

**The claimant conceded she allowed an unauthorized individual to operate her company truck. As she understood from both her training with the instant employer and her Class A licensing process that unauthorized individuals were not allowed to operate Class A vehicles, 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  
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: 0081 7543 42**

### 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 separated from her position with the employer on December 21, 2023. She filed a claim for unemployment benefits with the DUA effective December 17, 2023, which was approved in a determination issued on January 18, 2024. 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 February 23, 2024. 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). 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 obtain testimony from the claimant, as she was unable to connect to the initial hearing due to technical issues beyond her control. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 was discharged for deliberate misconduct in wilful disregard of the employer's interest because she allowed an unauthorized person to operate an employer vehicle, 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 a class A driver for the employer, a transportation company, from November 9, 2023, until December 20, 2023.
2. The claimant's supervisor was the transportation manager (the TM).
3. The employer maintained a policy prohibiting unauthorized passengers from operating work vehicles. The policy was given to the claimant in an employee manual at hire. Violators of the policy are subject to discipline up to termination at the employer's discretion.
4. The employer maintained an expectation that employees would not allow unauthorized passengers to operate work vehicles. The employer maintained this expectation to comply with federal law and maintain a safe work environment. The claimant was informed of this expectation during training and through the employee manual. The claimant also knew from receiving her Class A license that unauthorized individuals should not operate a Class A vehicle.
5. On November 21, 2023, the claimant was issued a written warning for incorrectly completing service log hours.
6. On December 4, 2023, the claimant was completing a delivery to a customer business (the Business) in an employer truck.
7. The claimant was attempting to back up the truck on a hill.
8. A man (the Man) saw the claimant attempting to back up the truck and began giving the claimant directions.
9. The Man was not an employee of the Business or of the employer.
10. The Man offered to back the truck up for the claimant.
11. The Man told the claimant that he was a former employee of the employer and that he had a class A license.
12. The claimant moved to the passenger seat and allowed the Man to operate the truck.
13. The Man was not authorized to operate the truck.
14. The truck was equipped with a radio and the claimant had access to a phone.
15. The claimant did not ask a supervisor if it was acceptable for the Man to operate the truck.
16. The claimant did not tell the employer that she had allowed the Man to operate the truck.

17. The claimant allowed the Man to operate the truck because she was “stressed about time.”
18. Although the claimant was stressed, she still knew the employer’s policy and expectation that she not allow an unauthorized individual to operate the truck. She chose to allow the Man to operate the truck anyway.
19. Approximately one week later, the Business reported to the employer that the claimant had allowed the Man to operate the truck. The Business did not report who the Man was.
20. On December 20, 2023, the employer conducted a disciplinary hearing for the claimant’s conduct on December 4. The claimant admitted that she had allowed the Man to operate her vehicle. The claimant told the employer that she did not know who the Man was. The claimant did not tell the employer that the Man was a former employee. The claimant did not tell the employer that she had checked the Man’s license.
21. On December 21, 2023, the claimant was discharged for allowing an unauthorized driver on December 4, 2023.

#### Credibility Assessment:

The initial hearing and the remand hearing were held by telephone. The claimant did not attend the initial hearing. The claimant did attend the remand hearing with an interpreter. The account manager and the transportation manager attended the initial hearing and the remand hearing.

In the initial hearing, the employer provided detailed testimony concerning the policy, expectations, and final incident. The employer testified that the claimant was provided a link to an electronic copy of the handbook when she was hired. The employer provided consistent testimony in the remand hearing. The testimony was consistent with the employer’s pre-hearing questionnaires.

In the remand hearing, the claimant gave vague testimony. The claimant initially denied knowledge of the employer’s policy or expectation. The claimant testified that she did not receive the handbook. The claimant gave conflicting testimony on whether the policy was covered in her training. The claimant did admit that she was aware from receiving her class A license that unauthorized drivers could not operate her truck. Based on this admission, the employer’s credible testimony that the claimant was informed of the policy and expectation, and the claimant’s evasive and vague answers, findings of fact were made indicating that the claimant was aware of the employer’s expectation that she not allow unauthorized drivers.

The claimant admitted that she allowed the Man to drive the truck. The claimant was evasive in the reason that she allowed it. The claimant was asked directly in

the hearing if she was having difficulty in the maneuver and she stated that she was not. The claimant repeatedly stated that she allowed the Man to operate the truck because she was “stressed about the time.” The claimant could not explain how switching drivers would help save time if she was not having any difficulty with the maneuver.

The claimant testified that she only allowed the Man to operate the truck after checking his class A license. The claimant did not remember any details from the license, such as the Man’s name or the expiration date. The claimant did not provide a reason for checking the license in the first place. The claimant admitted that she did not tell the employer that she had checked the Man’s license. The claimant’s testimony that she checked the license is not credible.

The claimant admitted that she did not ask the employer for authorization for the Man to operate her truck. The claimant admitted that she did not call the employer. The employer credibly testified that the truck had a radio.

The claimant initially admitted that she did not tell the employer she had allowed the Man to operate her truck because they already knew when she returned. The employer consistently testified that they did not find out about the incident until approximately the next week when the Business told them. Based on the testimony, the claimant did not report the incident and the employer was not aware of the incident until the following week.

### 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 not eligible for benefits.

Because the claimant was discharged from her employment, her 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. . . .

“[The] 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 unauthorized individuals from operating company vehicles, it retains discretion over how to discipline employees who violate that policy. Consolidated Finding # 3. As the employer did not provide any evidence showing it discharged all other employees who allowed unauthorized persons to enter and operate company vehicles, the evidence presented is insufficient 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 she was discharged. As the claimant conceded that she allowed another individual to operate the truck even though she knew that he did not work for the instant employer, there is no question that she engaged in the misconduct for which she was discharged. Consolidated Findings ## 12, 13, and 21. Further, it is self-evident from the claimant’s own testimony that her decision to allow the other individual to drive her truck was deliberate. *See* Consolidated Finding # 12.

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). 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 rejected as not credible the claimant’s testimony that she was unaware of the employer’s policy prohibiting unauthorized individuals from operating company vehicles. *See* Consolidated Finding # 18. 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). Upon review of the record and based upon the inconsistencies the review examiner identified in the claimant’s testimony, we have accepted his credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner’s reasonable credibility assessment, we conclude that the claimant deliberately acted in a way that she knew was contrary to the employer’s expectations when she allowed an unauthorized individual to operate the employer’s truck. Her concern over the timeliness of her delivery does not alter her understanding of the employer’s expectations about vehicle operation and safety. Consolidated Findings ## 4, 17, and 18.

Finally, we consider whether the claimant articulated mitigating circumstances for her decision to allow an unauthorized individual to drive the truck. 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 she was compelled to cede control of her truck to the other individual. *See Consolidated Findings ## 10 and 17.*

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 affirmed. The claimant is denied benefits for the week December 17, 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 - May 31, 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](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.

LSW/rh