The claimant worked as a class A driver for the employer trucking company. Because the claimant held a safety-sensitive position, he was subjected to the employer's random drug and alcohol testing policy. The employer discharged the claimant because he left a DOT testing facility before he could complete a random drug and alcohol test. Where the employer terminates all employees who refuse to take a drug and alcohol test, Board held claimant knowingly violated a reasonable and uniformly enforced policy. The employer also established the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. Therefore, the claimant is disqualified under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0081 0035 57

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 his position with the employer on August 22, 2023. He filed a claim for unemployment benefits with the DUA, effective August 20, 2023, which was denied in a determination issued on September 15, 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 13, 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 and produce evidence. 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 of proof to show that the claimant's discharge for refusing a random drug test was attributable to either a knowing violation of a reasonable and uniformly enforced rule or deliberate misconduct in wilful disregard of the employer's interest, 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 instant employer, a trucking company, as a Class A driver from December 22, 2020, to August 21, 2023, with a pay rate of $29.00 per hour.

2. The employer has a drug and alcohol policy in its handbook in conformance with the Department of Transportation (DOT) regulations. The employer and the DOT require compliance with random drug and alcohol testing to maintain licensure by the state and employment with the company.

3. The claimant received both the Employer Handbook and the Driver's Manual and signed a receipt on December 22, 2020.

4. On October 31, 2022, the claimant signed a consent form for the Federal Motor Carrier Clearing House to allow for random drug and alcohol testing.

5. On August 21, 2023, the claimant's manager contacted the claimant on his cell phone in the afternoon and informed him that he needed to report directly from his shift for a random DOT drug and alcohol test.

6. On August 21, 2023, the claimant reported to the DOT testing facility. The claimant was unable to produce a sufficient amount of urine for the urinalysis portion of the testing and the claimant was told to drink water and sit in the waiting room until he could produce a suitable sample. The claimant informed the technician that he was not able to urinate and that he was leaving. The technician told the claimant that if he left without providing a sample, the test would be deemed a refusal. The claimant left the testing site at 3:31 p.m.

7. On August 21, 2023, at 4:35 p.m., the claimant called his manager and informed her that he was unable to produce a sample for the urinalysis. He asked her if the test could be rescheduled. While the manager was speaking with the claimant, she received a call from the testing site. The manager told the claimant that she would call him back. The manager spoke with the test site and learned that they entered a refusal for the claimant because he left the facility. The manager called the claimant back and asked him if he left the testing site, and he said that he did because he did not have his phone with him, and the facility would not let him use their phone. The manager informed the claimant that due to the refusal, he could not report to work the following day.

8. On August 22, 2023, the human resource representative called the claimant and informed him that his employment was terminated, effective immediately, due to a failure of a random DOT screening.

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 he left shortly before the facility closed and only because they refused to allow him to use his phone to call his employer. However, the claimant's testimony is not credible. First, the manager testified that she contacted the claimant on his cell phone that afternoon to instruct him to report directly to the testing facility, therefore he either did have his cell phone with him, or he disobeyed the testing directives given to him and stopped prior to reporting to the testing site and left his phone somewhere. Secondly, the claimant's testimony of leaving shortly before the close [sic] of the facility is not accurate, as the employer provided the DOT testing documentation which shows the time the claimant left the facility as 3:30 p.m. The employer testified that the testing facility closes at 5:00 p.m. Further, based on the DOT documentation, the claimant waited over an hour to contact his employer to report that he could not provide a sample and request that the test be rescheduled. Finally, the employer provided documentation of the claimant's receipt of the Company's Handbook, and Terms of Employment.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 8 is vague and suggests the claimant was discharged for failing a random DOT screening. However, it is undisputed the employer discharged the claimant for leaving the DOT testing facility before he completed a random drug and alcohol test.[1] In adopting the remaining findings, we deem 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 reject the review examiner's legal conclusion that the claimant is entitled to receive 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 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. . . .

[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).

"[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 issue before us is not whether the employer was justified in terminating the claimant's employment, but whether he is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to "persons who are out of work . . . through no fault of their own." Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted).

The Supreme Judicial Court has held that, to establish a knowing violation, the employer must show that "at the time of the act, [the employee] was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still, 423 Mass. at 813. An employer does not meet its burden if the conduct was "'unintentional by virtue of being involuntary, accidental, or inadvertent.'" Id., *quoting* Still v. Comm'r of Department of Employment and Training, 39 Mass. App. Ct. 502, 510 (1995).

Here, the employer provided a copy of its employee policy and procedure handbook, which contains a drug and alcohol policy requiring all drivers, including the claimant, to submit to random drug and alcohol testing. *See* Consolidated Findings ##1–2; *see also* Remand Exhibit 11. According to this policy, all employees who refuse to submit to random drug and alcohol testing are discharged.[2] Arising from this policy is an expectation that employees will comply with the employer's random testing protocol so that they also follow all state and federal laws. *See* Consolidated Findings ## 2 and 4.

The Supreme Judicial Court has established guiding principles in discharge cases that involve drug testing. Safety sensitive work provides a sufficient business interest to justify random drug testing. *See*, *e.g.*, Webster v. Motorola, 418 Mass. 425, 432–433 (1994) (operating a motor vehicle is safety sensitive work; the job of a technical editor, whose work was checked by others, is not); Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 394 (1994). It is undisputed that the claimant worked for the employer as a Class A driver. Consolidated Finding # 1. Thus, he performed safety-sensitive work. As such, we believe that the employer's policy to be facially reasonable. Further, the findings establish that the claimant was aware of the employer's drug and alcohol testing policy, as he received the employee handbook and driver's manual on December 22, 2020, and subsequently signed a consent form on October 31, 2022, to allow for random drug and alcohol testing. Consolidated Findings ## 3–4; Remand Exhibit 11.[3]

Although the claimant reported to a DOT testing facility on August 21, 2023, for a random drug and alcohol test, he left without providing an appropriate urine sample to complete the test, even after he was informed that his leaving before doing so would constitute a refusal. Consolidated Finding # 6. The employer subsequently discharged the claimant on August 22, 2023, for leaving

[2] Specifically, Section 9.2 (12) of the employer's drug and alcohol policy, located in the employee policy and procedure handbook at page 34, states: "any driver failing or refusing to take and [sic] Alcohol or Drug Test will be terminated from employment." Remand Exhibit 11 is also part of the unchallenged evidence in the record.

[3] Along with the employer's handbook, Remand Exhibit 11 also includes the claimant's signed acknowledgement form, in which he attested to having received the employee handbook and driver's manual on December 22, 2020.

the DOT testing facility before he completed the drug and alcohol test, an act which the employer considered to be a refusal.

The claimant maintained that he did not refuse the drug and alcohol test, and merely left before he could complete the test because he did not have his cell phone with him, and the facility would not let him use their phone to contact the employer and request that the test be rescheduled. *See* Consolidated Finding # 7; *see also* Exhibit 2.[4] However, after remand, the review examiner no longer found this testimony to be credible. In her credibility assessment, the review examiner explained that the employer's witness provided direct testimony that called into question whether the claimant ever lacked access to his cell phone, and how the employer's testimony also undercut the claimant's other contentions that he left the testing facility because it was about to close for the day, and called the employer as soon as he gained access to his phone. *See* Consolidated Findings ## 6–7. 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). We believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The record establishes that the claimant refused to complete the random drug and alcohol test on August 21, 2023, and that he failed to offer any meaningful evidence that he was incapable of completing it. While the claimant alleged that he had been unable to produce enough urine to generate an adequate testing sample, he provided no evidence that this was due to a medical condition or any other circumstance beyond his control. In addition, the claimant's inability to produce an adequate urine sample does not explain why he left the DOT testing facility before completing the drug and alcohol test, where the employer established the claimant was at the DOT testing facility at least 90 minutes before it closed for the day. There is nothing in the record to explain why the claimant could not drink water in an effort to produce a suitable sample until the DOT testing facility closed. Instead, the record establishes that the claimant knowingly refused to take the random drug and alcohol test by leaving the testing facility before the test could be completed, in violation of the employer's policy. Nothing about the claimant's conduct can reasonably be viewed as involuntary, accidental, or inadvertent.

Where the employer provided evidence to show that it always discharges employees who refuse to take a drug and alcohol test, the employer has established its policy was uniformly enforced. Thus, the employer has met its burden to show the claimant engaged in a knowing violation of a reasonable and uniformly enforced policy.

The employer also established that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. The employer established, and the claimant acknowledged that, on August 21, 2023, he left a DOT testing facility before a mandatory random drug and alcohol test could be completed. The review examiner made a reasonable credibility assessment, accepting the employer's testimony over that of the claimant. Therefore, the record supports a conclusion

[4] Exhibit 2 is the claimant's fact-finding questionnaire response to DUA, dated August 29, 2023.

that the claimant engaged in the conduct for which he was discharged. As nothing in the record suggests that the claimant's conduct was inadvertent or accidental, we believe that the claimant acted deliberately.

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 review examiner made no specific findings of fact regarding the claimant's state of mind when he left the DOT testing facility and failed to complete the drug and alcohol test. A specific state of mind finding is not required where it is obvious from the conduct. *See* Sharon v. Dir. of Division of Employment Security, 390 Mass. 376, 378 (1983) (refusing to make a public apology is obviously intentional).

Here, the claimant received a copy of the employer's employee handbook, which contained its drug and alcohol policy, and he signed a form consenting to random drug and alcohol testing. Consolidated Findings ## 2–4. Thus, he was aware of the expectation to perform random drug tests, and specifically of the directive to do so on August 21, 2023. Consolidated Findings ## 2-5. As stated, we believe that the policy was reasonable.

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). In this case, the claimant's assertion that he left the test site early because he did not have a phone has been determined to be not credible. He offered no other mitigating circumstances. The absence of mitigating factors indicates that he 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 claimant knowingly violated a reasonable and uniformly enforced policy and engaged in deliberate misconduct in wilful disregard of the employer's interest as meant under G.L. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning August 20, 2023,[5] 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.

[5] In her decision, the review examiner determined that the claimant's eligibility began on Monday, August 21, 2023. We have modified the disqualification start date to reflect to appropriate week beginning date of Sunday, August 20, 2023.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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