**Although the employer restaurant believed that the claimant executive kitchen manager did not fulfil one of his most important job responsibilities, the review examiner found credible the claimant's testimony that he did his job to the best of his ability. Accordingly, the employer did not show that the claimant's poor performance was deliberate. Held the claimant remains eligible for benefits under G.L. c. 151A, § 25(e)(2).**

**Board of Review**
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**Chairman**
**Charlene A. Stawicki, Esq.**
**Member**
**Michael J. Albano**
**Member**

**Issue ID: 0082 2961 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 June 30, 2023. He filed a claim for unemployment benefits with the DUA, effective July 16, 2023, which was denied in a determination issued on March 31, 2024. 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 April 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 employer discharged the claimant for poor performance and not for disqualifying 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 as an executive kitchen manager for the employer, a restaurant, from November 3, 2022, until June 30, 2023.

2. One of the job duties of an executive kitchen manager is to streamline the kitchen process to maintain prompt service times.

3. The employer had an expectation that the claimant would streamline the kitchen process to maintain prompt service times.

4. Streamlining the kitchen process to maintain prompt service times is generally understood in the industry.

5. When the claimant started working for the employer, he signed the job summary regarding the job duties of an executive kitchen manager.

6. The claimant worked at the restaurant with the general manager and one line cook.

7. The line cook working at the restaurant was a new hire, and did not know how to perform the job.

8. The claimant and the general manager were training the line cook while still trying to meet the needs of the customers.

9. On or about June 29, 2023, the employer received complaints from customers that they were waiting one hour to one and a half hours to receive their food at the restaurant.

10. The employer investigated the claims of the customers and found that there were long waits for food at the restaurant.

11. The claimant was trying to get food out timely, but the kitchen was very large and their [sic] were a lot of customers.

12. The claimant had requested help from the employer.

13. The employer discharged the claimant on June 30, 2023, for not performing the job duties of streamlining the kitchen process to maintain prompt service.

14. The general manager was also terminated from his employment for the same reason.

Credibility Assessment:

The claimant credibly testified in the hearing that he was trying his best to meet the customers' needs.

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 terminated from his employment, his qualification 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).

The employer discharged the claimant for not performing his job duties. While the claimant's duties included streamlining the kitchen process to maintain prompt service, there is nothing in the record to show that the claimant's failure to perform these duties violated any specific policy or rule. *See* Consolidated Findings ## 2 and 5. Thus, there is no basis to conclude that the claimant knowingly violated a reasonable and uniformly policy or rule.

Alternatively, we consider whether the employer has shown deliberate misconduct in wilful disregard of the employer's interest. The employer expected the claimant to streamline the kitchen process to maintain prompt service times. Consolidated Finding # 3. There is no dispute that the claimant failed to meet the employer's expectations, in that the employer received complaints from customers that they were waiting an excessive amount of time to receive the food they ordered. *See* Consolidated Findings ## 9–10. Thus, the record shows he engaged in the misconduct for which he was fired.

We next consider whether the claimant's poor performance was deliberate. In her credibility assessment, the review examiner accepted as credible the claimant's testimony that he was trying his best to meet the customers' needs. 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). As the employer presented no testimony or documentary

evidence alleging that the claimant's poor performance was deliberate, we believe that this assessment is reasonable in relation to the evidence presented.

Instead, the record establishes that the employer assigned the claimant a workload that he was unable to handle. "When a worker is ill equipped for his job . . . any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Consistent with her credibility assessment, the review examiner found that the claimant was attempting to get food out of the kitchen in a timely manner. As he was training a new line cook who did not yet know how to perform the job and had requested help from the employer, the weight of the evidence shows that the claimant was working to the best of his ability. *See* Consolidated Findings ## 7–8, and 12. Thus, the employer has failed to show the claimant deliberately disregarded his job duties.

We, therefore, conclude as a matter of law 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 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 July 16, 2023, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - November 27, 2024**

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JMO/ rh