

The employer subjected the claimant to a random drug test, which came back positive for cocaine. The claimant driver for a steel company worked in a safety sensitive position. The employer's expectations were reasonable and the claimant was aware of them. Nothing in evidence called into question the validity of the test. Because the claimant denied using cocaine, he did not establish mitigating circumstances. He is disqualified for deliberate misconduct in wilful disregard of the employer's interest.

**Board of Review
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Issue ID: 0031 8100 25

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 July 23, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 18, 2019. The claimant 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 awarded benefits in a decision rendered on January 8, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the employer did not meet its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional information on the employer's drug testing process. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 decision, which concluded that the claimant's positive drug test result was insufficient to show that the claimant committed deliberate misconduct in wilful disregard of the employing unit's interest, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time non-CDL driver for the employer, a steel service center, between 08/27/2018 and 07/23/2019, when he separated.
2. The employer had a substance abuse policy requiring drug testing and prohibiting employees from reporting to work while using illegal substances.
3. The employer expected employees not to test positive for illegal substances.
4. The claimant participated in preemployment drug testing. The claimant's drug screen performed in the doctor's office was positive for cocaine. The claimant protested the drug screen results. The claimant's drug test performed in a laboratory (laboratory A) was negative.
5. The employer contracts with a third-party company to perform drug testing.
6. On 07/11/2019, the claimant was randomly selected for a drug test.
7. The claimant emptied his pockets and went into the bathroom. The faucet was taped. There was blue dye in the toilet. The claimant was unsupervised when he collected a urine sample. The claimant gave his urine sample to the owner/operator who collected the claimant's specimen. The claimant initialed two labels for his urine sample and signed the custody and control form for his urine sample in the presence of the owner/operator on 07/11/2019.
8. The claimant's urine was split into bottle A and bottle B. Bottle A and [sic] tested at laboratory A.
9. The preliminary test performed on bottle A was positive for cocaine. A confirmatory test was performed on bottle A with results at a level of 201 nanograms per milliliter. The DOT considers any result over 100 nanograms per milliliter to be positive. The confirmatory test of bottle A was positive for cocaine. The method used for the confirmatory test was less likely to produce a false positive result for cocaine.
10. On 07/17/2019, the claimant spoke to the medical review officer for a donor interview. The medical review officer informed the claimant that his specimen tested positive for cocaine. The claimant denied cocaine use. The claimant had no acceptable explanation for the lab test result. The claimant denied having any recent ear, nose, throat, or emergency room procedures as well as any other medical or surgical procedures during which cocaine might have been used as an anesthetic agent by the doctor performing the procedure. The medical review officer informed the claimant that he would be reporting the claimant's test result to the employer as positive for cocaine. The medical review officer offered and explained the split specimen testing process. The claimant was interested in bottle B but did not order it while on the phone with the medical review officer. The claimant was advised to call back if he wanted bottle B

ordered. An MRO Case Notes entry regarding the donor interview was submitted on 07/17/2019 at 11:03:17. The claimant did not request that bottle B of the split sample be tested.

11. The standard procedure when someone requests that bottle B of a split sample be tested is for laboratory A to send bottle B to a different certified laboratory to be tested. Bottle B of the claimant's split sample was not tested because the claimant did not place the order for bottle B to be tested with the medical review officer during the donor interview or anytime thereafter.
12. The claimant did not undergo any medical procedures where cocaine may have been used as a topical preparation within the week prior to the July, 2019 random drug test.
13. The claimant provided a list of his medications to the human resources manager. The claimant's medications at the time of the random drug test were the same as those he was prescribed at the time of the preemployment drug testing.
14. The claimant has high blood pressure, diabetes, and a lung condition. The claimant is prescribed Trazodone, Sertraline, Simvastatin, Metformin, Metoprolol Tartrate, Metoprolol, Glimepiride, Chlorthalidone, Valsartan, and Trulicity. The claimant takes over the counter apple cider vinegar, fish oil, cinnamon, testosterone, and a multivitamin.
15. There is no prescription medication that contains cocaine. It is not possible that one of the claimant's medications could cause a false positive urine test for cocaine. The claimant does not have documentation showing that the medication he is taking could cause a false positive test for cocaine.
16. On 07/23/2019, the human resources manager terminated the claimant's employment because of the positive results of the random drug test.

Credibility Assessment:

The claimant's testimony at the original hearing that he did not initial any labels for his urine sample is not credible. During the remand hearing, the claimant admittedly initialed vials and signed paperwork for the testing of his urine sample. The claimant's remand hearing testimony was corroborated by the sequestered testimony of the owner/operator who witnessed the claimant initialing the vials and signing the custody and control form.

The claimant's testimony at the original hearing and the remand hearing about his conversation with "the man from laboratory A" is not credible. The medical review officer testified during the remand hearing about his conversation with the claimant and this testimony was consistent with and corroborated by the MRO Case Notes entry on 07/17/2019 at 11:03:17 regarding the donor interview. The employer's

testimony and evidence that the claimant did not request bottle B to be tested is found more credible than the claimant's assertion that he made such a request.

The claimant's assertion at the original hearing that he did not use cocaine at any time is not credible given the totality of testimony and evidence presented, including the claimant's lack of documentation showing that the medication he is taking could cause a false positive test for cocaine, the claimant's own admission that he did not undergo any medical procedures where cocaine may have been used as a topical preparation within the week prior to the July, 2019, random drug test, that bottle A underwent a preliminary test and a confirmatory test, both of which were positive for cocaine, and testimony from the employer that the confirmatory test methodology was less likely to produce a false positive result for cocaine.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant did not engage in deliberate misconduct in wilful disregard of the employing unit's interest.

Because the claimant was terminated from his employment, his eligibility 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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The review examiner found that the employer has a substance abuse policy requiring random drug testing and prohibiting employees from reporting to work while using illegal substances. Consolidated Finding # 2. However, we do not have sufficient evidence to determine whether this policy is uniformly enforced. As such, we cannot conclude that the claimant was discharged for a knowing violation of a *uniformly* enforced policy.

We next consider whether the employer provided substantial and credible evidence showing that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The employer expected its employees not to test positive for illegal substances on random drug screenings. Consolidated Finding # 3. By his own admission, the claimant was aware of and understood this expectation.¹ While there is no dispute that the claimant was terminated because his July, 2019, random drug test was positive for cocaine, it does not necessarily follow he is ineligible for benefits. Consolidated Findings ## 9 and 16. The issue before us is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under these particular circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979).

In Massachusetts, an employee has a reasonable expectation of privacy in the information that can be extracted from a urine specimen. Horsemen's Benevolent and Protective Association, Inc. v. State Racing Commission, 403 Mass. 692, 700 (1989). And while an employer may have an interest in providing a drug-free work environment, this reason alone is generally insufficient to justify random drug testing when weighed against an employee's privacy interests. Webster v. Motorola, Inc., 418 Mass. 425, 432–433 (1994). Therefore, we must first consider whether the employer's expectation surrounding its random drug testing policy was reasonable under these particular circumstances.

Here, the employer expected that its employees would not test positive on random drug tests. *See* Consolidated Findings ## 2 and 6. While recognizing an individual's privacy expectations, employees in Massachusetts maintain a reasonable expectation of privacy over information extracted from their urine, random drug testing policies have been deemed reasonable in situations where a claimant is engaging in safety-sensitive work. *See Webster*, 418 Mass. at 432–433 (1994), *see also* Board of Review Decision 0013 4991 21 (March 11, 2015). The claimant in this case was a non-CDL truck driver for the employer, a steel service center. Consolidated Finding # 1. As the claimant's job duties included operating an employer-owned vehicle, the facts indicate his position could be considered safety-sensitive. *See Webster* 418 Mass. at 433; *see also* Board of Review Decision 0013 4991 21 (March 11, 2015).² As such, the employer's "added interest in ensuring that [the claimant] not operate their motor vehicle while intoxicated by drugs . . . [is] sufficient to outweigh [the claimant's] privacy interests." Webster, 418 Mass. at 433. Given these facts, we conclude that the employer's expectation was reasonable.

As the employer has established a reasonable expectation and the claimant was aware of this expectation, the final issue is whether there is substantial and credible evidence to show that the claimant engaged in the misconduct in question. The claimant has maintained that he did not use cocaine. Consolidated Finding # 10. However, the review examiner deemed the claimant's testimony not to be credible. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). The record shows that the claimant did not undergo any

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

² Board of Review Decision 0013 4991 21 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

medical procedures where cocaine may have been used as a topical preparation within the week prior to the July, 2019, drug test. Consolidated Finding # 12. Further, the evidence offered by the employer's medical and drug testing experts establish it was not possible that the claimant's medications could have caused a false positive for cocaine, and the claimant did not provide any documentation indicating otherwise. Consolidated Finding # 15. As such, we believe the review examiner's credibility assessment is reasonable in relation to the evidence presented.

We do, however, believe the review examiner erred in finding that the false positive on the claimant's preemployment drug screening called into question the accuracy of the results of the July, 2019, drug test. The employer concluded that the initial screening at the claimant's pre-employment test was a false positive because the confirmatory test conducted by laboratory A was negative. Consolidated Finding # 4. In contrast, the confirmatory test conducted by laboratory A on the July, 2019, sample confirmed the positive results of the July, 2019, screening test. Consolidated Finding # 9. This supports that the initial result was accurate. This evidence further detracts from the claimant's contention that he did not use cocaine. Given the aforementioned, the employer has met its burden to show that the claimant engaged in misconduct.

The record before us establishes that the employer has a reasonable expectation that employees in safety sensitive positions such as the claimant be subjected to and pass random drug tests. The claimant was aware of this expectation, and failed to meet said expectation, by testing positive for cocaine. The drug test appears to have been properly administered, the claimant was offered the option of having a split sample tested, but he did not pursue this option.

Finally, there is no basis to conclude that there are mitigating circumstances for the positive drug test. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. See Lagosh v. Comm'r of Division of Unemployment Assistance, No. 06- P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28*. The claimant is presumed to have deliberately used cocaine, and the absence of mitigating factors indicates that he acted in wilful disregard of the employer's interest. See Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the employer presented substantial and credible evidence showing claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of July 21, 2019 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.



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DATE OF DECISION - May 22, 2020

Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020³. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

LSW/rh

³ See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.