The employer commercial airline company fired the claimant from her DOT-regulated position as a flight attendant after she submitted to a random DOT alcohol screen immediately after landing from an overseas flight, and her breathalyzer test results were more than three times the employer's BAC limit. The claimant failed to show that this violation of the employer's drug and alcohol policy was due to mitigating circumstances. Accordingly, the Board disqualified her under G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0080 5783 58

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 reverse.

The claimant was discharged from her position with the employer on June 21, 2023. She filed a claim for unemployment benefits with the DUA, effective June 18, 2023, which was denied in a determination issued on July 14, 2023. 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 October 21, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 testify. Only the employer 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 employer had not met its burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule, or deliberate misconduct in wilful disregard of the employer's interest, when she exceeded the allowable limit in a random breathalyzer test, 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 for the employer, a commercial airline, as a flight attendant, from September 14, 2015, to June 12, 2023, with a rate of pay of $67.11 per hour.

2. The employer is a transportation company and is governed by federal Department of Transportation (DOT) rules and guidelines. The employer, and all employees, are required to comply with DOT regulations.

3. The employer and the DOT require compliance with random DOT drug and alcohol testing. The Blood Alcohol Content (BAC) limit for on duty flight attendants is 0.04%.

4. The employer maintains an anti-drug and alcohol misuse policy which states in pertinent part:

   Consuming [alcohol] in work areas at company facilities and office buildings while on duty is prohibited.

   Consequences of Positive Alcohol or Drug Tests:
   • Nothing in this section shall preclude the application of corrective and progressive disciplinary processes to address violations of other company policies or misconduct by a flight attendant.
   • A flight attendant who receives a positive test result for drugs or alcohol will be promptly removed from duty without pay, pending further investigation.

5. The claimant received the policies in her contract, during her annual training, and she testified to being aware of the expectations of the employer as well as the regulations.

6. On June 12, 2023, the claimant was notified upon landing from an eight and one-half hour overseas flight that she was required to take a random DOT alcohol screen. The claimant was administered a breathalyzer with BAC results of 0.121% on the first test and 0.129% on the second test, fifteen minutes later. The claimant informed the test administrator that she had ingested three Kombucha drinks during her flight and that she did not agree with the test results. The claimant requested they take her blood or urine for a more accurate test. Her request for an alternate test was denied.

7. On the [sic] June 12, 2023, the claimant was the German language translator for the flight. The claimant did not receive any complaints regarding her translation work. The claimant spoke with the captain several times and did not receive any negative feedback about her condition.

8. On June 12, 2023, the claimant was placed on unpaid leave pending an investigation, pursuant to company policy.

9. On or about June 15, 2023, the claimant met, via video conference, with the Inflight Service Supervisor (the claimant's direct supervisor), for an interview as a part of the investigation. The claimant told her supervisor that she was out with the crew on the layover and drank four vodkas'[sic] with soda and was back in her hotel room approximately thirteen hours before the time she was required to report for duty. The claimant stated that she did not drink any additional alcoholic beverages and did not bring any alcohol onto the airplane. The claimant stated that she drank three Kombucha tea beverages while working on the flight. The claimant told her supervisor that she believed that the fermentation in the Kombucha tea, combined with her hormone levels due to having her menstrual cycle, and medication that she was prescribed, but had not taken on the trip, caused the high-level BAC reading on the breath test.

10. The supervisor determined that, based on the facts of the BAC rising between the first and second tests, the claimant's body was still metabolizing the alcohol in her system, and therefore the claimant was not being truthful in her interview, and had consumed alcohol while on duty, in the recent time period before being tested.

11. On June 21, 2023, the claimant's employment was terminated due to violating the employer's alcohol policy.

Credibility Assessment:

The differences between the claimant's testimony at the first hearing and the employer's testimony at the second hearing are significant and relevant to the issue in dispute. The claimant testified that she did not consume any alcohol while on duty and proffered a completely unsubstantiated and not credible theory as to how her blood alcohol level could have been three times the legal DOT limit for a flight attendant. The claimant did not provide any documentation from her medical provider regarding her claimed conversation that either her prescribed medication or her menstrual cycle would falsely raise a breathalyzer test result, and if the claimant drank kombucha tea beverages over an eight hour period, it is highly unlikely that commonly available unregulated beverages sold in convenience stores would register at all on a breath test, regardless, a fermented tea certainly would not register at the extremely high BAC readings of the claimant. The employer's testimony was based on their written policy and regulations which were provided as well as the DOT BT results.

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. However,

as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the employer discharged the claimant, her 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).

To prove deliberate misconduct in wilful disregard of the employer's interest, the employer must first show that the claimant engaged in the conduct for which she was discharged. The employer in this case discharged the claimant for failing a random DOT alcohol screen that was administered to her after her plane landed from an eight and one-half hour overseas flight. *See* Consolidated Findings ## 6 and 11. The employer's drug and alcohol testing policy mandates that flight attendants submit to random DOT alcohol and drug testing. A BAC limit of 0.04% is imposed for on-duty flight attendants as required by the DOT regulations that regulate employee substance use. *See* Consolidated Findings ## 2–3. After landing from an overseas flight on June 12, 2023, the claimant's DOT alcohol screen with a breathalyzer returned results of 0.121% on the first test, and 0.129% on the second test, which was conducted fifteen minutes later. *See* Consolidated Finding # 6. The employer established that, by receiving two breathalyzer test results that were more than three times the BAC limit of 0.04%, the claimant engaged in the misconduct for which she was discharged.

Consolidated Finding # 9 provides that the claimant told her supervisor that she drank four vodkas with soda about 13 hours before the flight while out with the crew. Lacking any indication that the claimant's consumption of alcohol was accidental, and we see none, we can reasonably infer that her conduct was deliberate.

However, establishing 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) (citation omitted). 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).

Consolidated Finding # 5 provides that the claimant was aware of the employer's policy and DOT requirements about positive alcohol test results, including the expectation she not exceed a BAC limit of 0.04% while working as a flight attendant. *See* Consolidated Findings ## 4 and 5. Given that the expectation was based upon DOT regulations, we believe the employer's expectation to be reasonable.

During the first hearing, the claimant contended that not only could her consumption of the three kombucha tea drinks have contributed to a higher BAC and false positive test result, but that health conditions (including a slowed metabolism), medication she had been prescribed by her physician, and her menstrual cycle, could have all contributed to a higher BAC.[1] After remand, the review examiner rejected these assertions as "unsubstantiated" and "not credible." 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). We believe that the review examiner's assessment is reasonable in relation to the evidence presented.

As the review examiner noted in her credibility assessment, the claimant did not participate in the remand hearing or submit any corroborating documentation, such as a note from her physician, to confirm that the claimant's prescribed medication or menstrual cycle would raise her BAC and likely produce a false test result. In addition, the review examiner found that the claimant had reported to the employer that she had not taken her prescribed medication during the trip. *See* Consolidated Finding # 9.

Because neither the consolidated findings nor the underlying record includes substantial evidence that the claimant's alcohol use and BAC test results were due to factors over which she had no control, the claimant has failed to show that her deliberate violation of the employer's drug and alcohol policy was due to mitigating circumstances. The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law that the employer has met its burden to prove that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 18, 2023, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 20, 2024

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

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.

JMO/rh