

The employer had failed to prove that the claimant engaged in the alleged time theft for which it discharged her. Thus, the claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0075 5620 99

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 February 16, 2022. She filed a claim for unemployment benefits with the DUA, effective February 13, 2022, which was denied in a determination issued on April 2, 2022. 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 March 28, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 provide the employer with an opportunity to testify and present evidence. Both parties attended the remand hearing. 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, which concluded that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer by falsifying her time card as alleged, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is an automobile dealership. The claimant worked as a full-time business development manager for the employer. The claimant worked for the employer from 2/27/2019 to 2/16/2022.
2. The employer created a policy titled "Standards of Conduct." The policy reads, in part, "The following illustrates types of conduct that are not in the best interest of either the Company or its employees and therefore are not permitted. Behavior of this type may result in disciplinary action, up to and including dismissal. This is not a complete list. Also, the Company reserves the right to immediately terminate without cause for violations of this policy." The list includes, "Falsifying or altering Company records, including the employment application and the time card." The claimant read this policy before 2/16/2022.
3. The employer allowed the claimant to take two fifteen-minute breaks per shift. The employer did not require the claimant to clock out to take these breaks.
4. The employer never informed the claimant that she needed permission from a supervisor to take her breaks.
5. The claimant supervised a certain worker (Worker X).
6. The claimant presented for work on 2/16/2022 and clocked in. That day was Worker X's birthday. The claimant and an assistant manager (Assistant Manager 1) then went to a grocery store and bought a cake for Worker [X]. This excursion lasted less than twenty minutes. The claimant and Assistant Manager 1 returned to work.
7. The claimant sent a text message to her supervisor (Supervisor 1) on 2/16/2022 before she left to buy the cake. Supervisor 1 was not at work that day. In the text message, the claimant reported that she planned to leave at some point that day to buy a cake for Worker X because it was his birthday. Supervisor 1 responded via text message after the claimant had bought the cake and returned with it. In her response, Supervisor 1 wished Worker X a happy birthday. In her response, Supervisor 1 did not mention anything about the claimant's trip to buy the cake.
8. Prior to the claimant's departure from work to buy the cake on 2/16/2022, the employer did not tell the claimant that she did not have permission to leave to buy the cake.
9. Prior to 2/16/2023, the claimant did not receive any discipline from the employer for record falsification or theft of time.
10. The employer discharged the claimant because it determined that she falsified company records and stole time when she left work to buy the cake on 2/16/2022.

11. The employer did not discipline or discharge Assistant Manager 1 for her involvement in the excursion to buy the cake on 2/16/2022.

Credibility Assessment:

In the hearing, the claimant testified about her activities on 2/16/2022. In the hearing, the claimant testified that her trip to purchase the cake was not more than twenty minutes. In the hearing, the employer asserted that the claimant's trip to purchase the cake was forty-five minutes. Given the totality of the testimony and evidence presented, the claimant's testimony is accepted as credible because she was a participant in the activity and the employer did not present any evidence to show that the claimant was absent for forty-five minutes. Furthermore, the employer did not present any witnesses in the hearing who were at the facility that day and who tracked the claimant's absence.

In the hearing, the employer asserted that the claimant had to gain permission from the employer to leave for breaks. In the hearing, the claimant testified that the employer never informed her that she needed permission from a supervisor in order to take a break. The claimant highlighted that she herself was a manager and that her subordinates needed her permission to take breaks, but that she did not need permission as a supervisor. Given the totality of the testimony and evidence presented, the claimant's assertion is accepted as credible because the employer failed to show that the claimant knew about this alleged expectation. In the hearing, the employer testified that this alleged expectation is not explicit in its policies. The employer testified that the policies indicate that the facility must have proper coverage when workers take breaks. The employer asserted that the need for permission to take a break is "implied" in this dictate. This is not sufficient to show that the claimant knew she needed permission to take a break.

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 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.

Because the claimant was discharged from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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. . . .

“[The] 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).

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which she was discharged. In this case, the employer discharged the claimant after determining that the claimant had falsified employee records and stolen time when she left the work premises to buy a cake on February 16, 2022. *See Consolidated Finding # 10.* Specifically, the employer contended that the claimant had gone out without permission immediately after clocking in on the morning of February 16th, and she was out for 45 minutes, which is more than the 15-minute break afforded to employees twice per shift. *See Consolidated Findings ## 3 and 12–13.*

After hearing both parties testify at the remand hearing, the review examiner accepted as credible that the claimant did not need permission from her supervisor to take a break, as the claimant was in a management position. *See Consolidated Finding # 1.* Further, the review examiner found that employees did not have to clock out for their 15-minute breaks and, on February 16, 2022, the claimant's trip to the grocery store to buy her coworker's cake lasted less than 20 minutes. *See Consolidated Findings ## 3 and 6.* In reaching these determinations, the review examiner concluded that the employer did not present credible evidence to support its allegations against the claimant.

Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they 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 agree that the record does not contain substantial evidence to support the employer's allegations that the claimant had falsified company records and stolen time on February 16, 2022. There was no direct evidence that the claimant had taken more than a 15-minute break on the morning of the 16th. Given this record, the review examiner's assessment that the employer did not prove any of the allegations against the claimant is reasonable in relation to the evidence presented. Accordingly, the employer has failed to show that the claimant's discharge was attributable to misconduct or a policy violation.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that

she knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning February 13, 2022, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 2024



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.

SVL/rh