COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-947

PAUL WEBER

vs.

DIRECTOR OF THE DEPARTMENT OF UNEMPLOYMENT ASSISTANCE & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant, Marriott International Administrative Services, Inc. (Marriott), appeals from a District Court judgment reversing the decision of a review examiner of the Department of Unemployment Assistance (DUA) denying the plaintiff unemployment benefits. Because we determine that the review examiner's decision that Weber committed "deliberate misconduct in wilful disregard" of Marriott's best interest was not supported by substantial evidence, we affirm.

Background. We summarize undisputed facts found by the review examiner. From March 1999 to December 2017, Weber was employed by the IT department of Starwood Hotels (Starwood). When Marriott acquired Starwood in January 2018, Weber became an

[1] Marriott International Administrative Services, Inc.

IT market manager for Marriott. Weber's job responsibilities for Marriott included managing the disposal of obsolete and unwanted hardware from three of Marriott's Boston-area hotels. In or around March 2018, Weber became aware of several cellular network extender units (units) that Marriott was not using, and he designated them for disposal. After confirming that Marriott intended to discard the units and that Verizon, the units' seller, would not take the units back and did not want them, Weber removed four of the units from Marriott property. Several months later, Weber sold the units online for $700 each; he kept the proceeds of the sale. Weber did not inform his superiors of the sale, although Marriott eventually learned of his actions and, in June 2019, discharged Weber for "theft/attempted theft" based on his use of the discarded units.

Weber filed a claim for unemployment insurance benefits, and on July 17, 2019, the DUA issued a notice of disqualification, having found Weber ineligible for benefits. After (1) an unsuccessful appeal to a DUA review examiner who determined that Marriot (its unexplained failure to appear for the hearing notwithstanding) had carried its burden by showing that Weber "deceived [Marriott] by removing items that were intended for recycling, and selling them for his personal benefit," and (2) an unsuccessful appeal to the DUA's board of review, Weber sought judicial review of the DUA's final

decision. See G. L. c. 151A, §§ 40, 42. A judge of the District Court reversed the decision that disqualified Weber from receipt of unemployment benefits. Marriott now appeals.

Discussion. a. Standard of review. Giving "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it," Coverall N. Am., Inc. v. Commissioner of the Div. of Unemployment Assistance, 447 Mass. 852, 857 (2006), quoting G. L. c. 30A, § 14 (7), we review the DUA review examiner's decision to determine "whether the decision contains sufficient findings to demonstrate that the correct legal principles were applied, and whether those findings were supported by substantial evidence." Norfolk County Retirement Sys. v. Director of the Dep't of Labor & Workforce Dev., 66 Mass. App. Ct. 759, 764 (2006). "Substantial evidence" is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996), quoting G. L. c. 30A, § 1 (6). As relevant to our analysis, pursuant to G. L. c. 151A, § 25 (e) (2), an employee is disqualified from receiving unemployment benefits where the employer demonstrates that the employee was discharged for "deliberate misconduct in

wilful disregard of the employing unit's interest."[2] Id. "[Deliberate misconduct in wilful disregard of an employer's interest] is 'intentional conduct . . . which the employee knew was contrary to the employer's interest.'"[3] Still v. Commissioner of Employment & Training, 423 Mass. 805, 810 (1996), quoting Goodridge v. Director of the Div. of Employment Sec., 375 Mass. 434, 436 (1978). The burden of proof on this issue is on the employer. Id. at 809.

b. Lack of substantial evidence. Where the review examiner found that Marriott authorized Weber to identify and dispose of "obsolete and unwanted hardware," but made no finding that Marriott informed Weber of any limitations on his ability to dispose of that equipment -- specifically, that he was not permitted to make personal use of it -- we conclude that the review examiner's determination that Weber's actions amounted to "deliberate misconduct in wilful disregard of [Marriott's]

---

[2] Alternatively, the statute disqualifies employees terminated as a result of their "knowing violation of a reasonable and uniformly enforced rule or policy of the employer." G. L. c. 151A, § 25 (e) (2). Marriott does not argue the theory that Weber committed a "knowing violation" of a company rule.

[3] "[T]he employee's state of mind at the time of the misconduct is an issue for both parts" of the required analysis, South Cent. Rehabilitative Resources, Inc. v. Commissioner of the Div. of Employment & Training, 55 Mass. App. Ct. 180, 185 (2002), quoting Still v. Commissioner of the Dep't of Employment & Training, 423 Mass. 805, 810 (1996), i.e., to prove that the conduct was "intentional" and that the employee "knew [the conduct] was contrary to the employer's interest." Id., quoting Still, at 810.

interest" was not supported by substantial evidence.[4] Still, 423 Mass. at 810. Likewise, while the review examiner was free to determine, as she did, that Weber's explanation of his reason for taking and selling the units "lack[ed] credibility," that determination alone did not constitute evidence that such "misconduct" was intentional wrongdoing. Id. See New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 472 (1981) ("disbelief of any particular evidence does not constitute substantial evidence to the contrary").

At oral argument, Marriott clarified that it would not have constituted deliberate misconduct for Weber simply to dispose, at no cost to Marriott, of surplus, unreturnable equipment. Rather, Marriott asserted, Weber's deliberate misconduct consisted of disposing of such equipment in a particular manner: by selling it (on his own time) and then keeping the proceeds rather than turning them over to Marriott. Although Weber could be expected to know that retaining the money was contrary to Marriott's interest, thereby satisfying the second part of the section 25 (e) (2) test, the examiner made no finding that Weber

[4] The review examiner noted Marriott's representation on a DUA questionnaire that Weber was discharged for "[v]iolation of company policy unauthorized taking of property of vendor and selling it," but found that Marriott failed to establish that Weber was discharged for violating such "a uniformly enforced rule or policy." To the extent any policy existed at Marriott governing the situation here, there was no evidence that those expectations were communicated to Weber.

knew that retaining the money constituted misconduct, as required by the first part of the test.

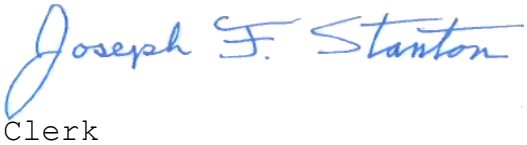
It was not enough to conclude, as the examiner did, that there was no affirmative evidence that Marriott intended Weber to personally benefit. Rather, the burden was on Marriott to show Weber's knowledge that his personal benefit would amount to misconduct. See Still, 423 Mass. at 809 (burden of proof on employer). Marriot did not do so. In this regard, it is notable that at oral argument, Marriot could not cite any record evidence that Weber knew that Marriott (as opposed to its predecessor, Starwood[5]) had ever engaged in sales of surplus unreturnable property for its own profit. Compare Gupta v. Deputy Director of the Div. of Employment & Training, 62 Mass. App. Ct. 579, 586 (2004) (that employee was aware of company policy and had twice been reprimanded for his behavior in violation of that policy was substantial evidence of "deliberate misconduct in wilful disregard"). We conclude that the review examiner's "deliberate misconduct" determination was unsupported

[5] Before Marriott's acquisition of Starwood, Weber had once arranged for Starwood to sell surplus electronic door locks at a profit, had arranged to donate other salvageable hardware, and was aware that previous managers had donated unwanted hardware or sent it home with IT employees for testing.

by substantial evidence, and thus affirm the judgment of the District Court.[6]

Judgment affirmed.

By the Court (Kinder, Sacks & Hand, JJ.[7]),



Clerk

Entered: May 25, 2022.

[6] We deny Weber's request for appellate attorney's fees.

[7] The panelists are listed in order of seniority.