

**Claimant failed to attend two mandatory meetings with the employer. Following the advice of legal counsel not to attend was a choice the claimant made and does not constitute a mitigating circumstance to justify his misconduct. Held the claimant's failure to attend the meetings was deliberate misconduct in wilful disregard of the employer's interest, and he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0079 2730 36**

### 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 19, 2023. He had filed a claim for unemployment benefits with the DUA, effective November 6, 2022. The underlying determination in this case, issued on February 23, 2023, disqualified him beginning January 15, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's determination and denied benefits in a decision rendered on May 13, 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 additional information regarding the claimant's separation. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest when he failed to attend two mandatory meetings regarding a motor vehicle incident, 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 bus driver for the employer, a state public transit authority, from November 1, 2017, until January 19, 2023, when he separated from the employer.
2. The claimant's direct supervisor was the superintendent.
3. The claimant was part of a union.
4. The claimant was required to maintain a commercial driver's license, Class B.
5. No written rules or policies were presented.
6. The employer maintained an expectation that drivers would maintain an active driver's license while in their employment.
7. The purpose of this expectation is to ensure all drivers were qualified to operate the vehicles.
8. The employer communicated the expectation to the claimant through its company handbook.
9. The employer maintained an expectation that employees would follow employer directives, including attending scheduled meetings.
10. The purpose of this expectation is to ensure all employees are following employer directives.
11. The employer communicated the expectation to the claimant through its company handbook.
12. The employer maintained an expectation that employees refrain from criminal conduct.
13. The purpose of this expectation is to ensure the safety of the public.
14. The employer communicated the expectation to the claimant through its company handbook.
15. The claimant's last physical day of employment was August 31, 2022.
16. On the morning of September 1, 2022, while the claimant was driving his personal vehicle to work, he was in a motor vehicle incident whereby the claimant drove over a pedestrian that was in the road.
17. The motor vehicle incident resulted in the pedestrian's death, the claimant's motor vehicle license being suspended, the claimant's arrest, and the claimant being charged with murder.

18. The claimant was immediately incarcerated following the incident.
19. On September 2, 2022, the employer placed the claimant on a suspension with pay when notified of the motor vehicle incident.
20. On September 2, 2022, the employer began an internal investigation into the motor vehicle incident which included obtaining police reports and speaking to legal counsel.
21. On September 6, 2022, the motor vehicle registry informed the employer that the claimant's license was suspended/revoked.
22. On September 7, 2022, the employer updated the claimant's job status to an unpaid suspension due to the suspension/revocation of the claimant's driver's license.
23. The claimant was released from incarceration on September 14, 2022.
24. On approximately September 16, 2022, the claimant made an impromptu visit to the superintendent's office to have a conversation.
25. During the September 16, 2022, conversation, the claimant informed the superintendent that that he was released from incarceration, he was doing well, and was looking to clear his name.
26. The claimant and superintendent did not discuss the claimant's job status during the September 16, 2022, conversation.
27. On approximately September 25, 2022, the superintendent called and spoke to the claimant by way of the claimant's son's mother's phone, whereby the claimant was notified that the employer was requesting an interview to discuss the September 1, 2022, motor vehicle incident.
28. During the phone call, the superintendent indicated the interview was mandatory, in which the claimant agreed to a September 27, 2022, scheduled interview.
29. The claimant knew that attending the interview was mandatory, because he was told it was mandatory by the superintendent.
30. The claimant was not informed of disciplinary consequences if he did not attend the September 27, 2022, scheduled interview.
31. Prior to the scheduled September 27, 2022, interview, the claimant was not provided with an agenda, rules, or exhibits.

32. The superintendent ensured the claimant would have union representation during the interview.
33. The claimant did not attend the September 27, 2022, scheduled interview.
34. The claimant did not notify the employer in advance that he would not be attending the September 27, 2022, scheduled interview.
35. The claimant did not inform the employer why he did not attend the September 27, 2022, scheduled interview.
36. Upon the claimant not appearing for the scheduled interview, the superintendent attempted to contact the claimant by telephone with the number on file to no avail.
37. Once the superintendent was unable to reach the claimant by telephone, the superintendent called and spoke with the claimant's union representative, Jose Cruz, about selecting a new date for the scheduled interview.
38. On September 27, 2022, the claimant's union representative confirmed with the claimant the scheduled interview would take place the following day, September 28, 2022.
39. On September 27, 2022, at 10:55 a.m., after the superintendent called and spoke with the union representative, the superintendent sent a follow up email to the claimant's union representative, and included the deputy director of labor relations, and the labor relations representative on the email, stating, "Per our conversation today, (Claimant) was ordered-in to report my Office today at 10am, and he was no show. As discussed, we will give him until tomorrow to show up as ordered. If (Claimant) does not report to the [Location] Superintendent's Office by the end of the business day tomorrow September 28, 2022, we will proceed with the disciplinary action and the paperwork will be sent by Certified and regular mail. Please confirm."
40. On September 27, 2022, at 10:58 a.m., the claimant's union representative sent an email response stating, "Good morning. Yes, not a problem to move on if he does not show by tomorrow."
41. On September 27, 2022, at 2:30 p.m., the chief operations officer sent an email to the superintendent, the deputy director of labor relations, and the labor relations representative, asking, "Did he say why he did not show up? He is out on bail."
42. On September 27, 2022, at 2:34 p.m., the superintendent sent a response email stating, "He is out on \$10,000.00 bail reduced from the original \$250,000.00."

He told the Union that he needs to consult with his lawyer. We agreed to give him until tomorrow.”

43. The claimant did not attend the September 28, 2022, scheduled interview.
44. The claimant did not inform the employer why he did not attend the September 28, 2022, scheduled interview.
45. The claimant did not notify the employer in advance that he would not be attending the September 28, 2022, scheduled interview.
46. After the claimant did not attend the September 28, 2022, scheduled interview, the superintendent reached out to the claimant’s union representative who stated the claimant informed him he did not appear because his lawyer informed him to not sign paperwork, his appearance was not required, and the scheduled interview would not change anything.
47. The claimant did not attend the September 27, 2022, and September 28, 2022, at the advice of his criminal defense attorney.
48. The superintendent immediately discussed the situation with the employer’s legal team, in which it was determined that the employer would move forward with the disciplinary process.
49. On September 28, 2022, upon not appearing for the scheduled interview, the superintendent sent the claimant a letter by certified mail, which outlined that the claimant did not appear for the two scheduled interviews, he was in violation of employer rules pertaining to the September 1, 2022, motor vehicle incident, and was placed on a 70-day suspension with the recommendation for discharge of employment.
50. On October 6, 2022, the claimant’s defense attorney for his criminal case sent a letter to the superintendent indicating, in part, that no one from the employer has contacted her, the notion that he did not cooperate with the employer was inaccurate and unfortunate, it was surprising the employer made a rush to try and terminate the claimant, and the claimant cannot make a statement concerning the events as is his constitutional right.
51. On January 19, 2023, the chief administrative officer sent the claimant a certified letter discharging the claimant from his employment due to being charged with murder, his driver’s license being suspended, and for failure to report for the two scheduled interviews as directed.
52. At the request of the claimant, on October 16, 2023, the claimant’s former union representative sent a letter to “whom it may concern” indicating, in part, that a deal was made with the superintendent that court documents would be submitted, and the termination would be done via US mail.

### Credibility Assessment:

It is undisputed that the claimant was in a motor vehicle incident that resulted in the death of a pedestrian, the claimant's arrest and charge of murder, and loss of his motor vehicle license. It is further undisputed that on approximately September 16, 2022, following his release from incarceration, the claimant went to speak to the superintendent, but no formal discussion on job status took place.

During the remand hearing, the superintendent provided direct and credible testimony that he called and spoke to the claimant in which it was confirmed the claimant would appear for the mandatory interview on September 27, 2022, to discuss the claimant's September 1, 2022, motor vehicle incident, consequences for missing the mandatory interview were not discussed, the claimant did not appear for the interview nor provide a reason to the employer as to why he did not appear, and that the claimant's union representative confirmed with the claimant the mandatory interview would be rescheduled for September 28, 2022. The superintendent provided further direct and credible testimony that the claimant did not appear for the September 28, 2022, interview, the claimant did not inform the employer as to why he did not appear, and the claimant's union representative indicated that after speaking with the claimant, the claimant indicated he did not appear for the mandatory interview because his criminal defense attorney stated to not sign paperwork, his appearance was not required, and the scheduled interview would not change anything. In support of his testimony, the superintendent provided a September 27, 2022, email communication with the claimant's union representative, in which the union representative stated, "Yes, not a problem to move on if he does not show by tomorrow" with regards to the pre-scheduled September 28, 2022, interview.

The claimant testified that he spoke with the superintendent by phone on approximately September 25, 2022, in which the superintendent requested he appear for a September 27, 2022, discussion in the office. The claimant further asserted that he spoke with his union representative asking for a ride to the scheduled interview whereby the union representative indicated he would speak to the employer so documentation could be provided to the claimant, then after the union representative spoke with the employer, the union representative informed the claimant that he did not have to go to the interview if he could just sign paperwork, in which the claimant responded that his defense attorney stated not to sign any paperwork, and that he could not go to the meeting because he was just released from jail, had no car, his license was suspended, and had nobody to bring him to the meeting. The claimant also indicated that the union representative stated that he spoke with the superintendent, documents would be sent by mail, and that he was never notified of a September 28, 2022, re-scheduled meeting. In support of this testimony, the claimant provided an October 6, 2022, letter from his defense attorney and an October 26, 2023, letter from his former union representative. However, neither document mentions the September 27, 2022, and September 28, 2022, scheduled interviews. Furthermore, it is not logical, if as the claimant alleged,

the claimant's union representative stated he did not need to attend the scheduled September 27, 2022, interview, and that he was never notified of the September 28, 2022, rescheduled interview, that the union representative would send a September 27, 2022, email to the superintendent indicating the employer could move on if the claimant did not attend the September 28, 2022, re-scheduled interview. As such, the superintendent's direct testimony and documentation is deemed more credible than the claimant's testimony.

### 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 review examiner's consolidated findings of fact support the conclusion that the claimant is not 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. . . .

"[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).

The employer did not provide any written policies or rules for us to review. *See* Consolidated Finding # 5. Moreover, the record fails to include evidence showing that others were discharged for similar policy violations. As such, the employer has not met its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* rule or policy. Alternatively, the employer may show that the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest.

In this case, the employer's reasons for discharging the claimant stem from a motor vehicle accident that occurred on September 1, 2022, which resulted in the death of a pedestrian. *See* Consolidated Findings ## 16 and 17. More specifically, the claimant was terminated because he was charged with the crime of murder, resulting in a suspension of his driver's license, and failure

to attend two scheduled meetings with the employer. *See Consolidated Finding # 51.* Because there is substantial evidence to support the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he failed to attend the two mandatory meetings, we need not address the other offenses.

The record reflects that the employer had an expectation that all employees attend scheduled meetings. *See Consolidated Finding # 9.* However, on September 27 and 28, 2022, the claimant failed to appear for two mandatory meetings with the employer to discuss the motor vehicle incident. *See Consolidated Findings ## 27–29, 38, and 43.* By failing to appear when directed to do so, the claimant engaged in misconduct. Since there is no evidence to suggest that his failure to attend the meetings was a mistake or inadvertent, we can infer that his actions were deliberate. *See Consolidated Findings ## 33–35, and 43–45.*

We next consider whether the claimant's misconduct was done 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). 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). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. *Id.* at 95.

There is no dispute that the claimant was aware of the employer's expectation that all employees follow a direct order to attend scheduled meetings. *See Consolidated Findings ## 9 and 11.* We believe that expectation to be reasonable to ensure that all employees follow the employer's directives. *See Consolidated Finding #10.*

However, the claimant will not be disqualified if the violation of the employer's reasonable expectation was attributed to mitigating circumstances. 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).

On remand, the claimant conceded that he did not attend the mandatory meetings because he was following the advice of his attorney. *See Consolidate Finding # 47.* Thus, the claimant chose to listen to his attorney rather than comply with the employer's expectations. It may be that the attorney's advice was intended to protect the claimant's constitutional right not to make a statement against interest which would be used against him in his criminal case. *See Consolidate Finding # 50.* We form no opinion about whether or not this was sound advice. It may have been the best personal decision for the claimant at the time. However, as it was his choice to stay away from the scheduled meetings, it was not due to circumstances which were beyond his control.

We, therefore, conclude as a matter of law 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).



The review examiner's decision is affirmed. The claimant is denied benefits for the week ending January 21, 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 - February 8, 2024**



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](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.

DY/rh