The employer discharged the claimant because he violated its policy prohibiting employees from using the employer's loyalty program membership to accumulate points for his own account while his family and friends were staying at the employer's hotel. Because the claimant was not aware of the policy, the claimant did not act in wilful disregard of the employers interest and is not disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0081 1352 81

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 18, 2023. He filed a claim for unemployment benefits with the DUA, effective September 17, 2023, which was denied in a determination issued on October 11, 2023. 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 November 1, 2023. The employer appealed the review examiner's decision, and the Board 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 allow the employer the opportunity to participate in the hearing. Only the employer 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 not aware of the employer's policies pertaining to its loyalty program, 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 are set forth below in their entirety:

1. In August 2021, the claimant started working full time for the employer, a hotel, as a Guest Experience Specialist. The claimant worked at the employer's [City], Massachusetts location.

2. The claimant's scheduled days of the week varied. The claimant usually was scheduled to work the shift that ran from 2:30 p.m. to 11:00 p.m. The claimant was paid approximately $21.00 per hour.

3. The claimant's supervisors were the Front Desk Supervisor and the Front Desk Manager.

4. The employer maintains a [Loyalty] Program for guests staying at the employer's hotels or purchasing services/items at the employer's hotels. The [Loyalty] Program awards guests with points that can be redeemed toward hotel stays, car rentals and other benefits. The points cannot be redeemed for cash. The employer's employees are allowed to apply for a [Loyalty] Program membership.

5. The employer maintains a Loyalty Program Terms & Conditions Policy in connection with the [Loyalty] Program. This policy applies to the employer's guests as well as to employees that apply for the employer's [Loyalty] Program.

6. In the Loyalty Program Terms & Conditions Policy, Section 2.5, titled Individual Earning for Qualifying Charges and Qualifying Nights, the employer lists: "2.5a No other person except the Member may earn Points/Miles on Qualifying Charges and Elite Night Credit on Qualifying Nights for his/her Membership Account. Points/Miles and Elite Night Credit for a room shared by two Loyalty Program Members will only be awarded to one Loyalty Program Member." The employer maintains this policy to ensure protection of the employer's assets.

7. The claimant applied for the employer's [Loyalty] Program and became a member.

8. The claimant did receive the Loyalty Program Terms & Conditions Policy upon opening his [Loyalty] Program membership.

9. The employer also maintains a Do's & Don'ts [Loyalty] Policy for Associates. Under the Don'ts Section, the employer lists: "Book reservations for friends or family members using your account." The employer has this policy posted in the front desk area of the employer's location in [City], Massachusetts. The claimant did work in the employer's front desk area. The claimant did not sign off on receiving the Do's & Don'ts [Loyalty] Policy for Associates. The employer maintains this policy to ensure the protection of company assets.

10. Whether an employee is discharged for violation of Loyalty Program Terms & Conditions Policy or the Do's & Don'ts [Loyalty] Policy for Associates is left to the discretion of the employer.

11. In the past, the claimant was not issued any disciplinary warnings for using his [Loyalty] Program membership to accumulate points for his own account when his friends and family members were staying at the employer's hotels or using the employer's services.

12. The claimant's brother was staying at the employer's hotel for approximately two months as the brother was homeless. The claimant was using [Loyalty] Program membership to accumulate points for his own account while his brother was staying at the employer's hotel.

13. The employer runs a report to list the employer's top 50 guests in connection with the [Loyalty] Program. Prior to the claimant's discharge, the claimant was listed as one of the top 50 guests in connection with [Loyalty] Program. Upon running this report, the employer discovered that during the 2nd Quarter 2023 and 3rd Quarter 2023, [sic] claimant had used his [Loyalty] Program membership more than 5 times but less than 20 times when his friends/family was staying at the employer's establishment as guests.

14. The General Manager spoke with the claimant about the claimant using the claimant's [Loyalty] Program account when his friends/family were staying as guests. The claimant admitted to [sic] General Manager that the claimant did use his own Loyalty Program account when his friends/family were staying as guests.

15. The General Manager spoke with the claimant about Do's & Don'ts [Loyalty] Policy for Associates that is posted at the front desk area. The claimant informed the General Manager that the claimant did not know about the Do's & Don'ts [Loyalty] Policy for Associates that is posted at the front desk area. The claimant did not know about the Do's & Don'ts [Loyalty] Policy for Associates. The General Manager believes that the claimant did not know about the Do's & Don'ts [Loyalty] Policy for Associates. During this conversation, the claimant informed the General Manager that the claimant did not know that using his own [Loyalty] Program account when friends/family were staying at the employer's establishment was wrong. The General Manager believed the claimant when the claimant explained that the claimant did not know that using his own [Loyalty] Program account when friends/family were staying at the employer's establishment was wrong.

16. The claimant did not know the employer expected workers not to apply their account rewards when family and friends were staying at the employer's hotels. The General Manager believes that that claimant did not know the employer expected workers not to apply their account rewards when family and friends were staying at the employer's hotels.

17. The General Manager does not believe that the claimant had malicious intentions toward the employer by using his own [Loyalty] Program account when friends/family were staying at the employer's establishment.

18. The claimant's last date of work was on September 17, 2023. On this date, the employer sent the claimant home.

19. On September 18, 2023, the employer discharged the claimant from work. The employer informed the claimant that the claimant was discharged from work during an in-person meeting held by the General Manager.

20. The General Manager also informed the claimant that the General Manager would rehire the claimant to work for the employer again in 6 months. The General Manager also informed the claimant that the General Manager hated to see the claimant go.

21. The employer discharged the claimant from work because the claimant was using his [Loyalty] Program rewards when family and friends stayed at the employer's hotel.

22. The claimant filed an initial unemployment claim effective the week beginning September 17, 2023.

23. On April 6, 2024, the employer rehired the claimant to work for the employer. The claimant has been working for the employer again since this time (as of the date of the Remand Hearing Session).

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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant was entitled to benefits.

Because the claimant was terminated from his employment, this case is properly analyzed as a discharge. G.L. c. 151A, § 25(e)(2), 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. . . .

"[T]he 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).

On the record before us, the employer has not met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. Because discipline is left to the discretion of the employer, we cannot determine if the policy is uniformly enforced. Consolidated Finding # 10. Accordingly, our inquiry will focus on whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

We remanded the case because the employer was unable to participate in the initial hearing. After remanding the case, the consolidated findings reiterate that the employer had an expectation that prohibited employees from applying their account rewards when family and friends were staying at the employer's hotels. The consolidated findings show, as the original hearing decision did, that the claimant was unaware of this expectation.[1]

As a threshold matter, the employer must show that the claimant engaged in some type of misconduct. Here, the claimant admitted to accumulating rewards points on his account while his brother stayed at the hotel. *See* Consolidated Finding ## 12 and 14. Thus, the claimant engaged in misconduct. As nothing in the record indicates that he did so by accident, we can reasonably infer that he acted deliberately in accumulating these points.

In order to determine whether an employee's actions were in wilful disregard of the employer's interest, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior." Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield, 377 Mass. at 97. Here, it is clear from the record that the claimant was not aware of the employer's expectation that he could not use the employer's program membership to accumulate points for his own account while his family and friends were staying at the employer's hotel. *See* Consolidated Findings ## 11–12 and 15–17. The consolidated findings show that the General Manager believed that the claimant was not aware of the expectation, and that he had no malicious intent toward the employer by using his own account to accumulate points. *See* Consolidated

[1]The original hearing decision is Remand Exhibit # 1. While not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

Findings # 16–17. Because the claimant did not have knowledge of the employer's expectation, he did not willfully disregard the employer's interests.

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 17, 2023, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 16, 2025

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.

MR/rh