

Claimant who helped two clients obtain new beds by using her credit card to rent a van was entitled to benefits even though such conduct was prohibited by the employer's policy. Where the claimant believed the clients had saved enough money to pay cash for the rental, and she only learned that one client had previously spent it at the time she returned the van, there were mitigating circumstances for disregarding the policy.

**Board of Review
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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. Benefits were denied on the ground that the claimant was discharged for loaning money to one of the employer's clients, which constituted deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on March 13, 2020. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on July 3, 2020. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On January 15, 2021, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to allow the claimant to present testimony and evidence. Both parties participated in remand hearing, which were conducted on March 4 and 30, 2021. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's discharge for loaning money to one of the employer's clients constituted deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The employer is a human services provider. The claimant worked as a full-time outreach worker for the employer. The claimant worked for the employer from 1/02/19 to 12/17/19.
2. The employer's team leader (Team Leader 1) supervised the claimant.
3. The employer created a manual titled "Human Resource Policies and Procedures Manual." This manual featured a policy titled "Code of Professional Conduct, Conflict of Interest, Compliance and Communications." The policy reads, in part, "Any employee who violates this Code may be subject to immediate termination or any form of corrective action deemed necessary and appropriate by the members of management." The policy reads, in part, "Employees are prohibited from taking, lending or borrowing money, possessions or gifts from the people we serve."
4. The claimant signed an acknowledgement on 1/02/19. The document reads, in part, "I have received a copy of [the employer's] Human Resource Policies and Procedures Manual and agree to read and abide by [the employer's] policies and procedures."
5. The employer determined that two of its clients needed beds. These two clients ("Client 1" and "Client 2") lived in the same home ("Home X"). The employer tasked the claimant to help the two clients procure the beds.
6. The claimant found beds for Client 1 and Client 2. A certain organization agreed to provide the beds. The employer wanted Client 1 and Client 2 to use their own money to pay for the transportation for their beds.
7. The claimant needed to secure a vehicle to transport the beds to Home X. The claimant determined that Client 1 and Client 2 could rent a truck from a truck rental service ("Rental Service 1").
8. Rental Service 1 required a credit card number to reserve a truck. The claimant gave her credit card number to Rental Service 1 to reserve a truck for Client 1 and Client 2. The claimant did this via telephone with Client 1 and Client 2 present. The claimant reserved the truck for 10/08/2019. Rental Service 1 did not charge the claimant's credit card for the reservation. In the months prior to this reservation, the claimant had asked the employer how she should reserve trucks to transport items for clients. The claimant asked this question in staff meetings. The employer never told the claimant that it had a credit card or that she could use it to reserve trucks. The employer never told the claimant how she should reserve rental trucks for client needs.

9. Rental Service 1 allowed customers to pay for rentals with cash. The claimant planned to have Client 1 and Client 2 pay for the rental with their money. The claimant asked Client 1 and Client 2 to save their money for the truck rental. The claimant told them how much she thought the rental would cost.
10. Client 2 gave money to Client 1 for his share of the truck rental cost. Client 1 spent all of his own money. Client 1 also spent the money that Client 2 had given to him.
11. The claimant worked with the employer's peer specialist on 10/08/2019. The peer specialist drove Client 1 and Client 2 to Rental Service 1 and the claimant followed in her vehicle. The claimant picked up the truck from Rental Service 1. The claimant used the truck to pick up the beds for Client 1 and Client 2. The claimant then used the truck to transport the beds to Home X. The claimant then brought the truck back to Rental Service 1. The peer specialist drove Client 1 and Client 2 back to Rental Service 1. Client 1 informed the peer specialist that he had spent his money; he had spent Client 2's money; and that he did not have any money to pay for the truck rental. The peer specialist relayed this information to the claimant. Prior to this, the claimant did not know that Client 1 and Client 2 did not have the money to pay for the rental. The claimant and Client 1 went into Rental Service 1's store. The claimant then authorized Rental Service 1 to charge her credit card for the rental because Client 1 and Client 2 did not have money to pay for the rental. Rental Service 1 then charged the claimant's credit card for the rental cost. The rental cost was \$86.98 and the gas for the endeavor cost \$15.11. The claimant did not give any money directly to Client 1 or Client 2.
12. The claimant did not ask Client 1 to pay her back for the truck rental charge or gas. Client 1 told the claimant that he wanted to pay her back. The claimant told Client 1 to let it go. Client 1 then contacted the employer and requested that the claimant receive a reimbursement. The claimant did not initiate any request for reimbursement with the employer.
13. The employer's payee handled reimbursements. The payee directed the claimant to ask Supervisor 1 to approve a reimbursement for the payment made to Rental Service 1. The claimant then told Supervisor 1 that she had to use her own credit card to pay for the truck to transport the beds for Client 1 and Client 2. The claimant told Supervisor 1 that the payee determined that she should ask Supervisor 1 to sign off on the reimbursement. Supervisor 1 told the claimant that she would get back to her about the situation.
14. The employer discharged the claimant because it determined that the claimant entered into a financial agreement with Client 1 related to the rental truck endeavor that happened on 10/08/2019.

Credibility Assessment:

In the hearing, the claimant testified about her interactions with Supervisor 1. In the hearing, the claimant testified that she had interactions with the payee and other workers that are not part of the e-mail exchanges in the record. Given the totality of the testimony and evidence presented, the claimant's testimony under oath about these interactions is accepted as more credible than the employer's representations of these interactions because Supervisor 1 and the other workers did not testify in the hearing.

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. As part of her appeal to the Board, the claimant included a copy of the receipts from the day she rented the van for her clients. *See* Remand Exhibit # 3. The date on the receipts was clearly November 8, 2019, rather than October 8, 2019.¹ Consequently, the dates cited in Consolidated Findings ## 8, 11, and 14 should be November 8, 2019. 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. In light of the new findings after remand, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

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's “Code of Professional Conduct” states, “Employees are prohibited from taking, lending or borrowing money, possessions or gifts from the people we serve.” *See* Consolidated Finding # 3; Hearings Exhibit # 3. The claimant was aware of the policy, having signed an

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).

acknowledgement of receipt on January 2, 2019. *See* Consolidated Finding # 4; Hearings Exhibit # 1. The claimant did not dispute that the policy is reasonable.

Consolidated Finding # 14 states that the employer discharged the claimant for entering into a financial agreement with a client by renting a truck, but Consolidated Finding # 3 and the review examiner's original decision note that the employer's policies allow for a range of discipline for violations. Since there is no evidence to show that the employer uniformly disciplined employees for similar infractions, we agree that it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

Alternatively, we consider whether the employer has met its burden to show deliberate misconduct in wilful disregard of the employer's interest. As a threshold matter, the employer must prove that the claimant engaged in misconduct.

The claimant conceded that she used her personal credit card to pay for a van from a truck rental service, paying \$86.98 for the van and \$15.11 for gasoline. *See* Consolidated Finding # 11. The question is whether she acted deliberately and in wilful disregard of the employer's interest. 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).

The review examiner's consolidated findings indicated that the claimant was assigned to procure new beds for two clients, that she found another organization that would provide the needed beds, and that the employer expected the two clients to use their own money to pay to transport the beds to their home. *See* Consolidated Findings ## 5-6.

The claimant arranged to secure a van from a truck rental service. Her efforts to obtain clarification from her supervisor as to how to reserve the truck were unsuccessful, as the supervisor never told the claimant that the employer had a credit card for such purposes. Consequently, the claimant asked the two clients to save a certain amount of money for the truck rental fee. Initially, the claimant used her personal credit card to only reserve a van. The claimant intended to have the two clients pay for the rental with their own money. *See* Consolidated Finding ## 7-9.

The review examiner found that, on November 8, 2019, the claimant obtained the van, used it to pick up the two beds and deliver them to the clients' home, and returned to the truck rental service. En route to returning the van, one of the clients disclosed that he had spent the money both clients had saved prior to moving day, so they had no money to pay for the van rental. Thus, the claimant, with no prior knowledge that the client had spent their money, had to use her own credit card to pay for the van and gasoline. *See* Consolidated Finding # 11. The claimant's use of her personal credit card was deliberate in the sense that it was not an oversight. However, we believe it was due to mitigating circumstances.

Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). The claimant did not know that the client had spent their money for the van until she had already used the van and transported the beds. As she headed back to the truck rental service, she reasonably concluded that she had no choice but to use her own credit card to pay for the transaction. We note that the review examiner also explicitly found that the claimant did not ask the clients to pay her back for the van charges, nor did she initiate a request for reimbursement with the employer. *See Consolidated Findings # 12*. We believe that these circumstances demonstrate that the claimant was not acting in wilful disregard of the employer's interest. The clients spent their money and left the claimant no apparent other way to complete the rental, so she had to use her own credit card.

We, therefore, conclude as a matter of law that the employer has failed to meet its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or engaged 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 ending December 21, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 2021



Charlene A. Stawicki, Esq.
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 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.

JPCA/rh