

BR-104579-A (April 16, 2008) – Police report, a hearsay document, contained sufficient indicia of reliability to support employer's testimony of alleged theft. Report identifies declarant and is based upon the author's personal observations and interviews.

Board of Review
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BR – 104579-A

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to award benefits to the claimant following her separation from employment. We review pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on December 21, 2006. She filed a claim for unemployment benefits with the DUA, but was disqualified in a determination issued by the agency on June 8, 2007. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which only the claimant attended, benefits were granted after the review examiner determined that the employer failed to prove that the claimant's discharge was attributable to deliberate misconduct or to a knowing violation of a reasonable and uniformly enforced policy 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 back to the review examiner to make additional findings. Both parties attended this second hearing. Thereafter, the review examiner issued his consolidated findings. Upon further review of the consolidated findings, the Board again remanded the case back to the review examiner to make subsidiary findings from the record.

The issue on appeal is whether the employer sustained its burden to prove that the claimant engaged in either deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

Findings of Fact

The DUA review examiner's subsidiary and consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked as the general manager/financial officer for the employer, a restaurant. The employer [XXX] was doing business as [the Restaurant].
2. The claimant worked for the employer from 8/02 until 12/21/06. She was employed full-time. She lived in a residence owned by the owner of the business.
3. The claimant had been relieved of many of her duties as of 11/11/06 as the owner had instructed her not to report to work any longer as a possible investor was going to work her duties as general manager pending further notice.
4. The claimant was to continue working part-time from home her financial paperwork and other assignments by the owner. [sic]
5. The claimant was placed on limited duties by the owner in November due to her medical conditions and temporary disabilities.
6. The claimant was no longer being paid by the employer as of November 2006.
7. The claimant made [allegations] of sexual harassment and general harassment against the owner in November. Formal charges were not filed yet pending negotiations between her lawyer and the employer's lawyer.
8. The claimant was terminated by the employer while out. She was not paid for work since 11/6/06.
9. The claimant was informed that she had been terminated by the owner. Charges were made against her for alleged theft of money, jewelry, alcohol and wines but denied by the claimant. No finding of guilt or admittance of such has been made.
10. Detective [A] did indicate in his written report dated 1/4/07, that he met with [B], the owner, [Owner's wife], and Attorney [A] on 12/19/06 concerning the claimant.
11. In a narrative for Detective [A] entered 1/16/2007, it indicates that in the course of executing a second search warrant of the claimant's residence on January 11, 2007, "fourteen filled and partially filled cases of wines and other liquors" were recovered from the residence. The narrative also indicates that when executing the first search warrant on 1/8/07 and seeing the cases, the claimant had been questioned and stated "that the alcohol was "expired" wines, and that she had obtained them from [the Restaurant]." Further, the narrative indicates that the claimant informed Detective [A] on January 10th 2007, while waiting for the claimant to voluntarily show him the contents of her safety deposit box at [Bank Name], she had been given all of the [sic]

these “alcohols by the “wine rep” for [the Restaurant].” The detective thought it were [sic] unusual for a wine rep to give such a large amount of wines to a person, and informed the claimant that he would be contacting the wine rep to verify the information. The narrative than [sic] indicates further that “at this point, [Claimant] changed her story yet again, and now stated that the owner of [the Restaurant], [B], had given her these wines.”

12. The claimant admitted in her testimony at the hearing on 7/2/07, that there were wines and alcohol at her residence which was [sic] owned by the owner of the business. She testified that some had come directly from the owner of the business, some from vendor [sic], and some from a bunch of parties the owner had at her residence.
13. The employer presented hearsay testimony on 9/24/07 that the claimant had admitted to the owner around 12/21/06 when confronted by him, that she had alcohol of the restaurant. They also presented a police report dated 1/4/07 regarding alleged larceny of assorted jewelry, gold, and coins by the claimant from the owner of the restaurant.
14. The claimant denied any theft, violation of policy, or misconduct on her part. She had done her job the best that she could.
15. The claimant filed for unemployment benefits on 5/17/07.

Ruling of the Board

The Board adopts the DUA review examiner’s consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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 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 Board finds the following facts dispositive. The claimant was discharged on December 21, 2006, for theft. At the July 2, 2007, hearing, the claimant admitted that she had wine and liquor belonging to the restaurant at her home. The employer testified that the claimant admitted to the owner that she had alcohol belonging to the restaurant.

These facts were corroborated in Detective [A]’s police reports. Detective [A] wrote that he had observed fourteen cases of the restaurant’s wine in the claimant’s home. His reports also provide

several detailed inconsistent statements, which the claimant made to him directly, about how she obtained the wine. The police reports corroborate the direct and hearsay testimony that the claimant took the restaurant's alcohol without consent.

The Supreme Judicial Court has held that hearsay evidence may constitute substantial evidence in an administrative hearing, if it contains sufficient indicia of reliability, Covell v. DSS, 439 Mass. 766, 786-787 (2003). Detective [A]'s police report contains sufficient indicia of reliability. It identifies the declarant, Detective [A], who personally interviewed the claimant and executed a search warrant at her home. His report is highly probative of deliberate misconduct inasmuch as it places the alcohol in claimant's possession, includes numerous inconsistent and mutually contradictory statements by the claimant about how it got there, and includes additional evidence, which corroborates [Owner's wife's] testimony about the claimant's discharge for theft.

We, therefore, conclude as a matter of law that the employer presented sufficient evidence to show that the claimant engaged in deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2). The DUA review examiner's decision is reversed. The claimant is denied benefits for the week ending May 19, 2007, and for subsequent weeks until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 16, 2008



Donna A. Freni
Member



Sandor J. Zapolin
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- May 16, 2008

AB/jv