

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

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

Issue ID: 0023 6091 47

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 the claimant benefits following his separation from employment on November 14, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On January 9, 2018, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on March 1, 2018, the review examiner affirmed the agency determination, concluding that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). The Board accepts the claimant's application for review.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's findings of fact are based on substantial and credible evidence in the record.

We also conclude that the reasoning used in Part III of the decision is supported and reasonable and is free from any error of law affecting substantive rights. In addition, we note that the evidence in the record also supports a conclusion that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The review examiner did not discuss that part of G.L. c. 151A, § 25(e)(2). However, there is substantial and credible evidence that the claimant was aware of the employer's expectations regarding drug testing,¹ that such expectations were reasonable, that the claimant violated the expectations, and that there is a lack of mitigating circumstances in the record.

As to mitigation, the claimant argues in his appeal to the Board that we should apply the holding of Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737 (1987), to the facts of this case. We decline to do so, based on our own precedent. In Board of Review Decision BR-108790-A (July 31, 2009),² the Board distinguished Shepherd, a case involving a compulsion to drink alcohol, from a case which involved a claimant who was stealing and using controlled

¹ See Exhibits ## 5, 6, and 7.

² This decision is posted on the Board's website: <http://www.mass.gov/dua/bor>.

substances she had no legal right to possess. Although the claimant in BR-108790-A was not discharged for testing positive for illegal drugs, the Board clearly rejected the idea that Shepherd can be used as authority for the proposition that an instance of misconduct or a policy violation may be mitigated if a person has a compulsion to use illegal controlled substances. Here, the claimant used cocaine, which is illegal. We do not view any asserted dependence on cocaine as mitigating his violation of the employer's policies or the June 9, 2017, return-to-work agreement. This is especially so in a job subject to United States Department of Transportation regulations.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning November 12, 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 - April 18, 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

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