

The claimant misappropriated employer funds to pay his automobile loan and insurance. Since the claimant denied engaging in this conduct, the defense of mitigation cannot be considered, and it is concluded that he engaged in deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
19 Staniford St.
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0033 4616 31

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 December 31, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 10, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on April 28, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor 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 remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's personal accounts paid with the employer's funds. Only the employer participated in 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 neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings show that the claimant misappropriated employer funds to pay his personal auto loan and insurance.

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 Unit Coordinator for the employer, a Hospital, from September 19, 2016, until December 31, 2019, when he was separated from his employment.
2. The claimant worked a full-time schedule of hours for the employer.
3. During the claimant's tenure, he always tried to perform the job to the best of his ability.
4. The employer has a policy that prohibits employees from engaging in any type of misappropriation of employer funds or theft in order to protect the employer's assets. Violations of the policy are dealt with on a case-by-case basis depending on the severity.
5. The claimant received a copy of the policy after hire.
6. In November 2019, the employer's finance department did an audit and found numerous discrepancies in their payroll account. The finance department determined that there were transactions made between August 2019 and November 2019 that were made in the claimant's name. The transactions totaled \$21,293.87. These transactions included transactions involving [Bank A] and [Company A] Insurance.
7. The employer contacted [Bank A] about the account associated with the claimant. Aside from the claimant's name being attached to the accounts, [Bank A] did not provide any additional information to the employer because there was no signed release of information from the claimant.
8. The employer witnesses have no knowledge of any account linking the claimant and Comcast. Whether the claimant currently has a Comcast account or not is unknown.
9. The finance department alerted their public safety department (the hospital's own police department), as well as the manager of labor relations.
10. The claimant was interviewed by a detective from the public safety department on November 26, 2019.
 - a. When the detective interviewed the claimant, he initially denied having a [Bank A] account.
 - b. The detective did a check with the [Registry] of Motor Vehicles ([RMV]) to try to get more information about the claimant.

- c. According to DMV records, the claimant currently owns a 2012 [Infiniti], which is registered in Massachusetts. The registration on this vehicle became active on January 3, 2019 and is valid until September 30, 2020.
 - d. From looking at [RMV] records, the detective found out that [Bank A] was the holder of the [lien] on the 2012 [Infiniti].
 - e. From looking at [RMV] records, the detective found out that [Company A] is the current insurer of the claimant's 2012 [Infiniti].
 - f. The detective informed the claimant that it obtained information indicating that the [Bank A] account was for an automobile loan and that the automobile was insurance [sic] through [Company A] under the claimant's name.
 - i. The claimant denied currently driving and owning a 2012 [Infiniti].
 - ii. The claimant told the detective that he had a 2012 [Infiniti] for a while, but not anymore.
 - iii. The claimant stated that he currently drives a Buick.
 - 1. The claimant was unable to substantiate the statement that he was currently driving and insuring a Buick.
 - 2. The detective was unable to find any information from DMV records linking the claimant to a Buick.
11. During the interview with the Detective, the claimant said he had an issue with a [Bank B] account. The claimant also stated that he had been notified by various institutions of accounts with his name on them that he never opened himself. The claimant stated he was a victim of identity theft.
12. The Detective asked the claimant to provide documentation corroborating the claimant's statements pertaining to identify theft.
13. The claimant agreed to provide the Detective with [Bank B] related paperwork the next day.
14. The claimant never provided the Detective with the requested documentation.
15. The third page ("Charges for [Name A]") of the documents uploaded by the employer's agent to the UI Online system on April 17, 2020, was prepared by the employer's Cash Service Manager, and it lists dates of various transactions from the employer's account to an account under the claimant's name. The company names are listed with the amounts deposited.

16. The claimant was allowed to continue to work for the employer during the investigation.
17. The claimant was asked to meet with the manager of labor relations on December 12, 2019.
18. During the meeting, the manager of labor relations again went over the allegations against the claimant. The claimant again explained that he had not engaged in any type of misappropriation of employer funds and/or theft from the employer. The claimant also informed the manager of labor relations that he was [the] victim of identity fraud and was working on figuring out the entire situation. The manager of labor relations told the claimant that he had until December 18, 2019, to provide him with adequate paperwork to show that he had been the victim of identity fraud.
19. On December 18, 2019, the claimant provided the employer with a section of his credit report and a letter from [Bank B]. The employer concluded that neither document amounted to proof that the claimant was the victim of identity theft. The claimant explained that he was still working on the entire situation and did not have anything else at the time.
20. On December 31, 2019, the employer sent the claimant a letter informing him that he was being terminated for stealing money from the employer.
21. The employer's public safety department charged the claimant with larceny.
22. As of the date of the last session of the hearing (April 22, 2020), the claimant has not been found guilty of any crimes related to his employment with the instant employer.
23. As of the date of the remand (June 15, 2020), there is still an open and ongoing criminal case against the claimant involving stolen monies from the employer.
24. As of the date of the last session of the hearing (April 22, 2020), the claimant is still involved in investigating the various fraud and identity theft alerts he has been receiving.
25. The claimant filed for unemployment benefits and received an effective date of December 22, 2019.

Credibility Assessment:

Both parties originally were on the phone when the remand hearing began on June 15, 2020. As soon as the claimant found out that the Detective that he was interviewed by was going to testify, the claimant objected to him being involved. The claimant stated that none of this should go forward while there was an active criminal case pending. It was explained to the claimant that he was not required to

participate in the hearing but failing to give answers to questions could be used against him. The claimant chose not to participate in the remand hearing. Given the fact that the claimant decided not to participate in the remand hearing once he found out the Detective was going to be involved, and given that the information provided by the Detective was very specific (*i.e.*, [RMV] records), it is concluded that the employer's testimony is found to be credible and that the claimant's original testimony is found to be not credible.

Ruling of the Board

In accordance with our statutory obligation, we review 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 # 3, which states that the claimant always tried to perform his job to the best of his ability, as neither party provided testimony or other evidence to substantiate this finding. We also set aside the portion of Consolidated Finding # 7, which states that [Bank A] only confirmed that the claimant's name was attached to a [Bank A] account, as the employer testified that [Bank A] also confirmed the account number attached to the claimant's name.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, in light of the consolidated findings showing that the employer's funds were used to pay the claimant's personal bills, we reject the review examiner's original legal conclusion that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer.

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

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).

employer.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

On the record before us, we do not believe that the employer has met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. This is because, although the employer has established the existence of a policy relative to the misappropriation of employer funds and theft, it has not established that the policy is uniformly enforced. As set forth below, however, we do believe that the employer has established that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest within the meaning of G.L. c. 151A, § 25(e)(2).

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 employer discharged the claimant after determining that he had misappropriated employer funds and used the money to pay his personal bills. The employer arrived at this conclusion after an audit by its finance department showed that a total of \$21,293.87 from its payroll account had been used to pay accounts under the claimant’s name between August and November of 2019. During the initial hearings, the claimant denied stealing employer funds to pay his personal bills and contended that his identity had been stolen. We remanded this case to the review examiner and requested that the parties provide additional evidence establishing that the accounts paid with the employer’s funds belonged to the claimant.

After remand, the review examiner found that RMV records accessed by the employer during the course of its investigation of the claimant established that the claimant owned a 2012 Infiniti vehicle, with an active registration between January 3, 2019, and September 30, 2020. The review examiner further found that the claimant assured the employer he was driving a Buick at the time of his separation, but the RMV records did not show that a Buick was registered to the claimant’s name. The review examiner also found that the RMV records showed that [Bank A] held a lien on the claimant’s 2012 Infiniti, the vehicle was insured by [Company A], and these were two of the accounts in the claimant’s name that were paid with the employer’s payroll funds. Finally, the review examiner found that the claimant received a copy of the employer’s policy prohibiting the misappropriation of employer funds and theft.

The review examiner made these consolidated findings after concluding that the employer’s testimony was more credible than that of the claimant. Since such an assessment on the parties’ credibility is within the scope of the review examiner’s role, and we believe 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).

The findings provide that the claimant was aware of the employer’s reasonable expectation that employees refrain from misappropriating employer funds. The findings and record also establish

that the claimant failed to comply with the employer's expectation, as he used the employer's payroll funds to pay his automobile loan and insurance bill. The claimant did not explain why he misappropriated the employer's funds. Rather, he has maintained throughout the unemployment proceedings that he at all times complied with the employer's expectation. In denying any misconduct, the claimant asserted that his identity had been stolen, which could account for the misappropriation of the employer funds at issue. As discussed above, the review examiner reasonably concluded that the claimant's testimony, including the testimony related to the alleged identity theft, was not credible. She declined to find that any circumstances existed, which mitigated the claimant's failure to abide by the employer's expectations regarding the use of company funds. The absence in the consolidated findings of any factors mitigating the claimant's misconduct indicates that he acted in wilful disregard of the employer's interest when he misappropriated the employer's funds. *See Lawless v. Department of Unemployment Assistance*, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the claimant 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 denied benefits for the week ending December 28, 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.



BOSTON, MASSACHUSETTS

DATE OF DECISION - July 17, 2020

Paul T. Fitzgerald, Esq.
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 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.

SVL/rh