclude that the claimant knew that his behavior was misconduct or that he was acting in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or 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 affirmed. The claimant is entitled to receive benefits for the week ending June 22, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 6, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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.

MJA/rh