The review examiner reasonably rejected the claimant's testimony that he did not use the client's account to order pool stakes for his personal use. The client had no need for pool stakes, and the claimant's girlfriend had an in-ground pool. Where nothing in the record suggested that the client approved of the order, the record is sufficient to show he engaged in deliberate misconduct in wilful disregard of the employer's interest.

Board of Review
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Issue ID: 0032 7541 17

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 reverse.

The claimant was discharged from his position with the employer on November 19, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 19, 2019. The claimant 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 awarded benefits in a decision rendered on May 5, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 did not commit deliberate misconduct in wilful disregard of the employer's interest because the employer's client either implicitly or expressly consented to the claimant's alleged misconduct, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a third-party facilities management company, from July 23, 2015, to November 19, 2019, as a Facilities Supervisor.

2. The claimant had a history with the employer [sic] client spanning fifteen years.

3. The employer had a policy, which prohibited "theft, will [sic] damage or unauthorized removal, possession, or use of Company, employee, visitor, supplier, or customer property, equipment, records or information."

4. The purpose of the policy was to ensure accountability and mitigate loss.

5. The claimant received the employer's policy on July 23, 2015.

6. Supplies and/or equipment in the claimant's workplace oftentimes ended up missing.

7. A regular inventory of supplies and equipment was not maintained.

8. All employees had access to the storage room.

9. No one reported having seen the claimant remove items from the workplace.

10. The claimant allowed employees to borrow items with his permission.

11. The claimant was the only individual with the employer authorized to place orders with the client's vendor.

12. Invoices were sent to and paid for by the client.

13. The client never questioned the claimant's orders.

14. The client had surveillance cameras in the facility.

15. In September of 2019, the claimant pulled his vehicle into the client's bay, which triggered the motion-sensor surveillance camera, and parked it out of view.

16. The bay contained supplies.

17. After an unspecified amount of time, the claimant backed the vehicle out of the client's bay.

18. No supplies from the bay were reported as missing.

19. In the past, the bay was used by several individuals for personal reasons.

20. The claimant owned property with an above-ground pool, but he resided in an apartment.

21. On an unknown date in September of 2019, an order was placed with an associated invoice # 9291879014 dated September 13, 2019, listing four items numbered 162P60, described as a cordless impact wrench kit with two manufacturer numbers 2767-22 and 48-11-1850, 35GJ99, described as a battery with a manufacturer number 48-11-1850, 408L70, described as a cordless impact wrench kit with one manufacturer number 2767-22, and a second battery item number 35GJ99 with manufacturer number 48-11-1850. Item numbers 162P60, 35GJ99 and 408L70 are grouped together with a unit price of $588.00. The second battery was priced separately at $132.38.

22. On September 12, 2019, at 9:12 p.m., an email from the claimant's email account to the vendor's Sales Representative stated, "Would this be something that you can locate/source and price for me? Looking for thirty. Please call me if needed. Thanks." An image of the item sought was attached to the email.

23. On September 13, 2019, at 9:50 a.m., an email from the Sale Representative stated, "Yes, I should be able to source the item. I will request a quote."

24. On September 14, 2019, at 9:09 a.m., an email from the claimant's account responded, "Please let me know as soon as possible. Thanks."

25. On September 16, 2019, at 3:16 p.m., an email from the Sales Representative stated, "Here is the quote for the pool anchors." Attached were picture images [sic] of the quote. At 3:23 p.m., an email from the claimant's account stated, "Yes please order. Thank you. How quickly can these ship?" At 3:53 p.m., an email from the Sale Representative stated, "It is about a 2 week lead time but we can ask for expedited delivery if you like.["]

26. On September 20, 2019, the claimant left for Italy on vacation with his girlfriend.

27. On September 26, 2019, the pool stake anchors were delivered to the claimant's workplace.

28. On or around September 26, 2019, the claimant called the Maintenance Lead Technician and asked him to retrieve the pool stakes and place them under his desk. The Maintenance Lead Technician complied.

29. On October 6, 2019, the claimant returned from Italy.

30. On the day that the claimant returned to work, the claimant retrieved the pool stake anchors from under his desk and left the office area.

31. On October 18, 2019, the employer determined that investigation was warranted after receiving an [sic] tip on its human resources hotline alleging that the claimant was stealing.

32. On October 22, 2019, after interviewing the claimant, the employer suspended the claimant with pay.

33. On October 23, 2019, the claimant's girlfriend closed her inground pool for the winter which was conducted by a pool company. The anchors embedded in the paving stones are corroded. The paving stones were in place since at least the spring of 2019.

34. During its investigation, the vendor informed the employer that the pool stake anchors were for an in-ground pool.

35. The employer took statements from employees.

36. The claimant denied wrongdoing. The claimant explained the purported duplicate order of a cordless impact wrench, that he rinsed the undercarriage of his vehicle because of a burned rubber smell that began on his way to work that morning, and he denied ordering the stake anchors.

37. On November 19, 2019, the employer discharged the claimant from employment on for [sic] theft.

[Credibility assessment:][1]

[T]he employer's secondary witness often gave conflicting or inconsistent testimony and for all intents and purposes, was successfully impeached by the claimant's attorney, but not in regard to every bit of his testimony. The witness testified that he was fearful of the claimant, yet despite that purported fear of the claimant, the witness visited the claimant at his girlfriend's residence in the spring of 2019, which was not work-related and is not indicative of fearing someone. The witness also testified that he had nothing to do with orders from the vendor, but later it was shown that he could and did access and view items from the vendor and make inquiries for an order. But what was found credible was that the witness received a call from the claimant upon delivery of the pool stake anchors.

On the other side of the coin, the claimant testified that he did not order the pool stake anchors. However, the evidence shows that on September 12, 2019, at 9:12 p.m., an inquiry into pool stake anchors was made to a vendor from the claimant's email and, thereafter, responses to the vendor were regular and timely from the claimant's email, which took place also during the workday [sic]. In an effort to bolster his denial of ordering the stakes, the claimant testified that he did not take his workplace laptop from the workplace and thus, he could not have emailed after 9:00 p.m. However, it is noted that emails are accessible from a variety of devices, not just the workplace laptop (or even an iPhone). The claimant suggested that someone else made the inquiry and started the order. It must be pointed out that the

[1] We have included here the review examiner's credibility assessment which appears in the Conclusions and Reasoning section of the May 5, 2020 hearing decision.

> level of evidence in administrative hearings is not even on par with the preponderance of evidence standard, but instead substantial evidence, or, what a reasonable mind might accept. Therefore, all that is "possible" is not being considered to establish an alternate set of facts. That being said, it would not seem likely that the claimant was oblivious to emails coming to and from a vendor from September 12, 2019 to September 16, 2019 regarding an order for thirty pool stake anchors if he in fact did not place that order. Because he likely knew of the emails, he likely knew of the order, and yet he did not raise any question about the order he purportedly did not place. The claimant's suggestion is unreasonable, and it is concluded that the claimant ordered the pool stake anchors.
>
> That being said, it is equally strange that the client, who was the purported victim of theft in this case, was not particularly helpful in producing evidence for the employer or even producing a statement that they felt wronged by the claimant even though such evidence was requested. This speaks volumes. The claimant and the client had a relationship that is older than the relationship between the employer and the client. One can conclude that the claimant placed the order with at least implied consent, if not expressed consent, of the client's purchase authorizer, as dubious as it might have been and as improper it may have been for that authorizer to do.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's 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, with the exception of the inference drawn about consent, as discussed below. However, we reject the review examiner's legal conclusion that the claimant did not commit deliberate misconduct.

Because the claimant was terminated from his employment, 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).

The review examiner found that the employer has a policy that prohibits theft, damage, or unauthorized removal of a customer's property, equipment, records, or information. Finding of Fact # 3. However, we do not have sufficient evidence to determine whether this policy is uniformly enforced. As such, we cannot conclude that the claimant was discharged for a knowing violation of a *uniformly* enforced policy.

Our inquiry will, therefore, focus on whether the claimant's actions constituted deliberate misconduct in wilful disregard of the employing unit's interest. The claimant, who worked as a facilities supervisor at a customer's (client) facility, received and reviewed the employer's policy on July 23, 2015.[2] Findings of Fact ## 1, 2 and 5. As such, he was aware that the employer expected him not to engage in theft or the unlawful removal of customer property.

The employer alleged two incidents of theft. The first involved the claimant's purchase of two identical impact wrench kits in September 2019. *See* Finding of Fact # 21. We agree with the review examiner's conclusion that there was insufficient evidence to show the claimant ordered the second impact wrench kit for his own personal use. *See* Findings of Fact ## 7 - 10, and 21.

The employer also alleged that the claimant engaged in theft when he used the client's account to order pool stakes for his personal use. *See* Findings of Fact ## 22–25, and 33. At the hearing, the claimant denied purchasing the pool stakes. The review examiner rejected this testimony on the grounds that the claimant was the only employee authorized to place orders with the vendor, emails discussing the order came from the claimant's email address during the workday, and the claimant did not raise any questions about the order. *See* Findings of Fact ## 11, and 22–29. 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 see no reason to disturb this credibility assessment.

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). There is no question that the claimant ordered the pool stakes deliberately. He had extensive email communication with the vendor's Sales Representative for the purpose of placing and expediting the order. *See* Findings of Fact ## 22–25. However, "[d]eliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests 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).

[2] In the findings of fact, the hearing officer refers to the customer in question as the "client." For clarity, we will use the same terminology in referring to the customer in question.

Here, the findings show that the pool stakes the claimant ordered were for an inground pool. Finding of Fact # 33. The client, a laboratory facility, had no apparent use for pool stakes.[3] However, the claimant's girlfriend had an inground pool which she closed for the season approximately two weeks after the claimant received the pool stakes. Findings of Fact # 34. It is reasonable to infer from these facts that the claimant used the client's resources to purchase pool anchors for his girlfriend's inground pool, not for any purpose that would benefit the employer or the client. For these reasons, we conclude the employer has established that the claimant acted in wilful disregard of the employer's interest when he used the client's account to purchase pool stakes for personal use.

In so holding, we reject the review examiner's conclusion that the claimant somehow had the client's express or implied consent to make the purchase. There is nothing in either the findings or the record to suggest that the employer or the client authorized buying these pool stakes. *See* Shriver Nursing Services, Inc. v. Comm'r of Div. of Unemployment Assistance, 82 Mass. App. Ct. 367, 371 (2012) (without the employer's consent, its client or customer has no authority to define or waive the standards of performance of the employment relationship). Thus, the review examiner's conclusion in this regard is unsupported.

We, therefore, conclude as a matter of law that the employer has met its burden 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 denied benefits for the week ending November 19, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS

DATE OF DECISION - July 30, 2020

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
(See Section 42, Chapter 151A, General Laws Enclosed)

[3] 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).

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.

LSW/rh