Claimant's failure to call new employees by their correct names was due to a good faith lapse in attention and her conduct was, therefore, not deliberate. For this reason, she may not be disqualified due to deliberate misconduct in wilful disregard of the employer's interest, and she is eligible for benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0067 1994 52

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 5, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 14, 2021. 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 April 26, 2022. 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 other 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 intentionally call two employees by the wrong name, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the employer did not provide any credible evidence to the contrary.

Findings of Fact

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

1. In 1999, the claimant began working for the employer, a coffee chain.

2. The claimant was working full-time as a store manager.

3. The claimant was on a COVID-19 related leave and returned to work around June of 2020.

4. While the claimant was on leave, the assistant manager was managing the store and hired multiple new employees.

5. Two of the new employees were Hispanic. The claimant called them by the incorrect names.

6. The claimant often called one of the employees [Name]. The employee's name was not [Name].

7. Around October of 2020, a complaint was filed against the claimant alleging bias and discriminatory behavior against the two Hispanic employees. The complaint stated the claimant was calling the individuals by the incorrect name and assigned them to unfavorable tasks.

8. The claimant's district manager was involved in the investigation until November of 2021. The investigation then went to the employer's ethics and compliance department until its completion.

9. In December of 2021, the claimant received a call from a third-party regarding the complaint.

10. The claimant's district manager received a report from the ethics and compliance department. The report said interviews substantiated the allegations against the claimant and recommended the employer terminate the claimant.

11. On February 5, 2021, during a normally scheduled meeting with her supervisor, the claimant was discharged because of the complaint filed by the two employees.

12. The employer usually issues a warning or corrective action to employees.

13. The claimant had never received a corrective action or other discipline in the 21 years she was employed.

14. The claimant did not expect any discipline for her conduct.

15. On September 14, 2021, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification effective January 31, 2021, stating she was not eligible for benefits.

16. The claimant appealed the determination.

Credibility Assessment:

> The claimant provided credible testimony during the initial hearing. The claimant did not provide any additional testimony at the remand hearing. The claimant's district manager was present as the sole witness for the employer. The employer's testimony relied on secondhand knowledge, hearsay, and determinations/conclusions of individuals who were not present at the hearing. The employer's witness testified her decision to discharge was based on the recommendation from the ethics and compliance department, and less about her own determinations. She claimed ethics and compliance drafted a report regarding the investigation. The report is not in the record for review. There is only testimony from and [sic] individual about a report she did not draft, which is based on information obtained from interviews of individuals who were not present for testimony. While it is possible the claimant's testimony is self-serving, her direct testimony about the events is more credible than that provided by the employer. The employer testified the investigation substantiated the allegations but provided no additional evidence to support that determination.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portions of Consolidated Findings ## 8 and 9 referring to November of 2021 and December of 2021, respectively. The dates in the remaining findings establish that the 2021 dates are a scrivener's error, and the correct dates are November and December of 2020. 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.

Because the claimant was discharged from her employment, we analyze her eligibility for benefits under 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. . . .

During the remand hearing, the employer's witness testified that the employer maintains a policy relating to harassment and discrimination and requiring employees to treat others with respect.[1] However, the employer did not present a written copy of this policy and, further, testified that discipline for a violation of the policy is at the employer's discretion, depending on the severity of the conduct. For these reasons, we cannot conclude that the claimant knowingly violated a uniformly enforced policy. The remaining question is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

We note at the outset that "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). Thus, it is the employer's burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation, and that the conduct was done deliberately in wilful disregard of the employing unit's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In determining whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, our first inquiry is whether the claimant actually engaged in the misconduct alleged by the employer. In this case, it is undisputed that the claimant called two Hispanic employees by the wrong names. *See* Consolidated Findings of Fact ## 5 and 6. As it is self-evident that a manager should call employees by their correct names, we agree that her failure to do so was misconduct. Our next inquiry is whether the claimant's misconduct was deliberate.

Although there is no finding stating one way or another whether the claimant's conduct was deliberate, we can reasonably infer from the evidence that the review examiner concluded that it was not. Based upon an investigative report, the employer's district manager testified that the claimant had engaged in discrimination. *See* Consolidated Findings ## 7–10. However, the review examiner rejected this testimony as not credible. 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). In this case, the review examiner's assessment indicates that he did not believe that the employer's hearsay evidence had indicia of reliability. We believe that the review examiner's assessment is reasonable in relation to the evidence presented, and we find no reason to disturb it.

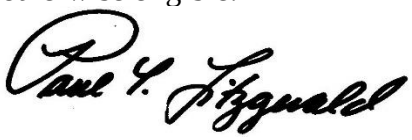
A person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. *See* Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). Here, the employer has not presented facts and circumstances that prove that the claimant's conduct was deliberate. The review examiner found that the two employees at issue were hired along with other employees while the claimant was on leave, and, upon her return, she referred to them using incorrect names.

[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).

See Consolidated Findings ## 3–6. Absent any evidence to show that the claimant intended to use the wrong names, and we see none, it is reasonable to infer that her mistake was attributable to meeting new people and the common confusion associated with remembering their names. Any conduct resulting from a good faith lapse in attention is not intentional. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

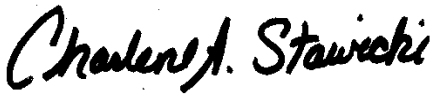
We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interests or for a knowing violation of a reasonable and uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending February 6, 2021, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 29, 2023

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.

SVL/rh