Although the claimant had several "at fault" accidents throughout her employment, the final incident, in which she looked off to the side for a moment and rear-ended a vehicle in front of her bus, does not show that she deliberately violated the employer's prohibition against at fault accidents. Consequently, she cannot be denied benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0025 8036 00

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 her position with the employer on June 5, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 29, 2018. 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 September 5, 2018. 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is subject to disqualification from the receipt of unemployment benefits 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 claimant had an accident while driving the employer's bus on or about June 5, 2018.

Findings of Fact

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

1. The claimant worked full-time for the instant employer as a bus driver from 6/20/2016 until her separation on 6/5/2018.

2. The employer has a company policy which prohibits at fault accidents which results in progressive discipline up to and including termination.

3. The claimant was provided this policy in writing at the time of hire.

4. The claimant received previous a verbal warning, written warning and suspension for previous at fault accidents during the course of her employment.

5. Just prior to her separation, the claimant rear ended another vehicle while operating the employer's bus.

6. The claimant looked off to the side for a moment while driving and when she looked back saw the vehicle in front of her stopped. The claimant did not have enough time to stop and rear ended the vehicle.

7. The claimant does not recall why she looked to the side while operating the employer's bus.

8. The employer determined that the claimant was at fault for the accident and informed her of her termination on 6/5/2018.

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 original 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the findings of fact support a conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was terminated from her employment, 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. The review examiner concluded that the employer had carried its burden. We disagree.

The underlying facts here are undisputed and straightforward. The employer prohibits its drivers from getting into at-fault accidents. The employer uses progressive discipline to enforce this policy. Over the course of her employment, the claimant was in several at-fault accidents. *See* Finding of Fact # 4 and Exhibit # 1, p. 6. She was in a final accident on June 5, 2018, and the employer discharged her.

Based on the number of accidents the claimant had, we have no reservations about concluding that the claimant violated the employer's expectation that she not have at-fault accidents. However, we cannot conclude from the review examiner's findings that the claimant had the state of mind necessary for disqualification under G.L. c. 151A, § 25(e)(2). 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). As to the final incident, the review examiner found that the claimant looked off to the side for a moment, she then looked forward and saw a vehicle in front of her, and she did not have enough time to stop before rear-ending the other vehicle. Nothing about this situation suggests that the claimant intended to get into the accident. The findings do not indicate that the claimant was deliberately trying to violate the at-fault accident expectation. Even though she could not recall why exactly she had looked off to the side for a moment, *see* Finding of Fact # 7, the claimant's actions, at best, were negligent, careless, and inattentive. But that does not make them deliberate and done with a wilful disregard of the employer's interest.

In this case, we interpret the phrase "at-fault" to mean that the accident was caused by the claimant. There is no doubt that the claimant caused the accident here, as she failed to stop her bus in time to avoid a rear-end collision. However, simply because the claimant is the root cause of the accident does not make her behavior deliberate as that term is defined in G.L. c. 151A, § 25(e)(2).

As to the claimant's discharge, we are reminded of the Supreme Judicial Court's distinction between the employer's right to fire an employee and whether a fired employee is eligible for unemployment benefits. The Court has the said that "the issue is not whether the employee had been discharged for good cause, but whether the Legislature intended to deny benefits in the circumstances presented by the case." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996), *citing* Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978). The purpose of G.L. c. 151A, § 25(e)(2), "is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). On the facts before the Board, we do question the employer's decision to terminate the claimant's employment, but the employer has not shown that the claimant's conduct exhibits an "intentional disregard" of the employer's expectations.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because, although the claimant had several at-fault accidents over the course of her employment, the employer did

not show that the final accident was done deliberately or in wilful disregard of the employer's interest 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 June 5, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – November 6, 2018

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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

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