Where a claimant denied engaging in the conduct, but the review examiner made supported findings of fact that the claimant gave away drinks for free at the employer's restaurant, the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2) for deliberate misconduct in wilful disregard of the employer's interest.

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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 reverse.

The claimant was discharged from her position with the employer on or about February 5, 2020. She filed a claim for unemployment benefits with the DUA, and her claim is effective February 2, 2020. On May 4, 2020, the DUA sent the claimant a Notice of Disqualification, informing her that she was not entitled to receive unemployment benefits. 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 June 2, 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. 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 to award 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 charge guests for drinks during her final shift on February 4, 2020.

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 bartender for the employer, a restaurant/bar from November 2018 until 02/04/20.

2. The employer maintained an expectation that its bartenders would charge customers for drinks immediately after pouring them.

3. The employer maintained the expectation for documentation and liability purposes.

4. The employer's expectation was discussed during a staff meeting in early January 2020.

5. A new General Manager (GM) began working in December 2019.

6. The GM was advised that there was a very big issue with actual verse [sic] theoretical alcohol inventory in the bar.

7. The GM, who had over 20 years of experience, knew that the difference in inventory was likely due to employees giving liquor away free.

8. In early 2020, the GM held a staff meeting to inform them he would be watching the bar to ensure drinks were made properly and charged properly and warned employees that they would lose shifts or other changes would be made to their employment.

9. Managers have an app on their phones that allow them to view the guest checks for each table in real time.

10. On 02/05/20, a couple who frequented the restaurant were seated in the bar area. The claimant served them each a margarita. Each drink is worth approximately $6.00.

11. The claimant did not charge the guests for the drinks when she served them or at any time during their visit.

12. The GM noticed the guests had drinks and checked the app on his phone to see if they were charged to their bill. The app showed the drinks were not charged on their check.

13. The GM went to the kitchen to get the Kitchen Manager to witness the situation.

14. The Kitchen Manager came out and saw the guests with the margaritas that were not charged to their bill. He watched with the GM until the guests left.

15. The GM did not talk to the guests about any issues while they were being served that day.

16. If an item is taken off of a check by a manager, it is still listed on the check with a "comp" marked next to the item.

17. The GM did not take any items off of the customers check.

18. Later that night, the GM entered a note into the claimant's Staff Journal that indicated, "[Kitchen Manager] and I watched as she gave Presidente margaritas to two of her regulars and never entered them in the system…"

19. On the claimant's next shift, the GM terminated her employment for giving drinks away to the guests without charging them on 02/05/20.

20. The GM did not tell the claimant that she was being laid off due to budgetary issues. He also did not tell her that she may be able to return to work weeks later.

21. The employer did not have budgetary issues at the time of the claimant's separation or at any time during the claimant's employment.

22. After the claimant was separated from employment, the employer's alcohol inventory levels returned to normal.

Credibility Assessment:

The parties disagreed about the events that occurred in the workplace on 02/04/20. The GM's testimony is found to be more credible than the claimant's because his version of events was supported by testimony from the Kitchen Manager, who was sequestered during the GM's testimony. The GM vividly accounted how he witnessed the claimant not charging the guests for the two margaritas that day, checked the app to ensure the charges were not on the bill, and then called the Kitchen Manager over to witness the event. His testimony is also supported by the contemporaneous notes he made in the claimant's Staff Journal that night.

Most significant was his testimony surrounding her discharge. The claimant had previously testified that the GM told her she was being laid off due to budgetary issues and that she may be able to return to work within a few weeks. The GM was adamant that he would have never said such things because the restaurant did not have budgetary issues and because he had strong feelings about the fact that he did not ever want her to return to work again after witnessing her giving away drinks to customers without charging them.

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, except for the date noted in Consolidated Findings of Fact ## 10 and 19. The testimony from the hearing was that the final incident occurred on February 4, 2020. 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 record supports conclusion that the claimant is not eligible to receive unemployment 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 . . . .

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 Employment and Training, 423 Mass. 805, 809 (1996). After the initial hearing, which only the claimant attended, the review examiner decided that the employer had not met its burden. Following our review of the record, including the testimony and evidence given during the remand hearing, we disagree.

The employer discharged the claimant for giving away free drinks to customers during her February 4, 2020, shift. Consolidated Finding of Fact # 19. Although some testimony was given regarding an employer policy, and the record contains documentation of a policy regarding cash handling and "void, comp, and discount abuse,"[1] the review examiner made no findings of fact about the policy or its enforcement. Because only the review examiner can make findings of fact in cases in which the Board does not hold a hearing, we cannot render findings about the employer's written policies. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). Therefore, we conclude that there are insufficient findings of fact to conclude that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy.

We next consider whether the employer has shown that the claimant's discharge is attributable to deliberate misconduct in wilful disregard of the employer's interest. Initially, the employer must show that the claimant engaged in the conduct which led to her separation. As to whether the claimant gave away drinks without charging the customers on February 4, 2020, the parties offered markedly different accounts. The claimant testified, in short, that she charged the customers for the drinks, the customers complained that the drinks were bad, and the general manager eventually came over to the customers and took the drinks off their bill. The employer offered that nothing of the sort happened. The general manager and kitchen manager testified that they saw the

[1] *See* Exhibits ## 8 and 10.

customers drinking the margaritas, they checked to see if the drinks had been put on the customers' bill, they saw that they were not on the bill, and the customers left without ever paying for the drinks. Clearly, both stories cannot be true. After reviewing the testimony from the parties, the review examiner made findings consistent with the employer's version of events. As noted above, we have accepted the review examiner's credibility assessment. The assessment is reasonable in relation to the evidence presented, and, therefore, we will not disturb it. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Thus, we have accepted the review examiner's findings of fact that the claimant served the two drinks and she never put them on the bill for the customers to pay. In effect, the customers received the drinks for free.

Having concluded that the employer has shown that the claimant engaged in the alleged conduct, we must now decide whether the findings and record support a conclusion that the claimant's conduct was deliberate and in wilful disregard of the employer's interest. Other than the claimant's testimony, which the review examiner did not credit, nothing in the record or the findings suggests that the conduct was not deliberate. For example, the review examiner did not find that the claimant was very busy and forgot to put the two drinks on the customers' bill. She did not find that the employer's electronic computer system was not functioning, such that she could not put the two drinks onto the bill. Thus, the review examiner's consolidated findings of fact support a conclusion that the claimant deliberately did not charge the customers for the drinks.

To determine if the claimant acted in wilful disregard of the employer's interest, 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). Here, the review examiner found that the employer was experiencing inventory control problems in late 2019 and early 2020. Upon his hire, the new general manager was told about this issue. Consolidated Findings of Fact ## 5–7. To combat this problem, the general manager held a staff meeting in early 2020 to remind the staff about properly making and charging for drinks. Consolidated Finding of Fact # 8. Although it is not clearly stated in the findings that the claimant attended and understood the expectations expressed at the meeting, during the initial hearing, she specifically testified she was "well aware that I should not give drinks away."[2] We think that this expectation is certainly reasonable, especially where the employer was trying to get a handle on its alcohol inventory. The expectation that no drinks be given away for free helps the employer maintain a positive cash flow in its restaurant and avoids unexplained losses.

As to mitigating circumstances, none are apparent from the review examiner's consolidated findings of fact. Nothing in the findings indicates that the claimant was somehow prevented from charging the customers for their drinks by putting them on the bill. Moreover, the claimant denied, at each hearing, that she did anything wrong and, instead, put forward a totally different story in which she charged the customers for the drinks, but they were subsequently taken off the bill by a supervisor. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See* Lagosh v. Comm'r of Division of Unemployment Assistance,

[2] The claimant's knowledge of the employer's expectation, while not explicitly incorporated into the review examiner's findings, 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).

No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

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 not supported by substantial and credible evidence or free from error of law, because the full record and the review examiner's findings of fact support a conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when she gave away drinks for free during her final shift on February 4, 2020.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 2, 2020, 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.

BOSTON, MASSACHUSETTS

DATE OF DECISION - July 30, 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.

SF/rh