

Review examiner's initial credibility assessment improperly based disqualification for theft of resident gift card upon the claimant's arrest and arraignment. Following remand, the review examiner found that claimant was not aware that the gift card was stolen. Since the claimant did not know the gift card was stolen, she did deliberately engage in misconduct and may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0031 8089 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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from her position with the employer on July 27, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 5, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 22, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest 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 review the record and provide a credibility assessment on conflicting testimony regarding the alleged misconduct. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 was discharged from her employment because she stole a gift card from a resident under her care, 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 full-time certified nursing assistant for the employer, a skilled nursing facility, between 03/13/2019 and 07/27/2019, when she separated.
2. The employer maintains "Resident Rights" stating that "Residents have the right to be treated with dignity and respect" and that "Residents have the right to be safeguarded against harsh or abusive treatment."
3. The purpose of the "Resident Rights" provisions is to protect residents in the communal living environment.
4. The disciplinary consequence for violating the "Resident Rights" depends on the infraction.
5. The employer maintains "Standards of Conduct" prohibiting "Intentional disregard of residents' rights" and "theft or removal of property from the facility premises."
6. The purpose of the "Standards of Conduct" is to ensure the safety and dignity of the residents.
7. Violating the "Standards of Conduct" "may result in disciplinary action, up to and including discharge."
8. The "Resident Rights" and the "Standards of Conduct" were contained in the employee handbook, for which the claimant signed an acknowledgement on 03/19/2019.
9. The employer expected employees not to engage in theft from residents.
10. The purpose of this expectation was to ensure the safety of the residents.
11. This expectation was communicated to the claimant through the "Standards of Conduct."
12. The claimant worked with another employee (employee A).
13. Family members of a resident (resident A) gave resident A gift cards. The family members took photocopies of the gift cards.
14. Resident A left the facility and went to a hospital for a period of time before returning to the facility. Upon resident A's return to the facility, her purse was missing. The purse and its contents were not at the hospital. Police tracked the gift cards.

15. Employee A sold a gift card valued at \$200.00 to the claimant for \$100.00. The claimant did not think that the gift card was stolen because employee A told the claimant that her son was in a car accident and that she received the gift card following the son's car accident.
16. The gift card the claimant purchased from employee A was one of resident A's gift cards.
17. The claimant used the gift card.
18. On 07/25/2019, police detectives arrested the claimant in the employer's parking lot upon her arrival to work.
19. On 07/25/2019, the claimant participated in an interview with police. The claimant denied engaging in theft and informed police of employee A's involvement.
20. The director of nurses and a supervisor interviewed employee A at approximately 8:00 p.m. on 07/25/2019. Employee A submitted a written statement.
21. The claimant was criminally charged with credit card improper use, larceny over \$250, and abuse of a resident over sixty five (65) years old. The claimant's charges are pending. Employee A is a codefendant in the claimant's criminal case.
22. On 07/27/2019, the employer terminated the claimant's employment by letter for resident abuse and theft.
23. The employer self-reported the incident to the Department of Public Health (DPH).
24. A DPH surveyor met with the director of nurses. DPH determined the facility was not liable and followed its own policies and procedures. On 09/17/2019, the DPH surveyor issued the claimant a letter that "the complaint investigation findings concerning allegations at [the facility] were not substantiated."

Credibility Assessment:

During the original hearing, there was a dispute between the claimant and the employer about how the claimant obtained one of resident A's gift cards. The employer alleged that the claimant engaged in theft herself, relying on the information provided to them by employee A. The claimant maintained that she did not engage in theft and instead purchased the gift card from employee A not thinking it was stolen. Both employee A's statements to the employer and the claimant's testimony at the hearing were self-serving. However, given that 1) the

claimant offered direct testimony that was subject to cross examination during the hearing, 2) the employer offered hearsay testimony and evidence of employee A's statements, 3) employee A was not presented as a witness in this case to offer any testimony and be subject to cross examination herself, and 4) the criminal charges against the claimant are pending, the review examiner finds the claimant's version of events (that she did not engage in theft from resident A) to be more plausible in this case.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

Because the claimant was terminated from her employment, her 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).

The employer maintains a policy prohibiting “[i]ntentional disregard of residents' rights” and “theft or removal of property from the facility premises.” Finding of Fact # 5. This policy is reasonable as it serves to protect the safety of the residents. Finding of Fact # 6. The claimant is aware of this policy as it is contained in the employee handbook she reviewed and signed on March 19, 2019. Finding of Fact # 8. However, we cannot determine if the policy is uniformly enforced, as the employer has complete discretion in determining the appropriate disciplinary action for any infraction and has failed to show that all other employees accused of theft had been terminated immediately. Therefore, the Board cannot conclude that the claimant knowingly violated a uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

The next inquiry is whether the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest. The central issue to this analysis is the claimant's state of mind at the time of the alleged misconduct. 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) (citation omitted). The employer's expectation that employees not steal from residents was communicated to the claimant through the aforementioned policy. Finding of Fact # 11. Further, at the hearing, the claimant did not dispute she was aware of this expectation.¹ Therefore, the dispositive question in this case is whether the claimant knew her possession and use of the gift card was contrary to the employer's expectation.

In her initial decision, the review examiner concluded that the claimant had engaged in theft because the claimant had been arrested and arraigned for improper credit card use, larceny over \$250, and elder abuse. *See* Finding of Fact # 21. However, arrest and indictment are only accusations of wrongdoing and do not show that a claimant actually committed the act alleged. *See, e.g.,* Board of Review Decision 0002 1676 38 (December 19, 2013) (the fact that the claimant was arraigned on criminal charges shows only that he was accused of wrongdoing, it does not show he engaged in wrongful conduct).² As such, we remanded the case for the review examiner to conduct a credibility assessment of conflicting testimony regarding the circumstances under which the claimant obtained the gift card without relying on her arrest and arraignment.

On remand, the review examiner credited the claimant's explanation of how she came to possess the gift card because the claimant offered direct testimony that was subject to cross examination, whereas the employer only offered hearsay testimony and a written statement by the claimant's co-defendant, another former employee. The review examiner therefore found that the claimant had purchased the gift card from the co-defendant, and was unaware that the gift card was stolen. Finding of Fact # 15. 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). In this case, the review examiner's credibility assessment is reasonable in light of the employer's failure to provide additional indicia of reliability to substantiate the hearsay evidence it presented at the hearing. *See Covell v. Department of Social Services*, 439 Mass. 766, 786 (2003) ("Substantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability'"), *quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 530 (1988). While we may have reached a different conclusion on the issue of credibility, we have no basis under the relevant law cited above, to disturb the credibility assessment.

¹ 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).

² Board of Review Decision 0002 1676 38 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

Since the claimant did not know that the gift card was stolen, the employer has not shown that her possession and use of the gift card was deliberate misconduct in wilful disregard of the employer's expectation regarding employee theft.

Therefore, we conclude as a matter of law that the employer has failed to show that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest 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 of July 28, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 7, 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

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.

LW/rh