

Delivery driver, who repeatedly disregarded the employer's safe driving expectations, was discharged after getting into an accident. Board held he was ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 affirm.

The claimant was discharged from his position with the employer on January 26, 2021. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 23, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner reversed the agency's initial determination and denied benefits in a decision rendered on July 3, 2021. 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 remanded the case to the review examiner to afford the claimant an opportunity to present evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued consolidated findings of fact and a credibility assessment. Our decision is based on our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's failure to follow safety guidelines while driving the employer's vehicle constituted deliberate misconduct in wilful disregard of the employer'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 assessments are set forth below in their entirety:

1. The claimant worked as a driver for the employer, a ground delivery company from July 1, 2020, until January 26, 2021.
2. The employer has a contract with an international shipping and delivery company.
3. The claimant worked full-time from Monday to Friday. He was paid a weekly salary of \$850.00. The claimant's supervisor was the manager.
4. The employer maintains a code of conduct, which is contained within the employee handbook.
5. The code of conduct prevents "negligence or improper conduct leading to damage of company-owned or customer-owned property" and "violation of safety or health rules."
6. Violation of the code of conduct may result in disciplinary action, "up to and including termination of employment."
7. The purpose of the policy is to prevent motor vehicle accidents and ensure the safety of the employer's drivers and other drivers on the road. The policy is also in place to ensure that the drivers remain in compliance with the laws about driving.
8. The employer also maintains the code of conduct to ensure that they do not lose their contract with the international shipping and delivery company because of unsafe driving.
9. The claimant received a copy of the code of conduct upon hire.
10. The claimant understood the purpose of the code of conduct.
11. The employer maintains a safety bonus plan.
12. The safety bonus plan provides "an outline for obtaining [their] bonus as well as a guide on what it takes to do [their] job safely and efficiently." According to the safety bonus plan, safe driving includes always wearing seatbelts, no preventable accidents or incidents, and no handheld electronic devices while driving.
13. If an employee adheres to the safety bonus plan, they are entitled to a monthly safety bonus.
14. Violation of the safety bonus plan can result in the loss of the safety bonus.
15. The claimant reviewed and signed the safety bonus plan on October 22, 2020.

16. The employer expects that all drivers act in accordance with the law, including following the rules of the road, not using a cellphone while driving unless both hands are free, and always wearing a seatbelt.
17. The employer also expects that its employees practice safe driving while on the job.
18. The claimant understood the employer's expectation.
19. The claimant knew that he could be fired for a pattern of unsafe driving.
20. The employer installs cameras in the trucks to monitor the drivers while they are at work.
21. If a driver is involved in an incident while driving, the employer receives a video of the incident within a half hour.
22. If a driver is involved in an incident, they are warned and required to complete a coaching session before returning to driving. The coaching session is completed electronically and recorded in a database.
23. Before the claimant's last day of work, he had four unsafe driving incidents.
24. On December 1, 2020, the claimant was recorded not wearing a seatbelt and using his cellphone while driving.
25. On December 29, 2020, the claimant was recorded not wearing a seatbelt.
26. On January 13, 2021, the claimant was recorded not wearing a seatbelt and using his cellphone while driving.
27. On January 22, 2021, the claimant was recorded not wearing a seatbelt.
28. On all four occasions, the claimant received a warning from his manager and was required to complete a coaching session before he could return to driving.
29. For three of the incidents, the claimant lost a month of his safety bonus.
30. On January 25, 2021, the claimant was in a motor vehicle accident while working.
31. The claimant took a right turn from a left turn only lane while exiting a parking lot and hit another vehicle.
32. During the incident, the claimant was not wearing a seat belt.

33. During the incident, the claimant had one hand off the wheel and was playing with an electronic scanner with his left hand.
34. The accident resulted in significant damage to the other driver's vehicle, and the employer being sued for \$4,800.00.
35. This stop was on a route that the claimant had driven before.
36. The accident was filmed by the cameras in the vehicle.
37. The employer determined that the accident was preventable.
38. The employer found the claimant at fault for the accident.
39. Based on the accident, and the claimant's driving record, the employer determined that the claimant was an unsafe driver.
40. The claimant was fired on January 26, 2021.
41. The claimant was fired in person by his supervisor. The supervisor told the claimant that he was at fault for the accident and that he posed a safety risk. The claimant denied it. The supervisor then showed the claimant the video footage of the accident. The claimant walked away and said that the employer would be hearing from his attorney.
42. The employer discharged the claimant from work because the claimant was involved in a preventable motor vehicle accident on January 25, 2021, by taking a right turn from a left turn only lane and because the claimant continued to display a pattern of unsafe driving habits, such as not wearing a seatbelt and not being handsfree while driving.
43. On March 23, 2021, the Department of Unemployment Assistance issued a Notice of Approval granting the claimant benefits under Section 25(e)(2) the Law commencing the week beginning January 24, 2021, as long as all other eligibility requirements are met. The employer appealed the Notice of Approval.

Credibility Assessment:

The employer and the claimant offered conflicting testimony on several topics. During the hearing, the claimant contended that he was not aware that he had been warned for unsafe driving on three of the four occasions. The employer's contention to the contrary is assigned more weight where the employer submitted the electronic records of the claimant's coaching sessions after each incident and videos of each incident.

The claimant contended that he did not know that he could be terminated for being at fault for a preventable motor vehicle accident and displaying a pattern of unsafe driving. The employer's contention to the contrary is assigned more weight where the employer submitted the employee handbook and the safety bonus plan, and the claimant testified that he had received both documents and understood the purpose behind the employer's policies and expectations.

The claimant contended that he was not aware that the lane he used to turn right was a left turn only lane. Such an assertion is not credible, where the video evidence submitted clearly shows a left arrow in the lane exiting the parking lot which the claimant used for a right turn. In addition, as this was a route the claimant had driven before, he should have known that this was a left turn only lane.

In addition, the claimant maintained that he had used his directional signal before he took the right turn, but the employer contended that he did not. After viewing the video evidence, it is impossible to tell whether or not the claimant used the directional, as his left hand is obscured during the moment when he would have switched on the directional.

The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's testimony was more specific and easier to follow compared to the testimony of the claimant during the hearing.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the 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 original 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. As discussed below, we affirm the review examiner's decision to deny benefits to the claimant.

The review examiner denied benefits after analyzing the claimant's separation under 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 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.

We note at the outset that "the 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). Consequently, under G.L. c. 151A, § 25(e)(2), the employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following our review of the full record and the consolidated findings of fact, we conclude that the employer has met its evidentiary burden.

In her consolidated findings, the review examiner found that the employer has a written Code of Conduct. Consolidated Findings ## 4–5. In part, this code is designed to prevent motor vehicle accidents and ensure that employees operate the employer's vehicles safely and in compliance with the relevant driving laws. Consolidated Finding # 7. The employer also maintains a "Safety Bonus Plan." Consolidated Finding # 11. Among other things, the "Safety Bonus Plan" required employees to wear seat belts and not use handheld electronic devices while operating the employer's vehicles. Consolidated Finding # 12. The claimant both understood the employer's Code of Conduct and reviewed and signed the "Safety Bonus Plan." Consolidated Findings ## 10 and 15. Consistent with both its Code of Conduct and Safety Bonus Plan, the employer expects to its employees to engage in safe driving while on the job, which includes always wearing a seat belt and refraining from using cell phones unless both of an employee's hands are free. Consolidated Finding # 16. The claimant was also aware of the employer's safe driving expectations. Consolidated Finding # 18.

The review examiner further found that, between December 1, 2020, and January 22, 2021, the claimant received four warnings for violating the employer's safe driving policies, including driving without a seatbelt and using his cellphone. Consolidated Findings ## 25 and 26. These violations resulted in the claimant losing his driving safety bonus on three occasions. Consolidated Finding # 29. He also was required to take a "coaching" session following each violation. Consolidated Finding # 22. On January 25, 2021, the claimant was involved in motor vehicle accident while driving a company vehicle. Consolidated Finding # 30. The review found that, at the time of the accident, the claimant was not wearing a seatbelt and had removed his left hand from the vehicle's steering wheel while playing with the vehicle's electronic scanner. Consolidated Findings ## 31–33. The employer discharged him after determining he was a safety risk based on his prior safety violations and the accident. Consolidated Finding # 39.

In rendering her consolidated findings, the review examiner provided a detailed credibility assessment rejecting as not credible several of the reasons offered by the claimant to justify his conduct. She noted that the claimant denied being warned for unsafe driving on three prior occasions, denied knowing he could be terminated for being at fault in a preventable motor vehicle accident, and that he was not aware that the lane that he used to turn right allowed for left turns only. Despite these contentions, the employer produced electronic records of the claimant's coaching sessions for the three prior incidents, the employee handbook, and the safety bonus plan, which the claimant acknowledged receiving, and a copy of the video showing the claimant turning right in a lane clearly marked as left turn only. The rendering of such credibility assessments is 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). We believe that her assessment is reasonable in relation to the evidence presented and see no reason to disturb the review examiner's findings.

Upon review of the record, we agree with the review examiner's initial conclusion that the claimant's conduct constituted deliberate misconduct in wilful disregard of the employer's interest. We note that the purpose of G.L. 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). In order 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). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield, 377 Mass. at 97.

The record establishes that the employer expected its employees to follow basic safety guidelines and laws while driving a motor vehicle. This expectation is inherently reasonable in this employer's business of providing personal ground delivery service by motor vehicle. The claimant was aware of the employer's reasonable expectation yet repeatedly violated this expectation despite numerous warning and coaching sessions. Such violations included the final incident which led to the claimant's discharge. Thus, the claimant was aware of the employer's safe driving expectation and intentionally violated these expectations. The review examiner's findings and credibility assessment lead us to further conclude the claimant presented no credible evidence of mitigating circumstances to justify his conduct.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct 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 affirmed. The claimant is denied benefits for the week ending January 24, 2021, 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 30, 2021



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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 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.

MJA/rh