

The claimant conceded he operated a forklift without a license and certification. Where he had previously been warned not to operate a forklift, he was aware that he was expected not to use it. His preference to use it to perform his warehouse duties did not constitute mitigating circumstances. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0081 5138 69

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 separated from his position with the employer on November 12, 2023. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 8, 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 February 29, 2024. 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 obtain additional evidence pertaining to the claimant's separation. 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 claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest because he was unaware that the employer expected him not to operate a forklift, 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. On June 11, 2023, the claimant started working full-time for the employer, a third-party logistics company at a papermill, as a yard jockey/driver. The claimant was scheduled to work the shift that ran from 6:00 a.m. until 6:00 p.m. The claimant was scheduled to work varying days of the week. The claimant was scheduled to work 4 days consecutively followed by 4 off from work. The claimant was paid \$25.00 per hour.
2. The claimant's supervisor was the Operations Manager.
3. The employer maintains a PIV Training Procedure Policy listing that employees are expected to obtain a forklift training certificate and forklift training license to operate the employer's forklifts. The employer has this expectation and maintains the policy to ensure safety in the workplace and to comply with Occupational Safety and Health Administration (OSHA) requirements.
4. The employer issues the forklift operation certificates and licensures to qualified employees who attend the required training. The employer has a Trainer on staff who issues the certificates and licensures to operate the forklifts at the employer's establishment.
5. The claimant did not obtain his forklift certification or licensure from the employer or watch video training in connection with operating the forklift.
6. The employer initially did not provide the claimant with the PIV Training Procedure Policy as the claimant's job duties as a yard driver did not require the claimant to operate a forklift.
7. Whether an employee is discharged from work for operating a forklift without certification and licensure is left to the discretion of the employer.
8. Prior to November 5, 2023, the claimant had inquired with the Operations Manager and General Manager about operating a forklift. The Operations Manager informed the claimant that the claimant was not required to operate a forklift to perform his job duties and advised the claimant not to operate a forklift as the claimant is not certified.
9. Approximately one month prior to the claimant's termination, the General Manager assigned the claimant to work on tasks at the warehouse sometimes. To complete tasks at the warehouse, the claimant used the employer's forklifts. The claimant was not required to use the forklift to complete tasks at the employer's establishment in the warehouse.
10. On November 5, 2023, the employer's Trainer observed the claimant operating a forklift while at work. On this date, the Trainer issued the claimant a verbal warning for operating a forklift without having the proper certification or licensure. On November 5, 2023, the Trainer provided the claimant with a copy

of the employer's PIV Training Procedure Policy regarding forklift certification and licensure requirements.

11. On November 10, 2023, the Operations Manager witnessed the claimant operating a forklift while at work. The Operations Manager instructed the claimant to get off the forklift and sent the claimant home for the day.
12. The claimant knew he was not permitted to operate a forklift at the employer's establishment without certification or licensure. The claimant was issued a verbal warning on November 5, 2023, by the employer's Trainer not to operate the forklift as the claimant was not certified nor had the licensure to operate the forklift.
13. The claimant's last date of work for the employer was on November 12, 2023. On this date, the employer discharged the claimant from work for operating a forklift without certification or licensure during an in-person meeting held by the Operations Manager and Human Resources Assistant.
14. The employer discharged the claimant from work because on November 10, 2023, the claimant operated a forklift at the employer's establishment without being certified or licensed to operate the forklift.

Credibility Assessment:

During the initial Hearing Session, the claimant contended that he did not know the employer expected the claimant not to operate the forklift, and that he was not issued any disciplinary warnings in the past by the employer for operating a forklift. However, the employer's contention to the contrary is assigned more weight where the claimant failed to participate in the continued Remand Hearing Session held on May 23, 2024, and the employer's testimony during the Remand Hearing Sessions was also more specific compared to the testimony that the claimant provided during the initial Hearing Session. The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's testimony was more specific and easier to follow compared to the testimony of the claimant during the hearing.

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 reject the review examiner's legal conclusion that the claimant is entitled to benefits.

Because the claimant was discharged from his 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).

While the employer maintains a policy prohibiting employees from operating a forklift unless they have the appropriate licensing and certification, it retains discretion over how to discipline employees who violate that policy. Consolidated Findings ## 3 and 7. As the employer did not provide evidence showing that it discharged all other employees who operated a forklift without the proper license and certification, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show the claimant engaged in the misconduct for which he was discharged. As the claimant conceded that he was operating a forklift in the employer's warehouse on November 10, 2023, there is no question that he engaged in the misconduct for which he was discharged. Consolidated Finding # 11. Further, because nothing in the claimant's testimony about using the forklift suggested that he did so by mistake, it is self-evident that his decision to operate the forklift on that day was deliberate.

However, the Supreme Judicial Court 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). 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).

Following remand, the review examiner accepted as credible the employer's contentions that the claimant was aware that the employer expected him not to operate a forklift because he did not have the proper license and certification. *See* Consolidated Finding # 12. 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). As both the employer's witnesses provided consistent and detailed testimony confirming that the claimant had not been trained to operate a forklift and had previously been warned that he was not permitted to operate the forklift, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Because the expectation not to operate a forklift without the required training and certificate is a safety measure consistent with OSHA requirements, the policy is reasonable. *See Consolidated Finding # 3.*

Finally, we consider whether the claimant has shown mitigating circumstances for his decision to operate a forklift on November 10, 2023. 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 did not provide any testimonial or other evidence suggesting that he was compelled by circumstances beyond his control to use the forklift to complete the tasks assigned to him on that day. *See Consolidated Finding # 9.* He was not required to use the forklift to complete any of his job duties. *See Consolidated Finding # 9.* His preference to utilize one to complete his tasks does not constitute a mitigating circumstance.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of December 31, 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



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.

LSW/rh