

Claimant, fired for using the employer's debit card to pump gas into a friend's vehicle, was disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0032 9029 32

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 the claimant benefits following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On December 18, 2019, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on February 19, 2020, the review examiner affirmed the agency determination, concluding that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). The claimant then appealed to the Board, and we accept the claimant's application for review.

The issue before the Board is whether the review examiner's decision to deny benefits, 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 claimant was discharged for using the employer's credit card to pay for gas for a friend.

Findings of Fact

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

1. The claimant worked full time as a direct care professional for the employer, a human services agency, from April 17, 2018 until November 26, 2019.
2. The claimant's immediate supervisor was the program operations manager (the POM).
3. The employer maintains a policy that prohibits, "Theft, embezzlement, fraud, misappropriation, of property or funds, or any other act of dishonesty." The policy also states that the conduct will result in immediate termination for

misconduct. The employer maintains the policy to ensure safeguarding of interests [sic] the individuals it serves.

4. All employees who violated the policy in the past were terminated.
5. On April 27, 2018, the claimant singed [sic] and provided the employer with an acknowledgement of receipt and review of the employment manual.
6. The employer maintained credit cards at each of its residences to pay for supplies and to pay for gas in its vehicles used to run errands for the residences and to transport residents.
7. The credit cards required the use of a Personal Identification Number (PIN) to make a purchase.
8. During the claimant's shift on November 14, 2019, her friend (the Friend), who was also an employee, called the claimant and asked her to borrow money.
9. The claimant and the Friend did not discuss the amount of money the Friend wanted to borrow.
10. The claimant told the Friend she would meet her at an atm near the residence where the claimant was working.
11. The claimant left the residence with an employer issued credit card to put gas in the residence's van and her own debit card.
12. The claimant drove the residence's van to meet the Friend.
13. The claimant called the Friend on the way to meet her and told her to meet her at a gas station.
14. When the claimant arrived at the gas station, she parked at a gas pump, exited the van, went the gas pump where the Friend was parked, pumped \$15.00 of gas into the Friend's vehicle, re-entered the employer's van, and left the gas station.
15. The claimant used the employer's credit card to pump the Friend's gas.
16. The claimant entered the employer's PIN into the gas pump to pump the Friend's gas.
17. The claimant left the receipt for the Friend's gas in the residence's van.

18. On or about November 15, 2019, the assistant program manager (the APOM) found the gas receipt in the residence's van and saw there was around a quarter of a tank of gas in the van.
19. The APOM notified the POM she found a gas receipt in the van, and there was a quarter of a tank of gas. The POM notified the employer's employee relations manager (the ERM).
20. The ERM reviewed the employer's records and discovered the claimant had used the employer's debit card to pump gas into the Friend's vehicle.
21. On November 18, 2019, the claimant met with the ERM. During the meeting, she stated she used the employer's debit to pump gas into the employer's van and denied using the employer's debit card to pay for gas for the Friend's vehicle.
22. On November 18, 2019, the ERM placed the claimant on administration leave pending an investigation.
23. On November 18, 2019, the ERM obtained video surveillance footage from the gas station and watched the footage with the director of human resources (the Director of HR). They saw the claimant and the Friend parked at gas pumps parallel to each; saw the claimant exit her vehicle, go to the Friend's gas pump, pump gas into the Friend's vehicle, leave the Friend's gas pump, enter the employer's van and leave the gas station without pumping gas into the employer's van.
24. On November 19, 2019, the claimant met with the ERM and watched the video. After watching the video, the claimant told the ERM she had "absentmindedly" pumped gas into the Friend's vehicle using the employer's debit card.
25. On February 4, 2019, the employer discharged the claimant for misuse of the company's gas card when she pumped \$15.00 of gas into the Friend's vehicle on November 14, 2019 using the company's credit card.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record, except for the date noted in Finding of Fact # 25. The evidence in the record is that the claimant was discharged on November 26, 2019. *See Exhibit 7.*

As to the review examiner's conclusion that the claimant is not eligible to receive benefits, we conclude that the decision is based on substantial evidence and is free from any error of law

affecting substantive rights. The review examiner's findings of fact, which we have adopted, support a conclusion that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy of the employer.¹ Although the claimant argues in her appeal that she offered credible testimony regarding the enforcement of the employer policy and her state of mind, the review examiner was well within her role as a fact-finder to render the findings she did.² See Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980) (review examiner has responsibility for determining the credibility and weight of testimony).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning November 26, 2019, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 6, 2020

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 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

¹ We note that the review examiner's findings of fact also support a conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, which is another basis for disqualification under G.L. c. 151A, § 25(e)(2). The findings of fact are sufficient to show that the claimant violated the employer's expectation that she not engage in theft or misappropriate the employer's funds, that she knew of such expectation, that the expectation was reasonable, and that no mitigation exists to excuse her conduct. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

² The claimant offered that a co-worker, [A], was not fired for falsifying timesheet records. The employer's witness suggested that such falsification would be covered by a different employer policy, not the policy cited by the review examiner in Finding of Fact # 3. The claimant also testified that she did not realize what she had done (paid for gas for her friend using the employer's card) until November 18, 2019. Given the events of November 14, 2019, as stated in Findings of Fact ## 14–16 and ## 21–24, it was not unreasonable for the review examiner to conclude that the claimant knew what she was doing when she used the employer's card to pay for gas for her friend.

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.

SF/rh