

**The employer's absence from the hearing prevented a disqualification, pursuant to G.L. c. 151A, § 25(e)(2), because the review examiner's supported findings of fact did not clearly indicate the reason for the claimant's discharge. Consequently, the employer did not carry its burden to show that the claimant should be subject to disqualification.**

**Board of Review  
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**Issue ID: 0020 8766 10**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by Severino Martinez, 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 December 16, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 21, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits,<sup>1</sup> attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 11, 2017.

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 accepted the claimant's application for review. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer did not attend the hearing and the record is unclear as to whether the claimant was discharged for not reporting an accident or for not paying for the damage resulting from the accident.

### **Findings of Fact**

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

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<sup>1</sup> The employer was invited to attend the hearing as a witness only. It is not an interested party to this matter.

1. From September 1, 2015 until December 16, 2016, the claimant worked as a full-time (40 plus hours per week) pest control technician for the employer, a pest control company.
2. The claimant used, in the regular course of his job duties, a company vehicle (the car) provided to him by the employer. The employer allowed the claimant to keep the car parked in his home during his off-work hours.
3. The employer expected the claimant to report any accident involving the car.
4. On or around November 18, 2016, as the claimant was parking the car in his driveway, he accidentally struck a stone wall. The accident resulted in damage to the car's right front quarter and bumper.
5. The claimant did not immediately report the accident to the employer because he believed that the employer's owner (the owner) would be angry with him.
6. On December 2, 2016, as the claimant pulled into the employer's parking lot in the car, the owner observed damage to the car's right front quarter and bumper. The owner then asked the claimant to submit a written report of the accident.
7. A few days after December 2, 2016, the claimant submitted an accident report to the owner in which he offered to pay for repairs to fix the damage to the car.
8. On December 15, 2016, the owner called the claimant and told him that he had taken the car for a cost of repairs estimate and that he had been quoted \$1,800 in estimated costs of repairs to the car. The claimant told the owner that \$1,800 was too high and that it was unreasonable for him to pay the full amount. The owner then told the claimant, "I'm not playing games with you anymore," and hung up.
9. Concluding that the claimant violated the employer's expectations by failing to report the car accident, the owner decided to discharge the claimant.
10. On December 16, 2016, owner met with the claimant and discharged him from his employment effective immediately.
11. On December 22, 2016, the claimant filed a claim for unemployment benefits with an effective date of December 18, 2016.

### 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 except as follows. We reject Finding of Fact # 9, because it is not supported by substantial and credible evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, because the employer did not attend the hearing to clarify the circumstances surrounding the claimant's separation, we conclude that the employer did not carry its burden to show that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

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 . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Although the employer did not attend the hearing, the review examiner concluded that the employer had carried its burden in this case. We disagree.

As an initial matter, in all discharge cases, the employer must first establish that the claimant's discharge was due to some act of misconduct or policy violation. The employer must show that the claimant engaged in the behavior which led to the discharge. In this case, the record is mixed as to the actual reason for discharge. The employer's initial statements to the DUA indicate that the discharge resulted from an accident with a company vehicle, which the claimant did not report. During the hearing, however, the claimant offered testimony that he felt that he was being discharged, because he did not pay the employer \$1,800.00 to repair the damage to a vehicle involved in an accident. This conflict in the evidence was not explicitly resolved by the review examiner in his decision.

The review examiner's conclusion appears to assume that the discharge resulted from the claimant's failure to report the accident to the employer soon after it occurred. However, the findings made by the review examiner reveal a different timeline of events. The claimant's accident in the company vehicle occurred on or around November 18, 2016. The employer's owner first noticed the damage to the vehicle on December 2, 2016. However, the claimant was not fired on or about December 2 for failing to report the accident. Instead, the employer received an estimate to fix the car and presented that amount to the claimant on December 15, 2016. *See* Findings of Fact ## 7 and 8. Only after the claimant balked at paying \$1,800.00 to fix the vehicle did the employer discharge him.

As noted above, we have rejected Finding of Fact # 9. That finding referred to the employer discharging the claimant for "failing to report the car accident." However, the review examiner

specifically found that “the owner decided to discharge the claimant” after the owner had “conclude[ed] that the claimant violated the employer’s expectations.” This finding is not supported, because the owner was not present at the hearing to testify to his thinking and the employer’s rationale for discharge. Without the owner’s testimony, any findings about what he concluded or decided are unsupported by substantial and credible evidence in the record.

Ultimately, the findings and record before us raise several questions about the discharge, which were left unanswered due to the employer’s absence at the hearing. For example, if the employer actually discharged the claimant for failing to report the accident in a timely fashion, why was the claimant not discharged on December 2 or soon thereafter? Also, if the claimant had paid the \$1,800.00 to the employer on or around December 15, 2016, would the employer have kept the claimant on as an employee? In addition, why did the employer continue to allow the claimant to work for it until the claimant declined to pay \$1,800.00 to fix the vehicle? The answers to these and potentially other questions would have been helpful to understand the reasons for the claimant’s termination. Without answers to these questions, the Board is left with a sequence of events depicted in the findings of fact which call into question the precise reason for the claimant’s discharge. Consequently, we conclude that the employer in this case has not carried its burden to explain the rationale for firing its employee.

We observe at this point that we are not condoning the claimant’s behavior in this case or disagreeing with the review examiner’s determination in Part III of his decision that the claimant’s testimony was not credible in certain respects. The review examiner’s observations about the claimant’s testimony were reasonable, and it was also reasonable for him to conclude that the claimant knew that he needed to report the accident when it happened. We also state at this point that we do not necessarily accept the claimant’s explanations as to what happened prior to his discharge. Simply because the employer did not participate in the hearing does not render the claimant’s testimony credible and believable. *See McDonald v. Dir. of Division of Employment Security*, 396 Mass. 468, 470 (1986). Nor do we credit the claimant’s argument on appeal that his course of conduct in this matter was somehow in the employer’s interest. We are holding only that the employer did not carry its burden in this case to establish the reason for the claimant’s discharge or that it constituted either a knowing policy violation or deliberate and wilful misconduct within the meaning of the statute. Therefore, the claimant cannot be denied benefits under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the review examiner’s decision is not supported by substantial and credible evidence or free from error of law, because the employer failed to present sufficient credible evidence to explain why the claimant was discharged.

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 - January 31, 2018**



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.

SF/rh