

The claimant took an expired salad and a packaged cookie from the employer's market without notifying the manager or documenting it on the employer's account. Because there is no evidence to support her belief that the employer knew of other employees engaging in the same behavior, the claimant failed to show that the employer condoned her actions. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and she is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0084 0449 70

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 reverse.

The claimant was discharged from her position with the employer on October 9, 2024. She filed a claim for unemployment benefits with the DUA, effective October 13, 2024, which was denied in a determination issued on November 20, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 11, 2025. 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 and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the employer failed to show that the claimant knew that by taking food from the market without reporting it to the manager or documenting it in the employer's account, she was violating the employer's expectation because other employees who committed the same infraction were not disciplined, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant worked as a full-time front desk agent for the employer, a hotel, from September 14, 2023, until October 9, 2024, when she separated.

2. The claimant's immediate supervisor was the front office manager (supervisor).
3. The employer maintains a "Termination of Employment" policy, (the policy), prohibiting employees from engaging in theft or other unauthorized taking of the employer's property.
4. The employer also maintains a "Process for Expired Meals" procedure (the procedure), requiring all expired foods to be removed from the market area and placed in the employee cafeteria for the employees to take.
5. Foods that are not expired must be purchased by the employee at a discounted rate.
6. The purpose of the policy is to prevent theft from the employer.
7. The policy states that a violation, "may result in termination."
8. A violation may also result in immediate suspension or termination.
9. The general manager of the hotel, with the advice of human resources, determines the disciplinary action incurred when the policy is violated.
10. The claimant was made aware of the policy and the procedure when she was given a copy of the employee handbook, which she signed an acknowledgement of receipt on September 14, 2023.
11. The employer expected the claimant to inform the manager the salad she took was expired so that it could be documented to the employer's account or pay for the salad if it was not expired.
12. The purpose of the expectation was to ensure no theft was occurring and that all items were accounted for.
13. A violation of the expectation could result in termination.
14. The claimant was aware of the expectation.
15. The claimant had previously asked the manager to take expired food and documented taking the food in the employer's account.
16. The morning staff would typically remove the expired items from the market and place them in the employee cafeteria for employees to eat.
17. At times, there are expired foods in the evening shift that the employees would remove and either take, [sic] place in the employee cafeteria or in the fridge behind the front desk area for the front desk employees to eat.

18. Employees would often take expired foods from the market without telling a manager or documenting it in the employer's account.
19. Employees would often take non-expired food from the market and the coffee location at the hotel without informing a manager, paying for it, or documenting it in the employer's account.
20. The employees and the claimant who had taken food and or beverages from the market or the coffee location in the past were not disciplined for doing so.
21. October 2, 2024, was a busy day when several guests were receiving packages. The packages were kept in the security office and the front desk staff, including the claimant, had asked the security officer on shift to deliver the packages to the guests. The security officer was angry that he was being asked to deliver the large number of packages.
22. On October 2, 2024, the claimant took an expired salad and a packaged cookie from the market, taking the salad home with her.
23. The claimant tried the cookie, did not like it, so broke it in pieces and gave it to the valet working at the time and another employee.
24. The claimant did not inform the manager she was taking the salad or the cookie and did not document them in the employer's account.
25. At the time, the manager was working in the restaurant and was not in the front desk area where the claimant was working.
26. The claimant did not think this was a violation of any rules, policies, or expectations of the employer because employees took food from the market without notifying managers or documenting [sic] in the system regularity [sic] and were not disciplined.
27. The security guard on the shift noticed the claimant taking the salad and the cookie and informed the manager.
28. The manager informed the acting director of human resources (director) at the time, who initiated an investigation into the report.
29. The director had worked at this employer location for a total of two (2) months, during which the report was made.
30. The director reviewed security footage and concluded the claimant stole food from the market without the approval of the manager.

31. On October 9, 2024, the claimant was discharged from employment for taking the expired salad and the packaged cookie without informing the manager or entering it into the employer's account.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 20 is misleading insofar as it fails to address whether the employer knew that the claimant and other employees took food and beverages without informing a manager, paying for it, or documenting it in the employer's account. We reject Finding of Fact # 26, as it is unsupported by the evidence, as further discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to receive unemployment benefits.

Because the claimant was terminated from her employment, her 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).

In this case, the employer discharged the claimant for taking an expired salad and a packaged cookie without notifying her manager or documenting it on the employer's account. *See* Finding of Fact # 31. Insofar as the employer has discretionary authority as to the form of discipline for any violation of either its theft policy or expired meal procedure, the employer has failed to meet its burden to show that the claimant violated a *uniformly enforced* rule or policy. *See* Findings of Fact ## 7 and 8.

Alternatively, we review the record to see if the employer has proven that the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest. On October 2, 2024, the claimant took an expired salad and a packaged cookie from the employer's market and failed to inform the manager that she had taken it or document it on the employer's account. *See* Findings of Fact ## 22 and 24. Thus, the claimant engaged in the misconduct for which she was

discharged. During the hearing, the claimant freely admitted that she did so, indicating it was not done accidentally.¹ From this we can infer that she acted deliberately.

However, the Supreme Judicial Court (SJC) has stated, “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. 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). In order 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) (citation omitted).

Arising from the employer’s termination policy and expired meal procedure is the employer expectation that its employees inform the manager if they had taken expired food and either document the expired food product in the employer’s account system or, if the item had not expired, pay for the item. *See* Findings of Fact ## 3, 4, 5, and 11. We believe that the employer’s expectation was reasonable, as it prevents theft and allows the employer to maintain an accurate account of its inventory. *See* Finding of Fact # 12.

We reject Finding of Fact # 26, insofar as the review examiner found that the claimant did not think that she was violating the employer’s expectation because other employees had frequently taken food without notifying the manager or documenting it on the employer’s account and were not disciplined. The finding show that she was aware of the employer’s expectation. *See* Findings of Fact ## 10–14. Based upon her prior history of asking the employer permission to take expired food from the market and documenting it on the employer’s account, we know that the claimant understood the responsibilities imposed upon her in terms of the employer’s expectation. *See* Finding of Fact # 15. Since the claimant knew that she was required to seek permission from the employer to take expired food from the market and document it on the employer’s account, or pay for it, and she did neither, she knew that her conduct was contrary to the employer’s expectation and that there could be consequences for its violation. *See* Finding of Fact # 13.

Despite this evidence, the review examiner concluded that the claimant did not possess the requisite state of mind, reasoning that the employer “condoned” the claimant’s behavior because other employees would often take expired food from the market without informing the manager or documenting it on the employer’s account, and they were not disciplined. *See* Findings of Fact ## 18, 19, and 20. This was an error. It is true that if the employer fails to discipline employees when it knows that they have violated a certain rule, a claimant may over time come to believe that such conduct is acceptable to the employer. *See Gold Medal Bakery, Inc. v. Comm’r of Division of Unemployment Assistance*, 74 Mass. App. Ct. 1105 (2009) and *New England Wooden Ware Corp. v. Comm’r of Department of Employment and Training*, 61 Mass. App. Ct. 532, 533–535 (2004).

¹ The claimant’s testimony, while not explicitly incorporated into the review examiner’s findings, 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).

However, we see nothing in the record that supports the claimant's belief that the employer had knowledge of and tolerated employees taking food from the market without informing the manager or documenting it. During the initial hearing, the claimant testified that she did not know if the employer was aware that she had taken food items in the past without authorization.² We also note that nothing in the record shows that the employer knew other employees were engaging in the same behavior and that it chose to remain silent. Since the employer was unaware that employees engaged in misconduct, the employer has not condoned the behavior.

Rather, the record shows that the employer did not tolerate this type of misconduct. The employer gave a specific directive on June 10, 2024, instructing all employees that taking food from the market without paying for it or documenting it was prohibited. The email read in relevant part, "... items in the market are not complimentary for any associate or valet staff. All items need to be purchased. I find things in the back office that are just opened and ½ eaten or drank. We do audits on these items so when there are items missing with no explanation its not good. We are allowed a 25% off discount ... and someone else needs to ring you in you are not allowed to cash yourself out. ..."³

In short, the record shows that the claimant knew that she was required to inform the manager if she had taken expired food from the market and that the item had to be documented by another associate.

Finally, the claimant did not present any evidence of mitigating circumstances that caused her to behave this way at work. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See Lawless v. Department of Unemployment Assistance*, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 12, 2024, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

² This portion of the claimant's testimony as well as Exhibit 9 referenced below are also part of the unchallenged evidence in the record.

³ The employer's email to all associates, dated June 10, 2024, is Exhibit 9.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 2025



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:
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.

DY/rh