

After hitting a pedestrian in a minor motor vehicle accident, the claimant drove her home in violation of the employer's expectation not to drive non-employees in a company vehicle. Nothing in the record indicates that this was an emergency or that there were any other mitigating factors requiring the claimant to do so. Held he was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), due to deliberate misconduct in wilful disregard of the employer's interest.

**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
Michael J. Albano
Member**

Issue ID: 0072 1835 39

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 August 13, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 26, 2021. 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 May 7, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest because he did not believe his actions would get him fired, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began working for the employer, an automobile parts wholesale company.

2. The claimant worked as the assistant manager at the times relevant to this matter.
3. The employer has a policy outlining Team Member Responsibilities which states, in relevant part: d. Store Drivers will not use company cellphones, GPS units and/or other devices while the company vehicle is in motion. Please be aware that personal cell phones and/or other devices including but not limited to iPads, iPods, kindles, tablets, etc. are prohibited from store delivery vehicles. h. No store Driver may carry non-[employer] passengers at any time. If an emergency requires you to transport a non-[employee] passenger, the passenger must wear a seatbelt.
4. The employer has a policy for reporting motor vehicle collisions while operating company vehicles. The policy states, in relevant part: 3) Call the police. All collisions, regardless of fault or severity, must be reported to police.
5. The employer handbook has a section titled Disciplinary Actions, which states the following: “If an [employer] team member fails to comply with any section of the policy or is involved in a collision that is deemed preventable, or a driving violation, progressive discipline will be used in order to correct the team member’s performance.
6. The policy includes “failure to report an accident/incident in a timely manner” under its examples of a major violation.
7. The handbook states, below its examples of major violations, “the following progressive discipline steps are recommended for specific driving performance issues... each driving violation/collision will be reviewed on a case-by-case basis and, depending on the circumstances surrounding a specific preventable collision and/or driving violation, more serious disciplinary action may occur, up to and including termination.”
8. On August 10, 2021, the claimant called the employer at 8:43 a.m.
9. On August 10, 2021, the claimant was involved in a motor vehicle collision with a pedestrian while operated a company vehicle.
10. The pedestrian did not want the police to come to the scene of the accident.
11. The claimant did not call the police to report the accident.
12. The claimant transported the individual whom he struck to her residence a short distance away from the site of the accident.
13. The claimant returned to the workplace and spoke about the accident with the general manager.

14. The following day the manager reported the incident to local police.
15. The employer expected the claimant to report the incident to police to ensure the safety of the employee and pedestrian, and for records of the company.
16. Accident protocols and procedures are in the dashboard of the company vehicle.
17. The claimant was aware of the employer's expectation that he reports the accident to police.
18. The claimant believed reporting the accident to his supervisor upon returning to the office was sufficient.
19. The employer expected the claimant would not have non-employee persons in the company vehicle outside of an emergency for both safety and liability purposes.
20. The claimant was aware he should not transport non-employee persons in the company vehicle.
21. The claimant believed he would be warned for transporting a non-employee person in the company vehicle.
22. On August 13, 2021, the employer discharged the claimant because of the August 10, 2021, incident.
23. The decision to terminate the claimant was made by the district manager.
24. On December 26, 2021, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification effective August 8, 2021, stating he was not eligible for benefits.
25. The claimant appealed the determination.

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 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 claimant is eligible for benefits.

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

“[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).

In this case, the employer discharged the claimant for his actions in connection with a motor vehicle accident using the company vehicle on August 10, 2021. Finding of Fact # 22. Specifically, while driving the vehicle, he hit a pedestrian, failed to call and report the accident to the police, and then he transported the woman that he hit to her home about a block away. *See* Findings of Fact ## 9–12. The actions of not calling to report the accident to the police and transporting a non-employee in the employer's vehicle violated the employer's written policies and procedures. *See* Findings of Fact ## 3 and 4.

We agree with the review examiner's conclusion that, because the employer imposes varying levels of discipline for violations of these policies depending upon the circumstances, the employer has not met its burden to show that the claimant knowingly violated a *uniformly enforced* policy. Alternatively, the claimant will be disqualified from receiving benefits if the employer shows that he engaged in deliberate misconduct in wilful disregard of the employer's interest.

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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

There is no dispute that, on August 10, 2021, the claimant was aware of both policies. *See* Findings of Fact ## 17 and 20. The review examiner failed to render a finding as to whether, at the time of the accident, the claimant had a phone that he could use to call the police. As he noted in his decision, this was a disputed fact. He seems to have resolved that conflicting evidence in the claimant's favor, as he states in the conclusion and reasoning section that the employer failed to present substantial and evidence that the claimant had a phone at the time. 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). We believe his assessment is reasonable in relation to the evidence presented.

Without a phone, the claimant did not have the ability to report the accident to the police at the time. This means that his failure to do so was not done in wilful disregard of the employer's interest, but due to mitigating circumstances. See Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control). We agree that he may not be disqualified from receiving benefits for this reason.

We next consider whether transporting a non-employee in a company vehicle, the pedestrian who was hit, was done deliberately and in wilful disregard of the employer's interest. The rule not to transport such individuals is reasonable, as it is driven by safety and liability concerns. See Finding of Fact # 19. Finding of Fact # 20 shows that that claimant was aware that he should not transport a non-employee in the company vehicle. Since there is no suggestion that the claimant transported her accidentally or that he forgot about the rule prohibiting this behavior, we can infer that it was done deliberately.

The review examiner reasoned that, although the claimant was aware of the expectation not to transport non-employees, he did not expect to be terminated for giving this woman a lift to her home a short distance away. And, because the claimant did not expect to receive such severe discipline, the review examiner decided that he was entitled to benefits. We disagree.

Nothing in the statutory terms of "deliberate misconduct in wilful disregard of the employer's interest" allows for the payment of benefits based upon the severity of discipline imposed. As noted in Garfield, the employer simply has to show that the claimant was aware of how the employer expected him to act or refrain from acting, and that the claimant failed to meet that expectation. See Garfield, 377 Mass. at 97.

The only question is whether his reason for violating the policy was due to a circumstance beyond his control such that there were mitigating circumstances for the behavior. Here, we see none. The policy does allow for transporting a non-employee in an emergency. See Finding of Fact # 3. However, there is no indication that there was an emergency. The claimant drove her home, not to a hospital.¹ It makes no difference that he transported her only a short distance. Nothing in the record indicates that the employer condoned any violation to its policy, however brief in duration or short the distance. The absence of any other mitigating factors indicates that the claimant 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 has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

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).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning August 8, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 18, 2022



Paul T. Fitzgerald, Esq.
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 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.

AB/rh