Claimant was disciplined for violating cash handling policies and the employer believed she stole money. When the claimant told the District Manager that the magistrate declined to bring charges, it asked for the court paperwork. In an exercise of poor judgment, she referred him to her attorney, who refused to provide any documents, rather than obtain them herself. The claimant asked the District Manager if the attorney was able to get him what was requested, but the employer fired her. Held the claimant did not act in wilful disregard of the employer's interest.

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Issue ID: 0033 5314 63

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 her position with the employer on January 21, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 24, 2020. 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 August 25, 2020. We accept the employer's application for review.

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, nor had she knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not disqualified under G.L. c. 151A, § 25(e)(2), because it was the employer and not the claimant who was either unable or unwilling to obtain paperwork confirming the court's dismissal of criminal charges against the claimant, 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 hotel management company, from June 6, 2019, to January 21, 2020, most recently as a Team Lead.

2. The employer had a cash handling policy which required employees to immediately drop any amount in cash over $300.00 from the cash drawer into a drop box and to document the amount being dropped.

3. The purpose of the policy was to ensure accountability of its assets.

4. The employer had a progressive system of discipline consisting of a verbal warning, a written warning, a second written warning, a third and final written warning, and termination of employment.

5. On or about October 5, 2019, an employee on another shift, put cash in excess of $300.00 from the drawer and placed in an envelope. The envelope containing the cash totally [sic] approximately $1,000.00 remained in the drawer and was not dropped. Other employees handled the envelope. The claimant found the envelope containing the money, counted it, which came to approximately $1,000.00, placed the cash in the correct envelope and went to drop the cash, but attended to a guest who just arrived. The claimant placed the envelope in the drawer in the office before returning to the front desk. The claimant forgot about the envelope until it was discovered approximately a month later.

6. Prior to October 30, 2019, a guest stayed in a room and the credit card on file from a previous stay was charged. The credit card on file was previously authorized by the credit card account holder, but not at the time of the most recent stay. The credit card account holder brought the matter to the attention of the employer. The claimant consulted with her Manager and the charges were reversed. The claimant failed to secure new payment from the guest.

7. On October 30, 2019, the claimant received a warning for violation of payment policy.

8. On October 30, 2019, the claimant wrote a statement that she does not recall seeing an envelope in the cash drawer.

9. On November 3, 2019, the envelope that once contained approximately $1,000.00 was discovered in a desk drawer in the office by the claimant. The claimant offered a written statement explaining what occurred and that she takes full responsibility for the missing cash.

10. On November 8, 2019, the claimant received a warning for the incident that took place on or about October 5, 2019, specifically that she did not follow proper cash procedures.

11. On an unknown date, the employer reviewed video surveillance and based upon the employer's observation, the employer concluded that the claimant took the envelope containing the money.

12. The local police department investigated and interviewed employees. The local police department petitioned the court for a criminal charge against the claimant.

13. On December 21, 2019, the claimant received a warning for failing to record a drop on a clipboard on November 29, 2019, which was a new policy implemented in November. The claimant forgot to log the cash drop on the clipboard but followed all other procedures.

14. On December 27, 2019, the employer suspended the claimant pending the outcome of the court proceeding as petitioned by the local police department. The claimant was informed that depending on the disposition, she could return to her job.

15. On January 9, 2020, the claimant attended a clerk magistrate's hearing regarding the employer's missing cash as brought by the local police department. The clerk magistrate entered a dismissal.

16. The claimant informed the District Manager, who requested documentation as a condition of her return to work. The claimant explained that he should go through her attorney.

17. On January 10, 2020, the claimant's attorney informed the District Manager of the disposition and stated that if the claimant's or his word is not sufficient, it is the employer's responsibility to request the disposition from the court as the alleged victim.

18. On January 11, 2020, the claimant sent a message to the District Manager following up. The District Manager stated that he was hoping he could get the court's disposition paperwork but did not. The claimant asked if her attorney did not send [sic], to which the District Manager did not reply.

19. On January 21, 2020, the employer discharged the claimant from employment for failing to provide court documentation.

[Credibility Assessment:][1]

The employer had an expectation that the claimant provide court documentation regarding the dismissal of a criminal case, in which the employer was the alleged victim. Because of the timing of the discharge and the statement made to the DUA

[1] We have copied and pasted here the portion of the conclusions and reason section in the review examiner's decision, which contains his credibility assessment, and which, despite his extensive experience writing decisions, he is either unable or unwilling to separate from his conclusions of law.

> in its certified questionnaire that the claimant was fired because she "did not turn in their court paperwork," it is found that the claimant was not discharged for improper cash handling though previously warned. When the claimant informed the District Manager that the case was dismissed and the District Manager requested documentary proof, the claimant properly referred him to her attorney. The claimant's attorney then confirmed what the claimant stated to the District Manager, but that the employer, as the alleged victim, should request the paperwork from the court and not the claimant or himself if their word is insufficient. Though not particularly helpful, it is reasonable under the circumstances. The employer was either unable or did not attempt to get the court paperwork that it desired and pursued the matter no further culminating in its decision to discharge the claimant from employment on January 21, 2020. Such action, or inaction, on the part of the claimant was not unreasonable.

Ruling of the Board

In accordance with our statutory obligation, we review the review examiner's decision 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. After such review, the Board adopts the review examiner's findings of fact except as follows. In Finding of Fact # 18, the statement, "The claimant asked if her attorney did not send," is incomplete. Because the finding is derived from a text message entered as an exhibit, we treat this sentence as a typographical error and rely instead on the text message, which asks if the claimant's attorney was not able to send the employer the requested paperwork.[2] In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Although our decision also concludes that the claimant is eligible for benefits, we reach this conclusion for different reasons, as set forth below.

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 . . . .

[2] The claimant's text message to the District Manager, dated January 11, 2020, includes the District Manager's statement, "Yes, I did receive an email from [claimant's attorney] last night. I was hoping he would be able to send me the paper work I requested." The claimant responds, "Was he not able to?" The text message is contained in Exhibit 14. While not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

"[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).

In its appeal to the Board, the employer argues that its discharge was based upon the claimant's violation of its cash handling and dishonesty policies. During the hearing, the parties disagreed about what triggered her discharge. Ultimately, Finding of Fact # 19 provides that the employer fired the claimant for failing to give the employer requested paperwork from the court showing that she had not been charged with stealing money. *See* Finding of Fact # 19.

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless the credibility assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.)

We accept that portion of the credibility assessment that explains why the review examiner found that the employer discharged the claimant for failure to provide requested paperwork from the court. It is supported by both the claimant's testimony and the employer's written responses on the DUA's fact-finding questionnaire. *See* Exhibit 1.

Although the record includes detailed evidence about the employer's cash handling policies, there is no indication that the employer has a policy about providing court documents. Rather, the request arose as a result of the particular circumstances of the claimant's employment. For this reason, we cannot conclude that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy.

Alternatively, the employer may prove that it discharged the claimant for deliberate misconduct 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).

In this case, there is no question that the District Manager expected the claimant to provide him with court paperwork showing that the magistrate declined to criminally charge the claimant. The

District Manager asked the claimant for it, but instead of going to the court to get it, she directed the employer to her attorney. *See* Finding of Fact # 16.

We consider whether the employer's request was reasonable. Apparently, the employer was not at the magistrate's hearing, and we are told it had videotape evidence indicating that the claimant took $1,000 in cash. *See* Finding of Fact # 11. Given that the local police sought criminal charges against the claimant, it is not surprising nor, frankly, unreasonable for it to ask the claimant to support her claim that the magistrate declined to charge her. *See* Finding of Fact # 12.[3]

We further believe that, when the claimant referred the District Manager to her attorney rather than go to court herself for the paperwork, this was a thoughtful, deliberate course of action on her part.[4] The issue is not whether the employer was justified in terminating her employment for this, "[i]t is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate 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.)

In his decision, the review examiner comments that the attorney's response to the employer's request is unhelpful, but not unreasonable. The attorney's actions are not before us. The question is whether the *claimant* acted in wilful disregard of the employer's interest. Importantly, the claimant followed up with the District Manager after she sent him to her attorney to find out whether the attorney provided him with the requested paperwork. *See* Finding of Fact # 18 and Exhibit 14. In our view, this gesture indicates that the claimant wanted the employer to have the court papers it asked for and, perhaps, did not anticipate that her attorney would refuse. At most, we believe the claimant's failure to provide the employer with court papers herself is due to poor judgment, not wilful disregard of the employer's interest. "When a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield, 377 Mass. at 97.

We, therefore, conclude as a matter of law that that the employer has failed to prove that it discharged the claimant for a knowing violation of a reasonable and uniformly enforce policy or for engaging in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

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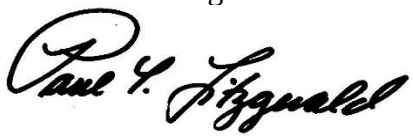
[3] We reject the review examiner's statement that "the employer was either unable or did not attempt to get the court paperwork that it desired" as unsupported. The employer's Property General Manager testified that she called the court and was told that she could not get the paperwork, but that the claimant would have to. This testimony is echoed by the District Manager's testimony that he remembers reaching out to the court, but they said that they could not release any paperwork regarding the claimant's court proceedings. The review examiner fails to explain why any of this testimony is not credible.

[4] We do not accept the review examiner's statement that the claimant "properly" referred the District Manager to her attorney for the requested documentation. This is not a credibility assessment, and to the extent this may be viewed as the review examiner's legal opinion, we do not necessarily agree that this action was a reasonable response to the employer's request.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning January 21, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - September 21, 2020

Paul T. Fitzgerald, Esq.
Chairman

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)

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.

AB/rh