

**Although the employer fired the claimant for time theft, at the hearing it failed to present credible evidence to show that the claimant worked fewer hours than reported. Therefore, the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0073 4831 55**

### 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 his position with the employer on October 20, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 1, 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 January 29, 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 give the employer an opportunity to testify and present other evidence. The claimant, the claimant's attorney, and the employer representative attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based on 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 violate any employer rule or policy or fail to comply with the employer's expectations regarding reporting time accurately, 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. From October 13, 2012, until October 18, 2021, the claimant worked for the employer, an environmental services company, as a full-time (over 40 hours weekly) retail chemist and driver.
2. The claimant's direct supervisor was the employer's regional retail coordinator (coordinator).
3. The employer maintained a written policy regarding falsifying time (policy). The policy states that falsifying time is a definition of fraud. The employer has this policy in order to have employees be fair, ethical, and honest. The employer retains discretion as to how much discipline it can impose on an employee for each infraction of the policy. The written contents of the policy are unknown.
4. It is unknown how the claimant received the policy, if he did.
5. Employees of the employer report time they worked on an electronic worksheet. Employees can submit their time on a computer. The claimant often reported his time on a work laptop.
6. The claimant tried to report work time as accurately as he can [sic] and to the best of his ability.
7. At no time did the claimant report work hours for the employer improperly.
8. In June 2021, the claimant injured his arm in a work-related matter.
9. As a result of his arm injury, the claimant needed another co-worker (co-worker) to assist him with his duties. Previously, the claimant could perform those duties on his own.
10. On October 18, 2021, the claimant worked, in part, at the employer's workplace (workplace).
11. On October 18, 2021, the claimant reported to work at 6:00 a.m. and left work at 5:00 p.m. On that day, the claimant performed duties, such as paint care, package delivery and unloading a work truck.
12. On October 18, 2021, the co-worker accompanied the claimant throughout the day to assist him with duties. The co-worker arrived and left work the same time as the claimant that day.
13. At approximately 3:15 p.m. on October 18, 2021, the claimant left the workplace through the main entrance in order to drop off work-related packages at a nearby delivery truck for a delivery service. The claimant went with the co-worker.

14. After dropping off the work-related packages, the claimant briefly went to the local coffee shop with the co-worker to get coffee before returning to the workplace.
15. At approximately 3:30 p.m., the claimant entered the workplace through a side entrance with the co-worker.
16. The claimant and the co-worker worked at the workplace to “clean up” until about 5:00 p.m.
17. The claimant left the workplace at around 5:00 p.m. on October 18, 2021, with the coworker.
18. The claimant submitted his hours to the employer as working from 6:00 a.m. to 4:30 p.m. for October 18, 2021.
19. The employer decided to discharge the claimant because it believed the claimant falsified his work time on October 18, 2021.
20. The employer discharged the claimant on October 20, 2021, effective immediately. The employer notified the claimant over the phone.
21. Prior to his discharge, the claimant was never disciplined by the employer for attendance violations.
22. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) on October 20, 2021, with an effective date of October 17, 2021.
23. On the employer’s responses to the DUA’s request for information, the employer stated that the claimant had reported hours for October 18, 2021, from 6:00 a.m. to 7:00 p.m.

Credibility Assessment:

The HR partner stated that the claimant left the workplace at 3:15 p.m. on October 15, 2021, and did not report back to work. The HR partner alleged that the claimant reported his time to the employer that he worked until 4:30 p.m. that day. The claimant previously stated that the alleged final incident [sic] October 18, 2021. The employer’s testimony was rather inconsistent with its prior responses to the DUA. The HR partner stated that the final incident occurred on October 15, 2021, but the [employer’s] prior responses to the DUA indicated, and the claimant corroborated, that an alleged final incident took place on October 18, 2021. The HR partner stated that the claimant had reported working from 6:00 a.m. to 4:30 p.m. that day, while the employer’s prior responses stated that the claimant reported working until 7:00 p.m.

While the HR partner asserted that he saw, in video footage that was not submitted to the agency, the claimant leaving the workplace at around 3:15 p.m. through the main entrance, the claimant irrefutably stated that he did leave the workplace at that time to give work-related packages to a delivery truck nearby. After the claimant transferred the work-related packages, the claimant and the co-worker briefly got coffee before reentering the workplace at around 3:30 to 3:45 p.m. through a side entrance. When asked if the HR partner witnessed any video footage of the side entrance for the relevant time, the HR partner could not adequately answer.

In light of the above, where the employer did not submit video footage, first-hand witnesses to testify, statements from witnesses, written policy, time-reporting logs, or any other evidence to support its assertions; where the claimant had never had previous issues with time-reporting; and where the employer's only witness to the hearing, the HR partner, had no accurate knowledge of the dates and times of the final incident; it is concluded that the claimant's testimony was more credible as to when he finished working for the employer on October 18, 2021. Therefore, it is concluded that the claimant worked from 6:00 a.m. to 5:00 p.m. on October 18, 2021, and did not falsify his time reporting to the employer that day.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree that the claimant is eligible for benefits.

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 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 . . . .

Under this section of law, the burden rests with the employer to show that the claimant is not eligible to receive unemployment benefits. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Following the first hearing, where only the claimant offered evidence, the review examiner concluded that the employer had not carried its burden. After reviewing the entire record, including the employer's testimony from the remand hearing, as well as the consolidated findings of fact, we agree.

For the employer to carry its burden, it must first show that the claimant engaged in the misconduct or policy violation that formed the basis for his discharge. In this case, the employer alleged that the claimant falsified his time reporting on October 18, 2021, by falsely reporting that he worked beyond 3:15 p.m. As evidence, the employer's human resources partner testified that the employer viewed video surveillance of the claimant leaving the workplace at 3:15 p.m. The claimant did not dispute this assertion. However, he testified to leaving the workplace at that time to deliver packages to a delivery service for the employer, and then re-entered the facility through the side entrance, (which was not captured on surveillance video,) and finally left work at 5:00 p.m. The review examiner rendered a credibility assessment accepting the claimant's testimony. Consolidated Findings ## 13–17 reflect that credibility assessment and show that the claimant worked all hours reported for October 18, 2021.

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.)

As a basis for his credibility assessment, the review examiner notes that the employer offered conflicting testimony as to the dates and times of the alleged misconduct, and it failed to present any video evidence, first-hand witnesses, statements from any such witnesses, or time-reporting logs. We believe his assessment is reasonable in relation to the evidence presented.

Together, Consolidated Findings ## 10–18 show that the claimant reported all hours worked on October 18, 2021, and did not falsify his work time. As such, the employer did not prove that he engaged in the misconduct for which he was discharged.

We, therefore, conclude as a matter of law that the employer failed to demonstrate that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a 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 October 17, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 19, 2022**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

**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](http://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.

MJA/rh