

**The claimant's failure to seek his supervisor's approval before performing work in another department was not done in wilful disregard of the employer's interest, where the claimant was caught up on his duties and believed he was helping his coworkers with the backlog, as he had previously been assigned to do in the past. The Board held the claimant's failure was nothing more than a lapse in judgment, and he was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0079 5389 73**

### 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 reverse.

The claimant was discharged from his position with the employer on March 17, 2023. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 12, 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 initial determination and denied benefits in a decision rendered on May 26, 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest, because the claimant assisted his coworkers in the quick lube department without his supervisor's authorization, 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 worked full time as a service mechanic for the employer, a new and used car dealership, from May 31, 2011, until March 17, 2023.

2. The employer has a written policy regarding its rules of conduct which includes sections relative to insubordination and fraud or dishonesty (the policy) that is contained within its employee handbook and is applied to all employees. The employee handbook is given to employees during orientation.
3. The policy was updated at some point prior to September 2021. The claimant was given a copy of the policy and signed an acknowledgment that he received it on September 3, 2021.
4. The policy addresses insubordination by stating, "Insubordination: We all have duties to perform and everyone, including your supervisor, must follow directions from someone. Employees must not refuse to follow the directions of a supervisor or member of management. If an employee has any concerns about following the instruction of his or her supervisor, the employee should raise that concern with the supervisor or another member of the management."
5. The policy also addresses fraud or dishonesty by stating, "Fraud, Dishonesty or False Statements: No employee or applicant may falsify or make any misrepresentations of fact on or about any customer documents, employment applications, resume, document establishing identity or work status, medical record, insurance form, invoice, paperwork, time sheet, time card, expense report, or other document. If you observe or are aware of such a violation, please report it to Human Resources immediately."
6. The purpose of the policy is to ensure that work is delegated to each employee fairly, and to promote an honest work environment.
7. The employer's manner of discipline for employees who violate the policy is determined on a case-by-case basis depending on the severity of the violation and the circumstances surrounding the violation.
8. The employer has not had a circumstance similar to that of the claimant in the past but has terminated other employees for failing to comply with the policy.
9. The employer has an expectation that employees will not perform tasks that have not been assigned to them or approved by a Supervisor or a Team Leader.
10. When technicians perform tasks not assigned to them by a supervisor, the employer potentially loses money by paying a higher rate to more experienced technicians for performing tasks usually assigned to lower paid technicians because not all technicians earn the same rate of pay.
11. The employer communicated its expectation that employees will follow the direction of their supervisors through its policy.
12. The claimant had not received any warnings or disciplinary actions in the past.

13. The claimant's position with the employer was unique.
14. The claimant was a highly paid, experienced auto technician who primarily performed repairs on used cars the employer was intending to resell. The vehicles the claimant primarily worked on were not registered and did not have license plates on them.
15. The claimant was paid as a flat rate technician, meaning the jobs he performed were given time parameters and a flat rate was paid for the job. For example, if the time allotted for repairing a taillight was 1 hour and the claimant completed the job in 15 minutes, the claimant was still paid for one hour and could use the remaining 45 minutes to complete other jobs for which he would also be paid.
16. Due to his skill and experience, the claimant was capable of performing, and being paid for, 100 hours of work in a 40-hour week.
17. Employees are given orders to service or repair cars (work orders) by Supervisor A, Supervisor B, or one of two Team Leaders.
18. Lower paid technicians were assigned lower-skilled duties such as oil changes and lube jobs on customer vehicles in the service and quick lube departments.
19. The claimant usually received his work orders from Supervisor B.
20. Sometimes Supervisor B would assign the claimant service orders to perform oil changes and other small services on customer cars when the quick lube department was backed up.
21. Supervisor B usually had Thursdays off each week.
22. On Thursdays when Supervisor B was absent, the claimant received work orders from Supervisor A.
23. On Thursday, March 16, 2023, Supervisor B was not at work and the claimant was caught up with his duties.
24. Usually when the claimant was caught up with his work orders, he would approach Supervisor A or Supervisor B and suggest work he could perform. Supervisor A or Supervisor B would approve the claimant's suggestion and issue a work order for the work to be performed.
25. On March 16, 2023, the claimant noticed the quick lube department was busy. The claimant did not speak to Supervisor A regarding assisting the quick lube department with their work orders.

26. On March 16, 2023, the claimant performed oil changes, tire rotation, and other small services on five vehicles that had not been assigned to him or approved by Supervisor A, or by one of the two Team Leaders.
27. On March 16, 2023, Supervisor A observed the claimant working on a customer vehicle that Supervisor A had not assigned to the claimant.
28. Supervisor A knew the claimant was working on a customer vehicle because the vehicle had license plate on it whereas the claimant usually worked on used cars that did not have registration plates.
29. Supervisor A asked the two Team Leaders who had assigned the customer vehicle to the claimant. Both Team Leaders told Supervisor A that they had not assigned the vehicle to the claimant to perform services.
30. Supervisor A asked the advisor of the service department how the claimant came to work on the customer's vehicle. The advisor told Supervisor A that he had seen the claimant take a service order out of the bin for the quick lube department.
31. Supervisor A investigated the services performed by the claimant on March 16, 202[3], and learned of an additional 4 service orders the claimant had taken from the quick lube department.
32. In the evening of March 16, 2023, Supervisor A contacted Supervisor B, the owner of the car dealership, and the attorney for the car dealership about the claimant violating its policies regarding insubordination and fraud. The decision was made by the employer to terminate the claimant.
33. On March 17, 2023, the claimant arrived at work and learned he was locked out of his computer system.
34. On March 17, 2023, the claimant was called into the Supervisor's office where he met with Supervisor A and Supervisor B. The claimant asked the Supervisors "Is this the reason I am getting fired?" The Supervisors told the claimant he was being terminated for performing duties of the quick lube department without authorization in violation of the employer's policy and was given his final paycheck. The claimant's response to being told he was terminated was, "I fucked up."
35. On April 20, 2023, the DUA issued a custom fact-finding questionnaire to the claimant asking the question, "Why did assign work to yourself without authorization from the service manager or supervisor?" To which the claimant replied, "... I asked Quick Lube if I could help them catch up with their work queue. They were behind in oil changes. ..."

## 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 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's actions amounted to deliberate misconduct in wilful disregard of the employer's interest.

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).

Based upon the record before us, we do not believe that the employer has met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. The findings show the employer had a written policy that included sections regarding insubordination and fraud and dishonesty, and that the claimant was aware of the policy when he was given a copy and signed an acknowledgment that he had received it. *See Findings of Fact ## 2 and 3.* However, as the findings further indicated, when determining the manner of discipline, the employer used its discretion on a case-by-case basis, and, thus, the employer has failed to establish that the policy was uniformly enforced. *See Finding of Fact # 7.* We now direct our attention to whether the claimant's actions constitute deliberate misconduct.

Here, the claimant was aware that his employer required that he perform services only on cars assigned to him by his supervisors or team leads. *See Findings of Fact # 17 and 24.* However, on March 16, 2023, the claimant performed services on five vehicles that were not specifically assigned to him by his superiors. *See Findings of Fact ## 25 and 26.* We can reasonably infer from the findings that the claimant's actions were intentional, as the claimant has previously sought his supervisor's permission for additional work orders when he was caught up on his initial assignments. *See Finding of Fact # 24.* Since the claimant performed maintenance services on orders of which he knowingly did not have the approval of his supervisor, his actions constitute deliberate misconduct. We now address whether the claimant's misconduct was in wilful disregard to 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.

The record reflects that the employer had an expectation that all employees perform tasks only assigned to them by their supervisor or team lead. *See* Finding of Fact # 9. The expectation was reasonable in light of the employer's need to avoid potential financial losses, by paying higher rate technicians to perform lower paying tasks. *See* Finding of Fact # 10. Although the claimant, a higher rate technician, was aware of the employer's expectation that employees are not to perform tasks unless they have been assigned by a supervisor or team lead, he took five orders out of the lube department's inbox and began to perform oil changes and other small service items. *See* Findings of Fact ## 11, 24 and 26. The claimant does not dispute that he took the orders, and the findings and record do not reflect any mitigating circumstances which would attribute to his misconduct. *See* Finding of Fact # 35.

However, we do not agree that the employer has met its burden of showing that the claimant's actions were in wilful disregard of the employer's interest. While the claimant was aware that he needed his supervisor's permission before performing any maintenance services on any unassigned automobiles, he noticed the quick lube department was busy. *See* Finding of Fact # 25. Since the claimant was caught up on his duties, and he noticed that the lube department was behind on their oil changes, he offered his assistance, as he had history of being assigned to assist them in the past. *See* Findings of Fact ## 20, 23 and 35. While the correct course of action would have been to seek out his supervisor's approval before performing mechanical services in a different department, we believe that the claimant's actions were nothing more than a lapse in judgment. "When a worker. . . has a good faith lapse in judgement or attention, 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, 377 Mass. at 97.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, nor did he knowingly violate a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 18, 2023, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 31, 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.

DY/rh