Although the claimant did not always pay for snacks at the time he took them from the employer's snack bar, he made sure to put enough money to cover them into the employer's lockbox either at the beginning of the week or the following day. Held the claimant was not acting in wilful disregard of the employer's expectation to pay for snacks and he may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0078 2781 05

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 September 8, 2022. He filed a claim for unemployment benefits with the DUA, effective September 18, 2022, which was denied in a determination issued on November 26, 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 February 16, 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 present testimony and other evidence. Both parties participated in 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, which concluded 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, is supported by substantial and credible evidence and is free from error of law where, after remand, the review examiner found that the claimant paid for snacks that he took from the employer's snack bar.

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 full-time inventory control for the employer, a surgical device manufacturer, from August 31, 1998, to September 8, 2022, when he was discharged.

2. The warehouse supervisor supervised the claimant.

3. The employer maintained a theft policy, prohibiting unauthorized removal or willful damage of property belonging to the company, company employees or customers.

4. The policy was to prevent theft from the workplace.

5. The claimant knew the policy.

6. Upon hire, the claimant received and signed the employer's handbook containing the policy.

7. The employer did not utilize a progressive system of discipline as the meting out of discipline was based upon the severity of the infraction and other circumstances.

8. The employer had an open snack bar for employees. Each snack item was $0.50. Employees were required to pay for their snacks at the time of purchase by placing money in a lockbox.

9. It was a common practice throughout the claimant's employment for all the employees to put money in the lock box at the start of the week to use as a tab towards snacks during the week.

10. The employer periodically sent emails to employees to let them know there was no tab for the snack bar. Following emails, employees continued to put money in the lock box at the start of the week to use as a tab towards snacks during the week, without discipline.

11. The claimant received the emails and did not pay attention to the emails because it was a "non-issue" as he made up for it and making sure he had enough credit in the lockbox.

12. At the beginning of every week, the claimant would put $4 to $5 in the lockbox to use to fund snacks during the week. There were times where the claimant did not have all the money with him for his snacks, he would get snacks from the snack bar, and would put the money in the lock box the following day. By the end of the week, the claimant would put in whatever money was necessary to complete payment for his weekly snacks.

13. The claimant had the same routine for years and had no prior discipline regarding the snack bar.

14. Every morning before his shifts, the claimant entered the cafeteria at 7:00 a.m. to purchase his habitual snacks: cranberry juice, potatoes chips and water, totaling $1.50.

15. On 8/24/2022, the claimant entered the employer's cafeteria around 7:01 a.m. with an open hand, he grabbed his snacks, he pretended to pay, he "air dropped" the money in the lockbox, and he looked at the camera and walked away.

16. The claimant pretended to pay because he did not want other employees to think that he was stealing.

17. On 9/6/2022, the claimant entered the employer's cafeteria at 7:00 a.m., he took snacks and pretended to pay and soon after he returned to get more snacks without stopping at the lockbox to pay.

18. On 9/6/2022, two employees were in the cafeteria and observed the claimant when he took the snacks from the snacks bar and did not pay. They reported the incident to management for further investigation.

19. On 9/6/2022, the vice president of operations (VP) and the manager notified human resources (HR) that the claimant was seen on surveillance video taking snacks from the snack bar without putting money in the lockbox.

20. On 9/7/2022, the claimant entered the employer's cafeteria at 3:02 p.m. He took the snacks from the snack bar and did not put money in the lockbox because he previously placed money in the lock box earlier in the week. Soon after the claimant returned and grabbed more snacks and did not put money in the lockbox.

21. On 9/8/2022, the employer discharged the claimant for stealing snacks on 8/24/2022, 9/6/2022, and 9/7/2022.

22. The claimant did not steal snacks from the snack bar on 8/24/2022, 9/6/2022, and 9/7/2022.

23. The claimant did not expect discipline from the employer for his actions on 8/24/2022, 9/6/2022, and 9/7/2022.

Credibility Assessment:

The claimant admitted that he knew that the employer had a theft policy. However, he testified that it was a common practice in the workplace for employees to use a tab at the snack bar and it was a non-issue. The claimant testified that this had been his routine for years, and he had never received any warnings or any disciplinary actions for violating this policy. Further, the employer's testimony established that

the consequence for violating this policy was based on the employer's discretion. As such, it can be concluded that the policy was not uniformly enforced.

Given this, it cannot be concluded that the claimant knew his actions of depositing money at the beginning of the week and paying what he owed for his snacks by the end of the week were prohibited by the employer. The claimant did not review the emails sent by the employer about the snack bar because it was a "non-issue". Further, the claimant testified about his own state of mind, that he did not expect discipline from the employer for his actions on 8/24/2022, 9/6/2022, and 9/7/2022. The claimant also testified that he did not steal snacks those days and paid for his items in full by the end of each week. It cannot be concluded that the claimant engaged in deliberate misconduct in willful disregard of the employing unit's interest.

Meanwhile, the employer's human resources testified that it was common sense for employees to pay for their snacks because each item had a price on it. However, the claimant refuted this testimony and stated that he did pay for his snacks either in the beginning of the week or later when he made up for it. In addition, human resources testified that the claimant was never told that he would be terminated if he violated this policy. Therefore, it cannot be concluded that the claimant engaged in deliberate misconduct in willful disregard of the employing unit's interest.

In view of the facts, the claimant is found more credible.

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 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 . . . .

"[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 he was discharged. In this case, the employer discharged the claimant for stealing snacks based upon an allegation that he stole from the employer when he took snacks from the employer's snack bar without paying for them on August 24, 2022, September 6, 2022, and September 7, 2022. *See* Consolidated Finding # 21. Inasmuch as the employer expected employees to pay for snacks at the time of purchase by placing money in a lockbox, and the claimant did not do this on these dates, we agree that the claimant engaged in misconduct. *See* Consolidated Findings ## 8, 15, 17, and 20.

Further, the review examiner found that, on two of these dates, the claimant pretended to pay when he took snacks by "air dropping" money into the lockbox so that other employees would think that he did. *See* Consolidated Findings ## 15 – 17. From this behavior, we can reasonably infer that the claimant's failure to put money in the lockbox was deliberate.

The question is whether the claimant acted 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). Behavior is not done in wilful disregard of the employer's interest, where the claimant acts to further the employer's goals. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 98 (1979) (claimant took alternative steps to prepare store for his absence, where he believed he could not reach the district manager); *see also* Fallon Community Health Plan v. Acting Dir. of Department of Unemployment Assistance, No. SJC-13440, 2024 WL 899770 at 4 (Mass. Mar. 4, 2024), Slip Opinion (rather than disregarding employer's interest, claimant offered to take several measures in lieu of vaccination to safeguard employer's vulnerable patient population).

Here, the claimant did not always pay for a snack at the time that he took it from the snack bar, but he ultimately paid for all of snacks on a weekly basis. The consolidated findings show that he either placed enough money to cover his weekly snacks in the employer's lockbox at the start of each week, or he made sure to pay any money owed by the following day. *See* Consolidated Finding # 12. Moreover, the review examiner found that he and other employees had been following this more flexible snack tab practice throughout his employment, including after periodic employer email reminders that it did not allow tabs for the snack bar. *See* Consolidated Findings ## 9 and 10. As the findings further suggest, the claimant did not even think that it was a problem, because he always made sure to cover what he took. *See* Consolidated Finding # 11.

In our view, this record shows that the claimant was not acting in wilful disregard of the employer's interest. He merely adopted a different routine to achieve the same purpose as the employer's theft policy and its expectation to pay for snacks.

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 he 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 September 4, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 2024

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.

SVL/rh