

**The claimant understood the employer expected him to clean the cab and bed of his work truck and to secure employer property. As the record showed the employer had a process for granting employees additional time needed to clean, and the claimant did not avail himself of this process, the review examiner reasonably rejected the claimant’s contention that the employer actions prevented him from complying with its expectations. Held the claimant’s continued failure to complete the tasks required of him constituted deliberate misconduct in wilful disregard of the employer’s expectation pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0078 2584 78**

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 separated from his position with the employer on September 2, 2022. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 10, 2023. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency’s initial determination and denied benefits in a decision rendered on April 5, 2023. 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 obtain testimony from the claimant, as he was unable to attend the initial hearing due to circumstances beyond his control. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 discharged for deliberate misconduct because he continued to leave trash and business documents in the cab of the employer’s truck, continued to smoke in the employer’s truck, and repeatedly failed to secure tools owned by the employer despite several warnings, 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. From February 4, 2021, until September 2, 2022, the claimant worked as a full-time (up to 40 hours per week with overtime on Saturday) construction assistant for the employer, a residential construction company.
2. The employer maintained a written policy, contained within its employee handbook, requiring its employees to clean the truck cab and bed on a daily basis. The employer retained discretion when disciplining its employees for policy violations.
3. The claimant received a copy of the employee handbook upon his date of hire on February 4, 2021.
4. The employer had a commonsense expectation that its employees would return the truck in a clean state (trash and debris in both the cab and bed are to be disposed daily) and not leave unsecured in the employer's truck beds/cab work machinery, tools, equipment.
5. The claimant was aware, as a matter of common sense, that the employer expected its employees to follow the employer's policy and the manager's verbal directives. The claimant was aware of this expectation when he underwent onboarding during his new hire orientation, and the numerous the written warnings the claimant accumulated from 2021 through 2022.
6. The claimant's construction assistant duties included: setup job sites, dismantle old decks, drive company truck to deliver materials to job sites, cleanup job sites, and mark footing locations.
7. The claimant received written warnings for various violations: failure to dispose of trash and debris in the truck's cab and bed, unsafe use and overloading the company truck, carrying a weapon (5" sheath [sic] knife) in company office and job sites, unauthorized use of company tools, failing to log in work hours and document tasks, charging personal expenses on company credit card and company accounts, leaving company tools and equipment exposed or unprotected, and leaving company office unlocked overnight.
8. On July 12, 2021, the claimant received a written warning when he failed to dispose of his trash that was left in the truck's cab, and left equipment and tools in the truck bed not properly secured. The claimant understood after signing the written warning that he could face further disciplinary action including termination of employment.
9. On July 16, 2021, the claimant received a written warning when he failed to dispose of his trash that was left in the truck's cab and failed to clean out the debris in the truck's bed. The claimant understood after signing the written

warning that he could face further disciplinary action including termination of employment.

10. On January 14, 2022, the claimant received a written notice to remove all trash and debris from the truck's cab, including old invoices. The notice reiterated that, per the company's policy, the truck's cab and bed are to be cleaned daily.
11. On January 28, 2022, the claimant received a written warning for failing to properly clean out all the lunch trash and debris in the truck's cab and bed on December 24, 2021, December 27, 2021, and December 29, 2021. The warning read, "Company Policy: All lunch debris will be removed from the trucks daily. Keep the truck clean of all debris and excess materials at all times. Remove all fasteners when removing debris from the truck bed." The claimant signed the warning, which further read, "I have read and understand the nature of these deficiencies / infractions and understand that if this behavior persists, further disciplinary action, up to and including termination of my employment, may occur."
12. On March 21, 2022, the claimant received a written warning for multiple incidents taking place between January 27, 2022, and March 14, 2022. The warning read, in relevant part, "Remove debris from the truck daily. 3/2. Banana, Lunch trash and others left inside the truck. Company Policy: All lunch debris will be removed from the trucks daily. Keep the truck clean of all debris and excess materials at all times. Remove all fasteners when removing debris from the truck bed." The claimant signed the warning, which further read, "I have read and understand the nature of these deficiencies / infractions and understand that if this behavior persists, further disciplinary action, up to and including termination of my employment, may occur."
13. As a result of having received numerous warnings, the claimant was aware that the employer expected him to return the truck on a daily basis in a clean condition and without debris and excess materials.
14. The employer has a policy: "make yourself available to the production manager via cell phone while working for the employer at all times during the day." This policy is embedded in the following written warnings dated July 12, 2021, July 16, 2021, January 28, 2022, and March 21, 2022.
15. At various times throughout his employment, on the following dates: July 12, 2021, July 16, 2021, January 28, 2022, and most recently March 21, 2022, the claimant was told by the production manager that he must notify the production manager when at the end of his shift if the truck cab and bed is not cleaned out and to request permission to stay later to clean the cab and bed.
16. At various times throughout his employment, most recently on March 21, 2022, the claimant was told to provide an explanation to the production manager as to the reasons why the truck was not cleaned prior to the end of the shift. The

production manager would then determine whether to grant extra time to clean the truck or allow the claimant to come in an off day to finish cleaning the truck.

17. The production manager would determine if extra time for truck cleanup is needed at the end of the shift. The production manager would review the next day work assignments if there was morning time allotted for truck cleanup, the cleanup would occur then.
18. On August 1, 2022, the claimant received a written warning for working unauthorized hours (9.18 hours) on July 2, 2022 (Saturday). The claimant and [sic] co-worker finished a demo job on July 2, 2022, the production manager told them to sign out when they returned to the yard. The co-worker signed out at 3:40 p.m.; the claimant signed out at 4:22 p.m.
19. The claimant did not receive permission from the production manager to stay late (overtime) on July 2, 2022, to clean out the truck.
20. On August 19, 2022, despite his awareness that he had been told to return the truck in a clean condition, the claimant returned the truck unclean: left in the truck's cab were cigarette butts, lunch trash, invoices, and tools and equipment were left in the truck's bed not secured away.
21. On August 20, 2022, after inspecting the vehicle, the production manager issued the claimant with a written warning on August 22, 2022. The written warning stated, in relevant part: "I've inspected Truck #2, (the truck that you operate on a daily basis) on 8/20/22. The same Truck that you've operated on Friday, August 19, 2022, and find it in abysmal condition. [. . .] The cab and bed of [the employer's] [t]rucks will be left free of any Lunch trash, Debris of any sort, all miscellaneous materials and documents on a daily basis." [. . .] "No smoking in [the employer's] trucks, on any job sites or on the [employer's] premises at any time."
22. On September 2, 2022, after further reviewing the claimant's disciplinary history, the production manager discharged the claimant for returning the truck in an unclean and unsecured condition on August 19, 2022.
23. On September 17, 2022, the claimant filed a claim for unemployment benefits with an effective date of September 11, 2022.

#### Credibility Assessment:

The claimant offered that, in the past, when he stayed late and cleaned up the truck, he was disciplined. That testimony is not credible and not supported by the record. The claimant received numerous written warnings for his failure to clean out the truck's cab and bed. The credible testimony from the production manager, which is corroborated by the submitted documentation, was that the claimant was disciplined for his failure to properly clean out the trucks. Furthermore, the

production manager credibly testified that the claimant was disciplined for working unauthorized hours (not approved overtime) when he cleaned out the truck on a Saturday without permission after the claimant and a co-worker were told to leave for the day by the production manager. The claimant asserted that he was in a non-tenable situation because if he failed to clean out/secure tools, equipment in the truck he would be disciplined---the claimant was disciplined for his repeated failures to clean out the trucks even after numerous warnings. The claimant alleged that when he informed the production manager, he was unable to clean out the truck before the end of his shift and he was disciplined. This testimony is not credible and not supported by the evidence. However, the production manager credibly testified that employees are not disciplined if they timely inform him/production manager and provide a reasonable explanation for not being able to clean out the truck at the end-of-the work shift. It is therefore concluded that the employer's version of events, which is supported by the documentary evidence in the record, constitutes the substantial and credible evidence in this matter. Accordingly, it is concluded that the claimant's contention that he did not clean the truck due to fear of being disciplined (particularly where he had received numerous warnings for engaging in that same conduct) is neither reasonable nor credible.

### 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 believe that the findings of fact support the review examiner's conclusion that the claimant is not entitled to benefits.

Because the claimant was discharged 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 record indicates that the employer retains discretion over issuing discipline for any infractions of its policies. Consolidated Finding # 2. As the employer did not provide any evidence showing it discharged all other employees who violated the employer's policies under similar circumstances, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the misconduct for which he was discharged. In this case the claimant was discharged because he repeatedly failed to clean the cab and bed of the employer's truck and failed to secure the employer's property, despite several warnings against continuing such behavior. Consolidated Finding # 22. At the remand hearing, the claimant stated that he did not take steps to clean the truck or secure the employer's tools from the truck bed, because the employer would not provide him with adequate time to complete those tasks. In so testifying, the claimant conceded that he had engaged in the misconduct for which he was discharged. Consolidated Finding # 20. Further, as the claimant testified that he chose to leave before completing these required tasks, his testimony confirms that his actions in so doing were deliberate.

However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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).

The claimant conceded that he understood that the employer expected him to remove all trash and business documentation from the cab of the truck, to clean the cab of the truck, and to secure all employer tools and other property. Consolidated Finding # 5. This confirms that he understood his decision not to complete these tasks was contrary to the employer's expectations.

The purpose of the employer's expectations were to minimize the risk of theft of company property, secure customer information, and ensure that employer equipment was properly maintained. Accordingly, we believe the employer's expectations in this regard are facially reasonable.

We next consider whether the record contained sufficient evidence to conclude that mitigating circumstances prevented the claimant from adhering to the employer's expectation. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

The claimant contended that the employer created a situation where he could not comply with the aforementioned expectations, because he would either be disciplined for failing to complete the tasks expected of him or would be disciplined for working beyond the scheduled end of his shift to complete those tasks. The review examiner rejected the claimant's contention as not credible,

because the warnings issued by the employer confirmed that the employer had a process in place for granting employees additional time needed to clean up after completing their workday. *See* Consolidated Findings ## 15–18, and 20. 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). Upon review of the record, we have accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

As the claimant did not avail himself of the process afforded by the employer for additional time to complete his work tasks, we believe that the consolidated findings do not support a conclusion that the employer’s actions, or any other circumstances beyond the claimant’s control, prevented him from complying with the employer’s reasonable expectations. *See* Consolidated Findings ## 19 and 20.

We, therefore, conclude as a matter of law that the claimant’s discharge was attributable to 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 of September 11, 2023, 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 - October 23, 2023**



Paul T. Fitzgerald, Esq.  
Chairman



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](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.

LSW/rh