

The Board remanded this case due to the speculative and hearsay nature of the employer's evidence of misconduct. After remand, the review examiner concluded that the employer had failed to prove that the claimant engaged in the alleged policy violations. 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: 0080 4328 28

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on June 2, 2023. He filed a claim for unemployment benefits with the DUA, effective May 28, 2023, which was denied in a determination issued on June 30, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 1, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he was 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 claimant's appeal, we remanded the case to the review examiner to obtain more information about the claimant's schedule and alleged workplace infractions. Only the claimant 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, which concluded that the claimant was ineligible for benefits due to taking a company van for personal use, 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 claimant worked full time as a life skills trainer for the employer, a provider of group housing and services to persons with brain and spinal cord and injuries, from 12/14/2022 to 6/2/2023.

2. The claimant worked 40 to 75 hours a week.
3. The claimant's hours varied but he was hired to work the second shift, 3 p.m. to 11 p.m., and the third shift, 11 p.m. to 7 a.m., Thursday and Saturday.
4. The claimant lived in [City A], Massachusetts and worked at a group house located in [City B], Massachusetts.
5. At some point in his employment, the claimant prepared the weekly schedules, assigning extra unassigned shifts to himself.
6. The employer has an employee handbook containing a written policy against "excessive personal or inappropriate use of Company information technology and communication systems, including without limitation, computers, computer software, internet access, fax machines, handheld wireless devices, Company vehicles, telephones, and cellular telephones." The employer has another written policy against "improperly parking motor vehicles, driving recklessly, speeding, and violating vehicle laws while operating Network vehicles or personal vehicles while conducting Network business." (vehicle policies)
7. The claimant received a copy of the handbook during orientation.
8. The purpose of the policy is to ensure that authorized employees have access to the company vehicles when needed to take residents where they need to go or for emergencies.
9. The employer maintains a sign-out sheet for employees to fill out when using a vehicle. Employees are to sign out with their names and to record vehicle mileage.
10. The employer determines discipline for violations of the vehicle policies on a case-by-case basis, up to and including termination, and it is based on the severity of the violation.
11. The employer expects that employees will not use vehicles for personal or unauthorized use.
12. The employer's expectations were issued to the claimant in the vehicle policies.
13. In April 2023, the employer received a complaint (the allegation) on its hotline about the claimant's behavior.
14. The allegation was made that on 3/2/2023 the claimant pulled a co-worker aside and said, "I'm going to f*ck you up."
15. The claimant was questioned about the incident by a manager.

16. After an investigation, the manager told the claimant that the incident was “unsubstantiated.”
17. The employer has two vans and keys for both vans are kept in the staff office. The keys are not locked up. The room is also unlocked and employees and clients have access to the staff office.
18. On Friday, 4/7/2023, a person or persons unknown took a company [sic] and drove to [City C], Rhode Island. The police ticketed the van on a particular street for a parking violation at 3:06 a.m.
19. On Saturday 4/8/2023, a person or persons unknown took the same company van and drove to [City C], Rhode Island. The police ticketed the van on a particular street for a parking violation at 2:50 a.m.
20. On Saturday 4/15/2023, a person or persons unknown took the same company van and drove to [City C], Rhode Island. The police ticketed the van on a particular street for a parking violation at 2:52 a.m.
21. No entries were made on the van sign-out sheet to correspond to the dates of the parking violations for the vehicle in question.
22. At least one other employee ([A]) may have been working during part or [sic] of the same shifts the claimant was working on 4/6, 4/7, 4/8, 4/9, 4/14/2023 (the dates in question) because he is typically scheduled on those days of the week.
23. On Thursday 4/6/2023, the claimant punched in at 2:07 p.m. and punched out at 11:04 p.m.
24. On Friday 4/7/2023, the claimant punched in at 6:55 a.m. and punched out at 11:21 p.m.
25. On Saturday 4/8/2023, the claimant punched in at 6:56 a.m. and punched out at 12:17 a.m. on Sunday 4/9/2023.
26. On Sunday 4/9/2023, the claimant immediately punched back in at 12:17 a.m. and punched out at 3:02 p.m., working about 32 hours.
27. On Thursday 4/13/2023, the claimant punched in at 2:26 p.m. and punched out at 7:00 a.m. on 4/14/2023.
28. On Friday 4/14/2023, the claimant immediately punched back in at 7:00 a.m. and punched out at 11:05 p.m., working about 32 hours.
29. The employer was not aware that the van was used on the nights of 4/7, 4/8 and 4/15/2023 until it received a Notice of Non-Compliance/Boot Eligible dated

5/3/2023 and a [City C] court summons for 5/23/2023, and a bill for \$100 in penalties for overtime parking violations for those dates.

30. On 5/22/2023, the claimant was suspended pending investigation into allegations that he violated the violence policy and the vehicle policies.
31. During the claimant's suspension hearing in May 2023, the employer accused the claimant of possessing a firearm on company property. The claimant denied possessing a firearm on company property.
32. During the claimant's suspension hearing in May 2023, the employer accused the claimant of having a personal or sexual relationship with his direct supervisor. The claimant denied having a personal or sexual relationship with his direct supervisor.
33. The claimant denied that he did any of what he was accused of by the employer.
34. The employer concluded that the claimant had violated its policies and decided to discharge him.
35. On 6/2/20223 the employer discharged the claimant.

Credibility Assessment:

The claimant testified in detail in the remand hearing about the allegations against him and the shifts he worked on the days in question, based on his own first-hand knowledge. He provided a printout of his punch in and punch out times in the remand hearing that he had received previously from the employer.

The claimant testified that he was not aware of the exact nature of most of workplace violence or other complaints against him. He had been accused of engaging in an inappropriate relationship with his supervisor and of having a firearm, which he denied. He was aware of the incident on 3/2/2023, although he was later told by a manager that the incident was unsubstantiated. The claimant also indicated that he had requested his personnel file and there was nothing about the allegations in it. The employer provided no evidence concerning the complaints.

The claimant's consistent testimony has been that he did not take the employer's van on the dates in question. During the remand hearing, the claimant presented employer time records to substantiate his testimony about the shifts he worked. The employer had testified at the original hearing that the claimant was the only employee who had worked the shifts both before and after the parking tickets were issued, so he must have been the one who had taken the van, yet the employer provided no evidence of this at the remand hearing.

The claimant further testified that another employee may have been working at that same time, as that employee typically worked Thursday through Saturday shifts. The employer did not present records to rebut this testimony.

In terms of the keys, the claimant provided testimony that the van keys were stored in an unsecured location in an office that was not locked so anyone could have taken them. The claimant testified he did not know of any eyewitnesses that tied the claimant to taking the van on the three dates. The employer did not provide any evidence about the keys.

In summary, because the employer did not attend the remand hearing or provide any additional documentation in advance of the remand hearing, only the claimant's testimony and the printout the claimant provided was added to the record. As such, and in light of the credible and consistent testimony given by the claimant, the findings of fact have been revised to reflect that the employer did not show that the claimant engaged in workplace violence or took the employer's vehicle without authorization on the dates in question.

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. In light of the revised findings and credibility assessment after remand, we reject the review examiner's original legal conclusion that the claimant is ineligible for benefits.

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 based upon allegations of having an inappropriate relationship with his supervisor, possessing a firearm in the workplace, and unauthorized use of the company van. *See Consolidated Findings ## 29–32, and 34.* After hearing both parties testify at the original hearing, the review examiner concluded that the claimant had taken the company van on several nights in April, 2023, as alleged. However, because the evidence against the claimant was speculative and primarily hearsay, the Board remanded for further evidence.

At the remand hearing, the employer neither participated nor produced any further evidence. Subsequently, the review examiner significantly revised her assessment of the evidence, concluding that the employer did not show that the claimant engaged in any workplace violence or took the van as alleged. 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 brought a firearm into the workplace or used the van without permission. There was no direct evidence about having a firearm or an inappropriate relationship with a supervisor. Additionally, although the claimant did work and would have access to the van on the nights that the van was used without permission, there were no eyewitnesses, the evidence indicates that the van keys were accessible to anyone in the facility, and he was not the only employee working on those shifts. *See Consolidated Findings ## 17 and 22.* 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 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 reversed. The claimant is entitled to receive benefits for the week beginning May 28, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 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.

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