

**While attempting to return a company truck to the employer's premises after work, as expected, the claimant was stopped by a NH trooper and asked to take a breathalyzer test. Having been told that refusal to take the test would result in arrest, the claimant's refusal was a conscious choice, which he made knowing that he would then not be able to bring the truck back, in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0019 3025 00**

## **BOARD OF REVIEW DECISION**

### **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 his position with the employer on July 11, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 21, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on August 10, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not disqualified under G.L. c. 151A, § 25(e)(2), because he did not intentionally fail to return the employer's truck is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked full-time as a laborer for the employer, a demolition and disposal company, from 11/23/15 to 7/11/16. He worked Monday through Friday, from approximately 7 a.m. to 3:30 p.m.
2. Employees use company vehicles at work, on occasion. Employees may also drive their own vehicles to job sites, depending on the tasks to be completed.
3. The employer has a written policy which states that employees are required to ask permission for personal use of company vehicles, and failure to do so will result in termination from employment.
4. The above policy is in place to protect employer assets and limit employer liability. The claimant was aware of this policy. All employees who violated the policy in the past were terminated from employment.
5. On 7/11/16, the claimant drove a company vehicle to a job site, as instructed by the employer's Vice President, and performed work at that job site.
6. The claimant and a co-worker split a six pack of beer at the job site after they were finished with work, during the course of approximately one and a half hours.
7. The claimant attempted to drive the company vehicle back to [Town A], MA, from [Town B], MA, but instead, drove to New Hampshire.
8. The claimant does not know how he ended up in New Hampshire. He is unfamiliar with [Town B], MA.
9. A New Hampshire State Trooper pulled the claimant over and asked him to submit to a blood alcohol test. He explained to the claimant that if he did not take the test, he would be arrested.
10. The claimant refused the blood alcohol test. He did not believe his blood alcohol content was over the legal limit to operate a motor vehicle. He refused the test because he is unfamiliar with New Hampshire law regarding driving under the influence.
11. The claimant was arrested after he refused the blood alcohol test. He called his girlfriend and told her what happened.
12. The claimant's girlfriend called the employer and told the Administrative Assistant that the claimant was arrested.
13. The Vice President of the company told the Administrative Assistant that the claimant was fired.

14. The Administrative Assistant told the claimant's girlfriend this information, and the claimant's girlfriend told the claimant this information.
15. The employer later recovered the company vehicle in [Town C], New Hampshire.
16. The claimant's girlfriend bailed him out of jail on 7/12/16.
17. The claimant is not an alcoholic.
18. The claimant started a new job sometime after 8/13/16.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and deems 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 eligible for benefits.

Because the claimant was terminated from his employment, the review examiner properly analyzed his eligibility for benefits under 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). We believe the employer has met its burden.

Although the review examiner did not make an express finding as to the employer's reason for firing the claimant, it is evident from her analysis of the case that she concluded that the employer did so due to the claimant's failure to get permission to use the company truck after he finished work on July 11, 2016. *See* Findings of Fact ## 3, 12, and 13, as well as the conclusions and reasoning section of the review examiner's decision. The requirement to seek permission to use or drive a company vehicle for personal use is a written employer policy, and the consequence for failing to get such permission is discharge. Finding of Fact # 3; *see also* Exhibit # 3. The review examiner found that the claimant was aware of the policy. *See* Finding of Fact

# 4. The findings also show that the policy is reasonably related to the employer's interest in protecting its assets and limiting its liability. Finding of Fact # 4.

We hesitate to reach the conclusion that the claimant knowingly violated the express terms of this policy, which prohibit "driving company trucks for personal use without permission." See Exhibit 3.<sup>1</sup> The findings show that, while the claimant was driving the company truck after work on July 11, 2016, he was not violating the policy but, rather, attempting to bring the truck back to the employer's premises. Finding of Fact # 7.

Alternatively, under G.L. c. 151A, § 25(e)(2), the employer may show that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute deliberate misconduct, 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). "Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.)

The expectation underlying the employer's policy is self-evident. Employees were to use company vehicles for work and to return the vehicles to the employer's premises when not working, unless given permission to do otherwise. The evidence indicates that the claimant knew this, as he testified that on July 11, 2016, he was heading back to the employer's premises in [Town A], MA to return the truck. See Finding of Fact # 7. There is no dispute that the employer had not given him permission to do anything else with the truck.

The real question is whether the claimant's failure to return the truck on July 11, 2016, was deliberate and in wilful disregard of the employer's expectation. A person's knowledge or intent is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

The review examiner concluded that the claimant did not act deliberately; he simply got lost on his way back to the office and ended up in New Hampshire. We do not challenge her view of the evidence that the claimant got lost. But, if the claimant had simply gotten lost, he could have turned around, returned the truck, and, presumably, he would not have been fired. The reason that he did not return the truck is that he refused a New Hampshire State Trooper's request to take a blood alcohol test. The trooper told the claimant that he would be arrested, if he refused to take the test. The claimant made a conscious choice not to take the test. See Findings of Fact ## 9 and 10. Knowing that he would be placed under arrest, the claimant had to realize the logical consequence that he would not then be able to drive the truck back to the employer's office. Whether or not the claimant made the right personal decision at that moment, it was made in wilful disregard of the employer's interest. In sum, the claimant caused his own unemployment when he elected to be arrested rather than take a blood alcohol test. See Cusack v. Dir. of

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<sup>1</sup> Exhibit # 3, a page from the employer's policy handbook, 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).

Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted) (the purpose of the unemployment statute is to provide temporary relief to “persons who are out of work . . . through no fault of their own.”).

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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner’s decision is reversed. The claimant is denied benefits for the week beginning July 10, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 15, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL 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](http://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.

AB/rh