Claimant may not be denied benefits under G.L. c. 151A, § 25(f), during his indefinite disciplinary suspension. Because he was not aware of the employer's expectation that patron identification must be checked each time a patron enters the casino, regardless of prior entry into the casino, he did not have the necessary state of mind to engage in deliberate misconduct, when he helped two people enter without having their identification checked. After his discharge, he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0032 5195 03

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 suspended on October 10, 2019, and discharged from his position with the employer on November 8, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 12, 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 March 26, 2020. 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 obtain additional evidence pertaining to the employer's expectation and the claimant's state of mind. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant was not aware of the employer's expectation that patrons must have their identification checked each time they enter the employer's casino.

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 bell captain for the employer from May 13, 2019, until the employer discharged the claimant on November 8, 2019.

2. The claimant works the overnight shift for the employer.

3. On October 5, 2019, the claimant worked an overnight shift that began on or about 9:00 p.m. and ended on October 6, 2019.

4. The employer is a hotel of multiple floors. The hotel's registration area/check in area, restaurants and casino are located on the first floor of the hotel. There are restaurants that can only be accessed by patrons through inside the casino.

5. The employer only allows patrons who are at least 21 years old to enter inside the casino.

6. The entrances to the casino are guarded by security guards who verif[y] each patron's identification document prior to entry inside the casino.

7. On October 6, 2019, a patron and his female companion (patrons) were hotels [sic] guests and had been inside the casino prior to the time the claimant escorted them to the casino entrance.

8. From his personal observation, the claimant believed the female patron to be about 50 years old.

9. On October 6, 2019, the claimant was aware that the patrons were hotel guests and had been admitted inside the casino prior to the time the claimant escorted them to the casino entrance.

10. During the early hours of October 6, 2019, the patrons asked the claimant to accompany them to a restaurant that is located inside the casino.

11. The claimant accompanied the patrons to one of the entry doors of the casino. The claimant observed that the employer's security guard was a new employee. The security guard denied entry to the female patron because she did not provide her identification document.

12. The claimant asked to see the Security Manager because the security guard was newly employed and typically the claimant consults with the Security Manager about security issues. The security guard did not contact the Security Manager.

13. As the patrons were becoming irritated, the claimant accompanied the patron and his female companion to a second entry of the casino where there were two security guards in position.

14. At the second entry of the casino, the claimant informed the security guard, who was familiar with the claimant and the male patron, that the patrons were going to a restaurant located inside the casino. The security guard did not request identification from the patrons and allowed the patrons to enter the casino floor.

15. The security guard at the second entry w[as] not distracted by the claimant and the patrons.

16. The employer did not issue any discipline to the security guards at the second entry of the casino.

17. On October 10, 2019, the employer suspended the claimant without pay pending an investigation.

18. The suspension was for an indefinite period.

19. The employer maintains a personal conduct policy. The discipline for violating the policy is up to and including termination.

20. The employer expects that patrons have their identification checked each time they enter the casino, regardless of any prior entry into the casino and whether or not their identification was checked at some other location on the property.

21. The employer maintains this expectation for safety and to comply with State law.

22. The claimant was aware that individuals must be at least 21 years old to enter the casino floor.

23. The claimant was not aware of whether the identification must be checked each time a patron enters the casino, regardless of any prior entry into the casino.

24. The claimant was not aware of how to properly identify patrons.

25. Security guards are charged to check patrons' identification prior to entry to the casino floor. The employer provides scanners to the security guards to check whether identification documents are fraudulent.

26. The claimant assisted a patron to enter the casino floor without providing identification, because he believed their identification had already been checked since he previously observed them inside the casino floor on that same date.

27. The employer discharged the claimant for assisting a patron to reenter the casino floor without providing identification.

Credibility Assessment:

The employer's witness offered hearsay testimony that the security guard at the first entrance did call the Manager as requested by the claimant, and that the claimant was informed that the Manager was denying entry. He further offered hearsay testimony indicating that the claimant had the patrons enter the casino via the second entrance while the security guard at the entrance was distracted. The employer contends that the claimant was aware that identification must be checked for reentry to [the] casino floor.

The employer did not present any direct witness to the incident. The employer's witness did not personally interview any of the security guards in question.

The claimant offered direct testimony denying that the security guard called the Security Manager. The claimant also denies that the patrons entered the casino via the second entrance while the security guard at the entrance was distracted. The claimant offered that there were two security guards at the second entrance, and he only indicated that the patrons were going to a restaurant inside the restaurant. While the claimant admits that he was aware that casino patrons were required to be at least 21 years old, he denies being aware that identification must be checked prior to any reentry to the casino.

Given the totality of the evidence presented, including the claimant's position as a bell captain and his observation of the patrons inside the casino prior to escorting them to the second entry, it is concluded that the claimant reasonably believed that the identification of patrons was not required for reentry to the casino.

In addition, it is further concluded that the claimant's direct testimony is more credible than the employer's hearsay testimony.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We set aside Consolidated Finding # 8, which states that the claimant believed the female patron looked to be about 50 years old. The claimant did not comment on how old he believed the female patron to be. During the remand hearing, he testified that the male patron looked about 55 to 65 years old.[1] In adopting the remaining 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. However, as discussed more fully below, we reject the review examiner's original decision to disqualify the claimant from receiving benefits.

[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).

Because the claimant was suspended for approximately one month prior to his termination, we will initially address his eligibility for benefits while on suspension. A claimant's eligibility during a period of suspension is addressed in G.L. c. 151A, § 25(f), which provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter] . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation in 430 CMR 4.04(4), which provides, in pertinent part, as follows:

> A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension.

Since the claimant was indefinitely suspended without pay on October 10, 2019, and he did not have a right to return to work at the end of the suspension, as his return depended on the results of the employer's investigation, he is entitled to unemployment benefits during the period of his suspension.

With respect to the claimant's subsequent termination from employment on November 8, 2019, 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).

On the record before us, the employer has not met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. This is because the employer has not satisfactorily established the existence of a policy specifically addressing patron identification protocols or the uniform enforcement of any such policy. Thus, our inquiry will focus on whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of § 25(e)(2).

We remanded this case to the review examiner to obtain additional information pertaining to the employer's expectation about checking identification and the claimant's knowledge of that expectation. After remand, the review examiner found that the employer expects staff to check patrons' identification each time they enter the employer's casino, even if they had already been in the casino that day or had their identification checked elsewhere on the employer's property. The employer has this expectation because, per state law, only individuals who are at least 21 years old are allowed entry into casinos. The review examiner found that, while the claimant was aware of the age restricted entry into the casino, he was not aware of the employer's expectation that patrons have their identification checked every time they enter the casino.

The review examiner further found that, on October 6, 2019, the claimant escorted a male patron and his female companion to one of the casino entrances. When a security guard at that entrance refused entry to the female patron because she didn't have identification, the claimant escorted the patrons to a second entrance to the casino, where the security guard allowed the patrons to enter without checking their identification. The review examiner found that the claimant assisted the patrons in gaining entry to the casino without providing identification because he believed their identification had already been checked when they entered the casino at an earlier time that day.

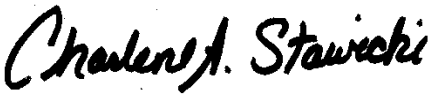
The review examiner arrived at these findings after determining that the claimant's testimony was more credible than the employer's testimony. Since such a credibility assessment is within the scope of the review examiner's role, and as we find that the assessment here is reasonable in relation to the evidence presented, we will not disturb it on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

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) (citation omitted). The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Id.

Because the claimant was not aware of the employer's expectation that staff check patrons' identification each time they enter the casino, where a patron has already visited the casino that day, the employer did not establish that the claimant knew he was doing anything wrong. He lacked the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest at the time he assisted the patrons.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, § 25(f), and 430 CMR 4.04(4), the claimant may not be disqualified during the period of his disciplinary suspension. We further conclude that, upon discharge, the claimant may not be disqualified, because he did not engage in 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 entitled to receive benefits for the week beginning October 6, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS Charlene A. Stawicki, Esq.
DATE OF DECISION - June 29, 2020 Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020[2]. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

SVL/rh

[2] *See* Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.