

**The employer did not prove that its discharge for poor work performance, including a final incident where the claimant failed to meet a delivery deadline, was done in wilful disregard of the employer’s interest. Therefore, the claimant may not be disqualified from receiving unemployment benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0077 8227 01**

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 affirm.

The claimant was discharged from his position with the employer on July 21, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 5, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency’s initial determination and awarded benefits in a decision rendered on September 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 nor 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 remanded the case to the review examiner to afford the employer an opportunity to participate in the hearing and offer evidence. 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 was not disqualified pursuant to G.L. c. 151A, § 25(e)(2), because he was discharged for poor work performance, 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 full time as a senior associate category management for the employer, a manufacturer/defense contractor, from approximately 12/21/2019 to 7/21/2022.
2. The employer is a critical supplier for the U.S. [Armed Service] and timely shipment of supplies can be a matter of national security.
3. The employer has a progressive disciplinary scheme. The scheme starts with a first written warning, then a final written warning and then a performance improvement plan (PIP). After successfully completing a PIP, an employee of the employer is on probation for six months.
4. On or about 11/9/2021, the claimant received a first written warning from the employer.
5. On or about 11/22/2021, the claimant received a final written warning from the employer.
6. The claimant was placed on a PIP by his supervisor ([A]) on or about 2/28/2022.
7. The claimant successfully completed the PIP on or about 6/17/2022.
8. No one informed the claimant that he was on probation after successfully completing the PIP on 6/17/2022.
9. There was no plan to discharge the claimant prior to 7/5/2022.
10. The claimant did not violate a rule or policy of the employer.
11. At the end of June 2022, a team which included the claimant was tasked to successfully complete a critical path action.
12. The claimant was tasked to ensure delivery of products to a customer on 7/1/2022. Part of the claimant's job was risk mitigation.
13. The claimant met with his team two times per week to ensure that they would successfully complete the task.
14. The claimant met with his manager on 6/29/2022 regarding the expectations of the employer.
15. The claimant was working with the team and the supplier to identify any nonconforming products.
16. The claimant identified nonconformance issues that would not allow shipment of the product without authorization from the quality engineer. The claimant identified these issues on or about Friday, 7/1/2022.

17. The quality engineer was not available on or about 7/1/2022 due to the holiday weekend. The claimant was not able to interface with the quality engineer until after the holiday weekend.
18. The claimant did not tell his manager about the nonconforming materials because they were raised on or about 7/1/2022. The claimant believed that he needed to bring the nonconformance issues of the product to the team.
19. The claimant did not intentionally fail to get the shipment out on 7/1/2022.
20. The claimant did not intentionally underperform his job.
21. On or about 7/5/2022, the employer reassigned the task of getting the shipment out to the customer to another employee. The other employee was able to perform the task in one hour.
22. [A] recommended that the claimant be discharged because of poor job performance, missing critical deadlines, failing to meet expectations, and underperforming which required jobs to be reassigned to other employees. Due to the short time period between completion of the PIP and what occurred regarding his work assignment for the beginning of July 2022, the employer pursued termination of employment.
23. [A]'s recommendation for the claimant's termination went to the legal department and it was approved.
24. On or about 7/21/2022, the claimant was discharged from his job with the employer for poor job performance, missing critical deadlines, failing to meet job expectations, and underperforming which required jobs to be reassigned to other employees.

#### Credibility Assessment:

In the remand hearing, the employer's human resources representative ([B]) testified that she believed that the claimant willfully failed to perform his job properly. [B] testified in the remand hearing that the claimant chose not to perform his job. [B] noted that the employer had been having challenges with the claimant for a few years and she felt that there was nothing preventing him from doing his job. However, [B] failed to provide any reasons that the claimant would purposefully underperform. [B] did not present any testimony substantiating the claimant willfully failed to perform his job properly.

In the remand hearing, the claimant testified that he did not purposefully underperform or fail to do his job properly. The claimant credibly testified in the remand hearing that regarding the task to ensure shipment on 7/1/2022, he could not ship nonconforming products. He testified in the remand hearing that the

quality engineer was not available to work with him regarding the quality of the materials. The quality engineer was not available due to the holiday weekend and therefore the claimant believed he could not ship the products on 7/1/2022. The claimant also credibly testified in the remand hearing that he felt that the issue had to go to the team on 7/5/2022. The claimant credibly testified in the remand hearing that he did not purposefully underperform or miss critical deadlines set by the employer.

Looking at the totality of the testimony and evidence presented, the claimant's testimony that he did not willfully and purposefully underperform or miss critical deadlines set by the employer is found to be more credible than the testimony of [A].

### 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 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 more fully below, we agree with 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).

Inasmuch as the employer has not asserted that its discharge was attributable to any policy or rule violation, the claimant may not be disqualified for knowingly violating a reasonable and uniformly enforced rule or policy under the above provision. *See Consolidated Finding # 10.*

Specifically, the employer discharged the claimant due to: poor job performance; missing critical deadlines; failing to meet expectations; underperforming, which required jobs to be reassigned to

other employees; and, apparently, because he had exhausted the employer's efforts to help him improve through a performance improvement plan. *See Consolidated Findings ## 22 and 24.* We do not question the employer's decision to terminate the claimant's employment. The only question before us is whether the discharge entitles him to unemployment benefits.

The Supreme Judicial Court has stated, “[when] a worker is ill equipped for his job . . . , any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). The review examiner explicitly found that the claimant did not intentionally underperform his job. Consolidated Finding # 20. Given this finding, the presumption is that the claimant was merely ill-equipped to perform his job up to the employer's standards and, thus, losing his job was not his fault.

We also consider the incident which triggered the claimant's separation, which was his failure to ship materials to a customer by July 1, 2022, as expected by the employer. *See Consolidated Findings ## 12, 16–19, and 21.* Nothing in the record suggests that, at the time that this task was assigned, the employer's expectation was unreasonable. The findings indicate that the claimant was aware of the expectation. *See Consolidated Findings ## 12 and 14.* It is also apparent that the claimant deliberately held up the order due to what he perceived to be a nonconforming issue, and the need to wait to discuss the problem until his team and the quality engineer were available the following week. *See Consolidated Findings ## 16–18.*

We must consider whether holding up the order was done in wilful disregard of the employer's interest. This means the claimant knew the conduct or inaction was contrary to the employer's interest. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted).

The review examiner found that the claimant did not intentionally fail to get the shipment out on July 1, 2022. Consolidated Finding # 19. As explained in her credibility assessment, this finding is based on the claimant's credible testimony that he believed that he was acting in furtherance of the employer's interest by holding up nonconforming products. In light of the fact that part of the claimant's job responsibilities included risk management and identifying nonconforming issues, it seems he was, in fact, acting in accordance with the employer's expectations, even if it clashed with another expectation to meet the deadline. *See Consolidated Findings ## 12 and 15.* Thus, we agree that the employer has failed to prove that the claimant's failure to ship the materials on time was done in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that it terminated the claimant for a knowing violation of a reasonable and uniformly enforced policy or 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 entitled to receive benefits for the week beginning July 24, 2022, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 11, 2023**

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  
(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](http://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