

A claimant is eligible to receive benefits pursuant to G.L. c. 151A, § 25(e)(2), where the employer failed to show that he engaged in the alleged theft. Because the employer could not show that the claimant engaged in misconduct, the employer could not carry its burden to show that the claimant should be disqualified from receiving unemployment benefits following his discharge from employment.

**Board of Review
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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 affirm.

The claimant was discharged from his position with the employer on October 23, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 6, 2020.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 29, 2020.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to offer evidence regarding the claimant's separation from employment. Both parties attended the remand hearing, which was conducted over the course of two sessions. Thereafter, the review examiner issued his 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 to award unemployment 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 review examiner has found that the claimant did not steal or take without authorization MBTA transportation passes belonging to the employer's client.

Findings of Fact

¹ In its determination, the DUA denied benefits pursuant to G.L. c. 151A, § 25(e)(1).

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

1. From October, 2013, until October 19, 2019, the claimant worked for the employer, a security services company, as a full-time (40 hours weekly) security officer.
2. The claimant was assigned to the employer's client (client) at the client's offices (offices).
3. The claimant's direct supervisor was the client's morning supervisor (supervisor).
4. The employer provided security to the offices 24-hours a day, 7-days a week.
5. The employer had approximately 20-25 security officers assigned to provide security services to the offices.
6. The claimant worked the second shift, which was from 2:00 p.m. to 10:00 p.m.
7. The offices are in [City A], Massachusetts.
8. The offices had six buildings that were closely located [sic]. One of the six buildings was the client's main building (main building).
9. At the main building, the employer maintained a security desk (desk) at the entrance. The desk would always have at least one of the employer's security officers manning the desk.
10. The desk contained monthly MBTA transportation passes (T-passes) to be given to employees (of the client and the employer) as a benefit. These T-passes were provided by the client.
11. The desk contains a list of the employees authorized to receive a T-pass.
12. All the employer's security officers assigned to the offices, along with a manager employed by the client, had access to the drawer and the T-passes.
13. The T-passes were often in one stack but were varied based on the travel zones the T-pass would cover.
14. During business hours (from 6:00 a.m. to 8:00 p.m.), the T-passes were on top of the desk, usually located in a cardboard box. Sometimes, however, the T-passes were left in the open on the desk.

15. During times other than business hours, the T-passes were typically kept in a locked drawer at the desk.
16. One of the duties of a security officer assigned to the desk is to properly distribute the T-passes to employees entitled to the benefit.
17. When an employee comes to the desk to request a T-pass, the security officer would ask for the employee's identification, check the identification with the list, put a check mark on the individual on the list receiving the T-pass, and find the appropriate T-pass (the employee was to receive) based on the zone. The security officer would then give the T-pass to the employee and count the same zoned T-passes remaining that the security officer took from.
18. The claimant's primary duty was to walk through and patrol the six buildings. The claimant was generally not assigned to the desk.
19. On occasion, the claimant would briefly relieve a security officer assigned to the desk.
20. Of the 40 hours the claimant worked for the employer each week, the claimant would spend no more than 3 hours at the desk.
21. On occasion, the claimant, while at the desk, would receive a request by an employee to give them a T-pass.
22. In addition to following the regular protocol of distributing a T-pass, the claimant would inform the security officer he relieved of how many T-passes the claimant distributed while the security officer was away.
23. On October 23, 2019, the employer's account manager (account manager) called the claimant at the offices that morning and accused the claimant of stealing T-passes. The claimant denied the allegation.
24. After the claimant denied the allegation, the account manager responded, "The client does not want you there anymore and you're taken off the assignment."
25. The claimant never took any T-passes from the client or the employer without authorization. The claimant never stole any T-passes from the client or the employer.
26. The claimant immediately left the offices after being told that the client did not want him at there any longer.
27. Later in the day on October 23, 2019, a representative of the employer called the claimant to inquire about the situation of the claimant leaving the offices. The claimant explained what had happened earlier in the day regarding the

account manager and reiterated his denial of the account manager's allegation. The representative said, "We'll take a look at this and get back to you."

28. The employer never contacted the claimant again after October 23, 2019.
29. On October 23, 2019, the employer discharged the claimant, as the employer had no intention of providing the claimant another assignment, because it believed the claimant stole T-passes from the client.
30. The claimant never had an interest in quitting his employment.
31. The claimant had no issues with the supervisor.
32. Sometime in October, 2019, the client contacted the [City A] police department to investigate the alleged theft of T-passes and to possibly file charges against the claimant.
33. Sometime after October 23, 2019, an unknown individual representing the [City A] police department called the claimant, but the claimant immediately referred the individual to the claimant's attorney.
34. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance on January 13, 2020, with an effective date of January 12, 2020.
35. As of the hearing date, the claimant has never been arrested by the [City A] police department for theft.

Credibility Assessment:

The HR manager testified at the first remand hearing that the claimant was discharged because the employer believed the claimant stole T-passes (valued at approximately \$12,471.00) from the client during the month of October, 2019. The HR manager testified that, while she had no first-hand knowledge of the alleged theft by the claimant, she interviewed the employer's district manager (district manager). The HR manager stated that the district manager told her that he viewed video footage from the client of the claimant taking T-passes from the desk and putting them in his pocket. However, the district manager was not present to testify at any of the hearings. The HR manager stated at the first remand hearing that the employer would submit a [City A] Police report regarding the alleged theft. The HR manager also stated at the first remand hearing that the employer would produce video footage from the client of the claimant committing the alleged theft. Upon the HR manager requesting two weeks from the first remand hearing to submit evidence, this Review Examiner provided the employer one month to do so prior to a second remand hearing. At the initial hearing and at the first remand hearing, the claimant had consistently denied stealing any T-passes from the client.

By the second remand hearing, the employer had not submitted any evidence it stated it would to provide to this Review Examiner nor any other evidence substantiating its assertions that the claimant stole T-passes. The claimant testified as to how T-passes were distributed at the desk. While the HR manager did not testify in the same level of detail as the claimant, her testimony about the T-passes had main similarities with the claimant. The claimant stated at the second remand hearing that an unknown individual purportedly working for the [City A] police department called him once at an unknown time, but he told the individual to contact the claimant's lawyer for any issues. At the first and second remand hearings, the HR manager could not provide any times or dates of when the claimant allegedly stole T-passes and did not provide any further details regarding the alleged theft.

In light of the above, where the employer did not submit any police report, video footage, first-hand witnesses to testify, statements from witnesses, or any other evidence to support its assertions; where the employer's only witness to the hearing, the HR manager, had no first-hand knowledge of the alleged theft (or even knowledge of the dates and times the alleged theft occurred); where the employer provided vague and unsubstantiated testimony regarding the alleged theft, where several individuals had access to the T-passes; where the claimant was never arrested by the police for theft; and where the claimant consistently denied stealing any T-passes at the initial hearing and at the remand hearing, it is concluded that the claimant did not steal any T-passes from the client or from the employer during his employment with the employer.

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. 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. As discussed more fully below, we conclude that the claimant is eligible to receive unemployment benefits.

Although the DUA initially resolved this matter under G.L. c. 151A, § 25(e)(1), both the claimant and the employer's human resources manager testified that the claimant was discharged from his position. 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

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996).

For the employer to carry its burden, it must first show that the claimant engaged in the misconduct or policy violation which formed the basis for his discharge. In this case, the employer alleged that the claimant stole MBTA transportation passes (T-passes) from the client company, where he was assigned as a security officer. During both the original and the remand hearings, the claimant denied that he stole T-passes. The employer's human resources manager attended the remand hearing. She testified that the employer's district manager had viewed video surveillance of the claimant taking T-passes from a desk at the client's office building. He then reported what he saw to the human resources manager. The human resources manager did not testify that she viewed the video. No video evidence was presented during the hearings. No eyewitness to the alleged theft offered testimony during the hearings. No written description of the video evidence, prepared by someone who viewed it, was entered into evidence.

Based on the evidence presented, the review examiner concluded in his credibility assessment that there was insufficient evidence to show that the claimant engaged in theft. The credibility assessment is reasonable and specific. We see no reason to disturb it. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Given his view of the evidence, the review examiner specifically found that the claimant "never took any T-passes from the client or the employer without authorization. The claimant never stole any T-passes from the client or the employer." Consolidated Finding of Fact # 25. As indicated above, this finding is reasonable in relation to the evidence. Because the employer has not presented sufficient, credible evidence to show that the claimant engaged in the conduct which led to his separation, the claimant cannot be denied benefits under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and free from error of law, because the review examiner's consolidated findings of fact indicate that the claimant did not steal T-passes.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning October 20, 2019, and for subsequent weeks if otherwise eligible.



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Fitzgerald, Esq.

DATE OF DECISION - May 28, 2020

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
(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 June 1, 2020². 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.

SF/rh

² See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.