

**The claimant did not have the state of mind for deliberate misconduct. There was no evidence that she had been compromised or that she knew that she was violating the employer's expectations when, five or six hours before reporting to work on the night shift, she had wine with a meal.**

**Board of Review  
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**Issue ID: 0020 6520 70**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by J. Berube, 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 her position with the employer on December 14, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 22, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 4, 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation is supported by substantial and credible evidence and is free from error of law, where the claimant admitted to consuming alcohol with her meal five or six hours prior to her scheduled shift.

### **Findings of Fact**

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

1. The claimant worked part-time as a cashier for the employer's retail business from 6/18/15 until 12/14/16. The claimant did not work for any other employer while working for the instant employer. The claimant worked two 8-hour shifts and two 6-hour shifts each week and was paid \$11.10 per hour.
2. The employer maintains a Substance Abuse-Free Workplace policy. The policy contains a statement of purpose which reads: "Alcohol and drug abuse ranks as one of the major health problems in the United States. Continuing research and practical experience have proven that even limited quantities of narcotics, abused prescription drugs, or alcohol can impair your reflexes and judgment. This impairment, even when not readily apparent, can have catastrophic results. Moreover, studies have shown that impairment by controlled substances may last long after the user believes the effects to have worn off. For these reasons, (Employer) has adopted a policy that all associates must report to work and remain completely free of illegal drugs and alcohol while working."
3. The employer's policy contains a section related specifically to alcohol use. This section reads in relevant part: "Associates are prohibited from coming onto Company premises, reporting to work, or working with alcohol in their systems."
4. The employer's policy contains a section which explains the consequence for violations. This section reads in part: "Associates who violate this policy or who are suspected of violating this policy (as determined at the Company's discretion) will be removed from the workplace immediately and will be subject to disciplinary action, up to and including termination of employment."
5. On 6/22/15, the claimant reviewed the employer's Substance Abuse-Free Workplace policy and confirmed this review electronically.
6. On 12/14/16, the claimant was scheduled to work from 8:00 a.m. until 4:00 p.m. During the morning, a new supervisor contacted the employer's human resources department to report that he detected the odor of alcohol on the claimant's breath. At approximately 1:30 p.m., the human resources staff conducted a telephone conference call with the claimant and supervisor. The claimant denied having consumed alcohol that day. During the meeting, the claimant admitted to having consumed wine prior to reporting to work on previous occasions. The claimant provided the employer a written statement which reads in part: "As I stated on the phone there has been maybe about a half dozen occasions when I did have some wine before work. (only wine) My performance has never been compromised and I always perform over and above what is expected."
7. The claimant is not an alcoholic. The claimant sometimes consumed alcohol with a meal five or six hours prior to reporting for work. The claimant does not know how long it takes for alcohol to metabolize and leave her system.

8. On 12/16/16, the employer discharged the claimant for violating its Substance Abuse-Free Workplace policy by reporting to work after consuming alcohol.
9. The claimant filed a claim for unemployment insurance benefits, effective 1/1/17.
10. On 1/6/17, the claimant completed a DUA fact finding questionnaire in which she wrote that her employment had been terminated on 12/16/16 because an assistant manager claimed that he smelled alcohol on her breath. In her responses, the claimant wrote: "...but I did admit that I occasionally had a glass of wine before work."
11. On 2/22/17, the DUA issued the employer a Notice of Approval, finding her eligible for benefits under Section 25(e)(2) of the law.
12. On 3/6/17, the employer appealed the Notice.

### 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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, however, we conclude, contrary to the review examiner, that the claimant is not subject to disqualification.

As the claimant was discharged, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 . . . .

The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about her own unemployment through intentional disregard of standards of behavior which her employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Vital to this analysis in determining whether an employee's actions constitute deliberate misconduct is the claimant's state of mind at the time of the conduct leading to the separation. See 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.) If the employer cannot show that there was misconduct, and that the misconduct was deliberate and done in wilful disregard of the employer's interest, then the claimant will not be denied benefits, under G.L. c. 151A, § 25(e)(2).

Thus, under Massachusetts law, for the employer to carry its evidentiary burden, it must show that the claimant intentionally and willfully engaged in some type of prohibited behavior or misconduct. Based on the findings and record before us, we cannot conclude that there was any specific act of misconduct on the claimant's part. Moreover, the findings of fact do not support a conclusion that the claimant intended to do anything wrong.

The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield, 377 Mass. at 97. The review examiner found that the employer's policy on alcohol states that their "[a]ssociates are prohibited from coming onto Company premises, reporting to work, or working with alcohol in their systems." This policy is vague and does not include any specific time frame required before employees may report to work after having consumed alcohol. Thus, the claimant was never placed on notice by the employer as to what its specific expectation was regarding alcohol consumption.

Furthermore, the review examiner found that the claimant did not know how long it takes to metabolize alcohol, and, consequently, the claimant could not have known that five or six hours was not enough time for her system to be free of alcohol. Under the above statute and cited decisions, in order to reach the determination that the claimant had engaged in deliberate misconduct, the review examiner would have to have shown the claimant affirmatively knew at the time she reported to work that she still had alcohol in her system. Since the claimant did not know at the time she reported to work that she still had alcohol in her system, she did not have the state of mind for deliberate misconduct.

We, therefore, conclude as a matter of law that the claimant did not engage in disqualifying conduct, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 11, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 28, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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.

SE/rh