

0019 4525 76 (Mar. 30, 2017) – Claimant was not disqualified from receiving benefits after being fired for refusing to take a drug test. His reason for refusing was more in furtherance of his own privacy interest than a wilful disregard of the employer’s relatively speculative concern about confirming that the claimant was “clean.” Moreover, the employer’s reasons for asking for the test—that the claimant’s driving duties were about to increase and another driver had just failed the test—were not included in its drug testing policy.

**Board of Review**  
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**Issue ID: 0019 4525 76**

## **BOARD OF REVIEW DECISION**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny 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 August 9, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 29, 2016. The claimant 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 denied benefits in a decision rendered on October 27, 2016. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest and, thus, was 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 claimant’s appeal, we remanded the case to the review examiner to obtain additional testimony and other evidence pertaining to the regulations governing the claimant’s position with the employer. 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 on appeal is whether the review examiner’s conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, under G.L. c. 151A, § 25(e)(2), by refusing to submit to a drug test, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant had met the requirements for federal Department of Transportation (DOT) certification and neither those requirements nor the employer’s drug testing policy required the claimant to submit to a drug test simply because his driving duties were going to increase.

## Findings of Fact

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

1. The claimant worked full-time as a Shipping & Receiving Supervisor for the employer, a manufacturer, from 04/04/05 until 08/09/16. The claimant's rate of pay was \$19.77 per hour.
2. For approximately the past two years, the claimant also served as the employer's back-up Department of Transportation (DOT) driver.
3. The claimant was not required to have a CDL for his job as a backup DOT driver.
4. The employer has a written Alcohol and Drug Testing, and Drug Use policy that governs all employees (whether or not in DOT governed positions). The policy states that the employer "performs random drug screening on employees at various times throughout the year, which is mandatory for all employees."
5. The policy goes on to state: "***Refusal to submit to alcohol or drug testing, or being under the influence of alcohol or illegal drugs during working hours or on [employer] property will result in immediate termination of employment.***"
6. The claimant – a Supervisor - signed off on receipt of the employer's policy and was responsible for enforcing it.
7. The purpose of the employer's policy is to comply with state and federal laws and to ensure safety.
8. This is the first instance of an employee refusing to submit to a drug test in the employer's history.
9. There is no state or federal regulation that requires backup DOT drivers to immediately undergo drug testing if their driving duties are going to increase.
10. On 11/04/15, the claimant submitted to a drug test for the instant employer. The claimant was not randomly selected for the test but took it as part of his DOT certification.
11. On 08/09/16, the Plant Manager informed the claimant that the regular DOT Driver had been fired for failing a drug test and that the claimant would be filling in until a replacement was found.

12. The Plant Manager went on to inform the claimant that he needed to submit to a drug test that day.
13. The employer chose the claimant to be drug tested because the employer “was short a driver” and the claimant’s driving duties would increase until a replacement was hired.
14. The claimant told the Plant Manager: “I already took one.” The Plant Manager told the claimant: “You have to take another one.”
15. The claimant responded: “No thanks.” The Plant Manager asked the claimant: “Are you sure? That’s automatic termination.”
16. The claimant answered: “I’m not taking it.”
17. The Plant Manager processed the claimant’s termination and escorted him to his truck.
18. On 08/10/16, the claimant filed his claim for unemployment benefits with an effective date of 08/07/16.

### Ruling of the Board

In accordance with our statutory obligation, we review the examiner’s decision to determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner’s consolidated findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. However, we conclude that the totality of the consolidated findings and the evidence in the record support an award of benefits to the claimant.

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 . . . .

After remand, the review examiner found that the claimant was aware of the employer’s *Alcohol and Drug Testing, and Drug Use* policy, as the claimant received a copy of the policy and was responsible for its enforcement in his role as a supervisor. The review examiner also found that the employer asked the claimant to submit to a drug test on August 9, 2016, because his driving

duties were going to increase, given that the employer had just fired one of its regular drivers for failing a drug test. The claimant refused to take the drug test because he had already taken a test in November, 2015, as part of his DOT certification. The review examiner concluded in her original decision that the claimant's refusal to take the test on August 9<sup>th</sup> constituted deliberate misconduct in wilful disregard of the employer's interest, because he intentionally failed to comply with the employer's reasonable expectation that he submit to a drug test at any time, per the employer's drug testing policy. We disagree with this conclusion.

The employer's *Alcohol and Drug Testing, and Drug Use* policy states that the employer performs drug screenings (1) on all new employees, (2) when the employer has a reasonable suspicion that an employee may be under the influence of drugs, (3) when there is a work-related accident or injury, and (4) by random selection at various times throughout the year.<sup>1</sup> That policy also makes clear that refusal to submit to the testing will result in immediate termination of employment. As mentioned above, the claimant was asked to submit to a drug screen on August 9, 2016, because his driving duties were going to increase due to the employer's recent loss of a regular driver. The employer testified that he wanted to make sure the claimant was "clean," given that the regular driver was terminated for failing a drug test. Since the employer's reason for requesting that the claimant submit to a drug test on August 9<sup>th</sup> does not fall under any of the mandatory drug testing categories defined in the employer's policy, we cannot conclude that the claimant's refusal to undergo drug testing constituted a knowing violation of the employer's drug testing policy.

Turning to whether the claimant's refusal was deliberate misconduct in wilful disregard of the employer's interest, we acknowledge the employer's understandable concern about driver safety after having to discharge one of its regular drivers for failing a drug test. However, because drug testing via urinalysis impinges upon an employee's statutorily-protected privacy interests, *see Webster v. Motorola, Inc.*, 418 Mass. 425, 421 (1994), and cases cited therein, claimants will not be disqualified from unemployment compensation benefits unless the employer has a safety-related business interest in ordering the employee to be tested, the testing protocols are properly designed to serve that interest, and the employee is generally aware of the circumstances in which he will be tested. Thus, for example, this Board has denied benefits to vehicle operators who have failed random drug tests where the employee's job is subject to federal DOT regulations mandating such tests. *See* Board of Review Decision 0017 2240 72 (September 28, 2016). It has also denied benefits in the case of a driver in a safety-sensitive, but non DOT, position, who refused to sign a policy requiring random drug tests. *See* BR-124098-A (May 30, 2013).<sup>2</sup>

In the instant case, the claimant, who had been a back-up driver for the employer for about two years, had obtained DOT credentials the previous November, which included a drug test. Neither the employer's own drug testing policy nor the claimant's DOT license indicated that he would be subjected to targeted (*i.e.*, non-random) drug testing simply because his driving duties

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

<sup>2</sup> Board of Review Decision BR-124098-A is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

were about to increase. The record contains no evidence of any kind suggesting that the claimant had given the employer a basis for suspecting him of drug use, which would have permitted a targeted drug test. The claimant's DOT credentials already rendered him subject to randomized, routine drug testing under strict guidelines, which were designed to protect the employer's and the public's interest in the claimant's safe driving. In this situation, therefore, we think the claimant's refusal to submit to a targeted drug test was more in furtherance of his own privacy interests than in wilful disregard of the employer's relatively speculative concerns about confirming that the claimant was "clean."

We, therefore, conclude as a matter of law that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced policy of the employer, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 13, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 30, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**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.

SVL/rh