

**While the claimant continued to drive individuals served by the employer, he deliberately failed to alert the employer that his driver's license had been suspended for an unsafe driving record. Where he did so to avoid being removed from the schedule, held he engaged in deliberate misconduct in wilful disregard of the employer's interest. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0080 0949 50**

### 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 August 13, 2023. He filed a claim for unemployment benefits with the DUA, effective September 10, 2023, which was approved in a determination issued on October 6, 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 October 31, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he 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 afford the claimant an opportunity to participate in the hearing. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest by failing to maintain a safe driving record and an active driver's license, 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 residential direct care [sic] for the employer, a non-profit human service agency, from 8/31/2018 through 8/13/2023.

2. The employer's residential coordinator (the RC) supervised the claimant.
3. The employer expected that the claimant have a safe driving record and notify it if he lost his driver's license. The expectation was in place to ensure the safety of the individuals it served and to prevent monetary liability to the employer. The employer informed the claimant of the expectation when it provided him with his job description and job duties at the time he was hired.
4. As part of his job duties as residential direct care [sic], the employer required the claimant to drive individuals.
5. On an annual basis, the employer provided its insurance company with names of employees that were required to drive as part of their job duties. The insurance company ran a report and notified the employer of employees that could not be insured to drive.
6. During the claimant's employment, he worked part-time as a pizza delivery driver.
7. On an unknown date in 2018, the claimant's driver's license was suspended for unpaid tickets.
8. The claimant reinstated his driver's license on an unknown date in 2020.
9. The claimant continued working for the employer, driving individuals after his driver's license was suspended.
10. Although the claimant knew that he should notify the employer if his license was suspended, and knew that he needed the license to do his job for the employer, the claimant intentionally did not notify the employer that his driver's license was suspended because he believed the employer would remove him from the schedule.
11. The claimant's driver's license was suspended for a second time during his employment from 11/29/2021 through 12/11/2021.
12. The claimant did not notify the employer that he lost his driver's license and had it reinstated.
13. The claimant continued to drive for the employer when he did not have a driver's license.
14. On 8/4/2023, the employer's insurance company notified the employer that it could not insure the claimant because he failed the Massachusetts driver exclusion limit for incurring too many steps after having multiple speeding tickets and accidents.

15. The insurance company notified the employer that the claimant had six speeding tickets, one accident, was pulled over once for the vehicle [sic] was driving was unregistered and pulled over twice for driving without a driver's license.
16. On 8/13/2023, the vice president of human resources met with the claimant and discharged him for not having a safe driving record and for not notifying the employer when he lost his driver's license.
17. The claimant's two license suspensions were related to his part-time employment as a pizza delivery driver.

Credibility Assessment:

The claimant admitted at the hearing that his driver's license was suspended twice during his employment and [sic] continued to transport the employer's individuals. The claimant further admitted that he did not inform the employer of his license on either occasion. Also, he admitted that he was aware of the employer's expectation that he have a valid driver's license for his employment and understood the expectation. The claimant's direct testimony on these points is accepted as 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 agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Where a claimant is discharged from 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).

In this case, the employer discharged the claimant due to his unsafe driving record and for failing to notify the employer that his driver’s license had been suspended. *See* Consolidated Finding # 16. There was no dispute that the claimant was required to drive individuals served by the employer’s business as part of his residential direct care position, or that he had to maintain an active driver’s license and safe driving record. *See* Consolidated Findings ## 1, 3, and 4. There is also no question that at different times during his employment, he was driving these individuals while his license was suspended and did not notify the employer. *See* Consolidated Findings ## 7–9, and 11–13. Moreover, the insurance company report on August 4, 2023, revealed that the claimant’s driving record included numerous speeding tickets and a motor vehicle accident. *See* Consolidated Findings ## 14 and 15. This shows that he engaged in the misconduct for which he was fired. Inasmuch as the review examiner found that the claimant intentionally failed to notify the employer of the license suspension, we are also satisfied that the claimant acted deliberately.

However, deliberate misconduct alone is not enough. The employer must also prove that the misconduct was done in wilful disregard of the employer’s interest. Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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) (citation omitted).

The record shows that the claimant was made aware that he needed to have a safe driving record and knew that he needed an active driver’s license to work for the employer. *See* Consolidated Findings ## 3 and 10. Further, he knew that he was expected to notify the employer if his license had been suspended. Consolidated Finding # 10. Given that the employer was responsible for the safety of the individuals it served and could be exposed to liability if something happened while transporting them, these expectations were reasonable. *See* Consolidated Finding # 3. The question is whether the claimant has presented any mitigating circumstances for his unsafe driving record, driving without a valid license, and keeping this from the employer.

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 had six speeding tickets, one accident, had driven an unregistered vehicle, and had driven without a license. *See* Consolidated Finding # 15. As reflected in Consolidated Finding # 17, the claimant asserted that the two driver’s license suspensions stemmed from his employment as a pizza delivery driver for another employer. For purposes of our analysis, it makes no difference who the claimant was working for when he incurred these infractions. It was his decision whether or not to drive an unregistered vehicle and to drive without a license, and he was in control of how he drove. Further, not telling the employer about this driving record so that he would not be removed from the schedule demonstrates that he was acting willfully in his own self-interest — he wanted to keep working without regard to the employer’s safe driving

expectations. *See* Consolidated Finding # 10. Nothing in this record shows mitigating circumstances.

We, therefore, conclude as a matter of law that the employer has met its burden to demonstrate 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 beginning September 10, 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 - August 26, 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.

AB/rh