

The claimant store clerk was discharged because he failed to properly place cash in the safe and secure it at the end of his shift. However, the review examiner reasonably accepted as credible the claimant's testimony that he inadvertently left the cash unsecured because he felt pressured to not work beyond a 40-hour work week and rushed to try to leave as close to the end of his shifts as possible. Because he did not act deliberately, this was not deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2), and he is eligible for benefits.

**Board of Review
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Issue ID: 0081 1392 28

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 13, 2023. He filed a claim for unemployment benefits with the DUA, effective September 10, 2023, which was denied in a determination issued on December 13, 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 January 25, 2024. 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 afford the employer an opportunity to testify and present evidence. Both parties 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's failure to secure money when closing the employer's store was not deliberate misconduct, 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 for the employer, an auto parts store, as a counter salesclerk and key holder from April 7, 2019, to September 13, 2023. The claimant was paid approximately \$20.00 per hour.
2. The employer maintains a written Daily Store Closing Checklist which includes in pertinent part:

Activity

3 Verify cash drawer amounts and Daily Cash Drawer Count Out Slips, put money from cash drawers in the appropriate bag. Put all cash bags in the store safe and secure the safe.

7 Turn on alarm, turn off lights and lock the store.

3. The purpose of having the checklist is to ensure that the assets of each store are properly secured at each closing time.
4. The claimant testified to knowing the Daily Store Closing Checklist.
5. The employer maintains a Store Loss Prevention Program which states in pertinent part:

All stores are to have a safe, this safe is to be kept locked at all times.

Bank deposits are to remain in the safe until removed to go directly to the bank.

All cash is to be secured in the safe when not being used in an active cash drawer.

6. The employer maintains a progressive disciplinary procedure for violations of the policies.
7. The Human Resource Manager testified that all violations of cash handling policies are mandatory termination.
8. The claimant testified that he has witnessed violations of the cash handling policy by a coworker as well as his direct manager, and termination was not the consequence.
9. On September 7, 2023, as the claimant was in the process of closing the shop for the day, a customer entered the store. The claimant had completed emptying the registers and all of the money had been placed inside the designated bank envelopes. The claimant attended to the customer past the store closing time. After the customer left, the claimant set the store alarm, turned off the lights and locked the building for the night.
10. On September 8, 2023, the store manager opened the store in the morning and found the safe not locked and the money from the registers in the bank envelope on a counter. The manager informed human resources of his discovery and human resources informed loss prevention to perform an investigation.

11. Loss Prevention reviewed the video of the evening of September 7, 2023, and informed the Human Resource manager they observed the claimant empty the registers and leave the bank envelope on the counter. Later the claimant was observed to leave the store for the night.
12. When the claimant arrived for his next shift, the store manager informed the claimant that he found that the store safe had not been closed and locked and that the bank envelope had not been placed inside of the safe.
13. On September 13, 2023, the Human Resource Manager contacted the claimant via phone to discuss the incident. The Human Resource Manager asked the claimant if he failed to lock the money in the safe overnight and the claimant told her that he did. He told her that he was rushing to leave work and was in a hurry and he had made a mistake. The claimant was informed that his employment was terminated.
14. The claimant testified that the employees were under pressure from the company to not work more than their scheduled forty-hour weeks. The claimant would typically rush to try to leave as close to the end of his shifts as possible.
15. On September 7, 2023, the store closed at 6:00 p.m. The claimant and his coworker punched out at approximately 6:19 p.m.
16. The claimant has no prior discipline for closing procedure errors or money handling errors.

Credibility Assessment:

The employer's witness at the hearing did not have any personal knowledge of the claimant's actions, or the investigation. The claimant testified, in the initial hearing, and again in the remand hearing, that he remembered the date of the incident as being Sunday, September 10, 2023, and that he believed that he was alone in the store, which he thought contributed to his rushing to close and forgetting to lock the money and safe. While the claimant was wrong about the date and having a coworker on the shift, his testimony regarding his actions during the incident as well as his reasoning remained consistent.

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. As discussed

more fully below, we believe the review examiner's decision to award benefits is supported by substantial and credible evidence and free from error of law.

Because the claimant was discharged from his employment, his eligibility for benefits is governed by 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. . . .

“[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).

While the employer maintains loss prevention policies to ensure that store assets, including cash, are properly secured at the end of each business day, it did not provide any evidence showing it discharged all other employees who failed to secure cash in accordance with these policies. Although the employer's witness testified that all violations of cash handling policies result in mandatory termination, the employer provided no evidence to rebut the claimant's contention that he had witnessed violations of the cash handling policy by a co-worker and his direct manager, and termination was not the consequence. *See Consolidated Findings ## 7–8.* Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. Although there are no specific findings on this point, it is undisputed that, as the keyholder, the claimant was responsible for placing cash in the store safe and securing the safe prior to leaving for the day on September 7, 2023. The next day, the store manager opened the store in the morning and found the safe unlocked and the money from the registers in the bank envelope on a counter. We, therefore, believe that the employer has shown the claimant engaged in the misconduct for which he was discharged. *See Consolidated Findings ## 1-2, 9, and 10–11.*

In order to deny benefits under the deliberate misconduct in wilful disregard of the employer's interest provision, it must be shown that the claimant acted deliberately. The claimant maintained that he did not intentionally fail to place the cash in the store safe and secure the safe at the end of his shift.

After reviewing the evidence presented at both the initial and remand hearings, the review examiner accepted as credible the claimant's contention that he did not intentionally fail to

properly place the cash in the store safe and secure the safe on September 7, 2023. *See Consolidated Finding # 13.* Specifically, the claimant testified that he forgot to properly secure the cash in the store safe before leaving that day because employees were under pressure from the company to not work more than their scheduled forty-hour schedule per week, which caused him to typically rush to try to leave as close to the end of his shifts as possible. Consolidated Finding # 14. 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). Upon review, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

We form no opinion about whether the employer made the appropriate decision to end the claimant's employment. *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 95 (1979) (the issue is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances). However, because there is no evidence that the claimant deliberately failed to secure the cash at the end of his shift, we agree with the review examiner's conclusion that the claimant was discharged under non-disqualifying circumstances.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest 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 10, 2023,¹ and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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:

¹ In her hearing decision, the review examiner determined that the claimant was eligible for benefits beginning September 13, 2023. We have modified the eligibility date to reflect the appropriate week beginning date of September 10, 2023.

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.

JMO/rh