

**Bus driver, who reported for work 5 hours after taking Percocet for back pain rather than call in sick, was disqualified under § 25(e)(2), after his discharge for driving under the influence of a narcotic. While serving his unpaid 10-week disciplinary suspension, the claimant was entitled to benefits under § 25(f) and 430 CMR 4.04(4), because he did not have a right to return to work at the end of the suspension period.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0020 5493 40**

## **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 we affirm in part and reverse in part.

The claimant separated from his position with the employer on November 10, 2016. He filed a claim for unemployment benefits with the DUA, effective December 25, 2016, which was approved in a determination issued on April 28, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 21, 2017. 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 afford the claimant an opportunity to participate in the hearing and to obtain evidence about the claimant's disciplinary suspension before his discharge. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. 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 entitled to any benefits, pursuant to G.L. c. 151A, § 25(e)(2), due to driving the employer's bus under the influence of a narcotic, is supported by substantial and credible evidence and is free from error of law, where the findings after remand show that, for a period of time before discharge, the employer had suspended the claimant without pay and without a right to return to work.

## Findings of Fact

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

1. On 4/11/2005, the claimant began working full-time as a Bus Driver for the employer's public transit authority.
2. The employer's prohibited acts policy forbids reporting to work in an unfit condition and operating a bus under the influence of narcotics. The employer also requires employees to immediately notify the employer's Central Control whenever they are involved in an accident at work.
3. The employer has a zero tolerance for operating work vehicles under the influence of narcotics. No employee found to have operated a bus while taking narcotics has been permitted to remain as an employee.
4. The claimant was given the employer's Drug and Alcohol Policy on February 27, 2014.
5. On November 10, 2016, the claimant's back hurt. He found some Percocet in an old prescription bottle in his medicine cabinet. It is not known whether the Percocet had originally been prescribed to the claimant or to another member of his household. The claimant did not have a current prescription for the narcotic. Approximately 5 hours prior to the start of his shift, he took four 5 mg pills of Percocet.
6. At the time he took the pills, the claimant knew the employer prohibited driving a bus while under the influence of narcotics. The claimant did not want to call out sick because he would lose his holiday pay if he did.
7. On 11/10/2016, while driving passengers in his bus, the claimant hit the curb with his wheels, struck several tree branches and struck a parked van causing damage to the van's side mirror.
8. While driving the employer's bus on 11/10/16, the claimant was under the influence of the Percocet he had taken.
9. After striking the van, the claimant stopped the bus and left a note under the van's windshield wiper with the claimant's number to call regarding damage to the van. The claimant did not report the accident to the employer even though he knew the employer's policy was to immediately report accidents.
10. After the accident, the claimant was aware his driving was influenced by the Percocet he had taken but he still continued driving. The claimant did not consider calling a supervisor to assist him due to his condition.

11. A passenger on board the bus the claimant was driving notified police the claimant was driving erratically.
12. The police responded to the passenger's call and stopped the claimant's bus. The claimant told police he understood he was being stopped because he had hit the van. The police administered a field sobriety test and concluded the claimant was under the influence. The police did not arrest the claimant.
13. The employer's Superintendent reported to the site where the police had stopped the van. He escorted the claimant to an employer location where a nurse from the employer's clinic collected a urine sample from the claimant. The sample was tested. The clinic reported to the employer the sample tested positive for narcotics.
14. The claimant is an alcoholic, but did not consume any alcohol on 11/10/16.
15. On 11/10/16, the employer suspended the claimant with pay, pending investigation.
16. On or about 11/14/16, the claimant informed his supervisor he was leaving immediately to enter a drug and alcohol rehabilitation program in Florida. The supervisor wished the claimant good luck in his treatment.
17. The police later charged the claimant with OUI Drugs, Leaving the Scene of an Accident with Property Damage, Operating to Endanger, and Failure to Submit. Those cases are pending. The claimant has not yet entered a plea.
18. On 11/29/16, the claimant's status was changed to suspended without pay. The employer sent the claimant a letter stating he was suspended for 70 days without pay pending discharge. The claimant did not have a right to return to work at the end of the suspension period.
19. The claimant completed the rehabilitation program and returned to Massachusetts on 12/14/16.
20. On 12/28/16, the claimant opened an unemployment claim having an effective date of 12/25/16.
21. The claimant remained in an unpaid suspension status from 11/29/16 until he was discharged, via letter, on 3/21/17.
22. The employer discharged the claimant for driving a bus under the influence of narcotics and for failing to immediately report an accident on 11/10/16.
23. The claimant is a union member. He did not grieve the discharge because his union representative told him it was a "lost cause."

## CREDIBILITY ASSESSMENT

The claimant did not refute the allegation that, on 11/10/16, he drove the bus erratically while under the influence of a narcotic for which he did not have a prescription. The claimant agreed that he was involved in an accident with his bus on 11/10/16 and he failed to report the accident to the employer's Central Control as required by the employer policy. Indeed, the claimant generally agreed that events on 11/10/16 happened as described by the employer.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant is disqualified from receiving benefits during the period of his disciplinary suspension.

The review examiner found that the employer terminated the claimant's employment due to an incident that took place on November 10, 2016. Consolidated Finding # 22. In his original decision, the review examiner focused on the claimant's discharge, analyzing 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 . . . .

As for the claimant's actions on November 10, 2016, we agree with the review examiner's analysis that they constituted disqualifying misconduct under G.L. c. 151A, § 25(e)(2).

Consolidated Findings ## 2-4 show that the claimant was aware of the employer's drug policy, which prohibits reporting for work and driving a bus under the influence of narcotics, and that the employer uniformly enforces violation of that policy with discharge. Consolidated Finding # 5 states that about five hours before his shift began, the claimant took four 5-mg. Percocet pills for back pain. Rather than call in sick and lose the week's holiday pay, the claimant chose to report for work and drove his bus under the influence of the narcotic. Consolidated Findings ## 6 and 8. On this evidence, the employer has met its burden to show a knowing violation of a uniformly enforced policy.

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). 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). A mitigating factor is something that drives a person's actions and over which the person has no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). Here, the only mitigating factor suggested by the record is that the claimant took the Percocet because his back hurt. However, the employer did not fire him for treating his back pain with Percocet. He was fired for subsequently reporting to work and driving a bus under the influence of a narcotic.

"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.) After taking the medication, the claimant had control over whether or not to report to work. The only reasonable inference to be made from claimant's decision to work rather than call in sick was that he did so in wilful disregard of the employer's drug policy.

Although we agree that the claimant's discharge from employment was disqualifying under G.L. c. 151A, § 25(e)(2), the consolidated findings now show that the claimant was not formally terminated from his job until March 21, 2017. *See* Consolidated Finding # 21 and Remand Exhibit # 11. Until then, from November 29, 2016, through March 20, 2017, the claimant was on an unpaid disciplinary suspension. Eligibility for benefits during a disciplinary suspension is governed by different provisions of law. G.L. c. 151A, § 25(f), provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter] . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

The application of G.L. c. 151A, § 25(f), is further explained by regulation at 430 CMR 4.04(4), which provides, in pertinent part, as follows:

A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, *and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension.*

(Emphasis added.)

The consolidated findings show that when the employer placed the claimant on an unpaid 70-day (10-week) disciplinary suspension based upon the November 10, 2016, incident, he did not have a right to return to his job at the end of the 10 weeks. Consolidated Finding # 18. Under the italicized provision of 430 CMR 4.04(4) above, the claimant may not be disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(f), during this period of time.

We, therefore, conclude as a matter of law that under G.L. c. 151A, § 25(f), the claimant is eligible for benefits during his disciplinary suspension. We further conclude that upon his termination from employment on March 21, 2017, he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

The portion of the review examiner's decision that disqualified the claimant beginning December 25, 2016 through March 20, 2017, is reversed. The claimant is entitled to receive benefits during this period, if otherwise eligible.

The portion of the review examiner's decision that disqualified the claimant beginning March 21, 2017, is affirmed. The claimant is denied benefits beginning March 21, 2017, 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 - January 16, 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