The claimant was discharged for drinking a beer while of premises on his lunch break and then returning to work with alcohol in his system. Where the employer's policy does not have language prohibiting such conduct, the claimant was not otherwise made aware of the employer's expectation to refrain from such conduct, and there is no evidence of intoxication, the employer has not shown that the claimant's misconduct was done in wilful disregard of the employer's interest. He is eligible for benefits 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

Issue ID: 0082 3145 60

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 reverse.

The claimant was discharged from his position with the employer on February 16, 2024. He filed a claim for unemployment benefits with the DUA, effective February 25, 2024, which was approved in a determination issued on March 27, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 27, 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 additional evidence pertaining to the employer's policies and expectations. 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law, where the totality of the evidence in the record establishes that the claimant was not aware of the employer's expectations.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The employer is a manufacturer. The claimant worked as a full-time machine operator for the employer. The claimant worked for the employer from 8/15/2022 to 2/16/2024.

2. The employer created a handbook. The handbook features a policy titled "Drug and Alcohol Policy." This policy was in effect on 2/16/2024. The claimant signed an acknowledgement of this policy on 8/11/2022. The policy reads, in part:

   [The employer] believes in and is committed to providing a safe working environment that is free from the harmful effects of drugs and alcohol.

   This policy applies to everyone who works at [the employer] in any capacity. Compliance with this policy is required as a condition of employment or continued employment with [the employer]. An employee violating this policy will be subject to disciplinary action up to and including immediate termination. The purpose of this policy is to outline company standards on the use, possession or sale of drugs or alcohol. This policy is meant to ensure a safe working environment and protect employees from injury and [the employer] from damage caused by an employee under the influence of drugs or alcohol.

   Employee use, possession, sale or distribution of drugs or alcohol while on company premises or reporting to work under the influence of drugs or alcohol will not be tolerated and will be subject to disciplinary action up to and including termination.

   The use, possession, sale or distribution of drugs or alcohol off the job is prohibited when the use affects the employee's on-the-job ability to do his/her job or directly affects the company's reputation, products or services.

3. The employer's Drug and Alcohol policy does not explicitly indicate that "employees are prohibited from having alcohol in their system when reporting to work." The employer's Drug and Alcohol policy does not explicitly indicate that "employees are prohibited from having alcohol during their lunch break or any other break."

4. The employer does not allow workers to have alcohol in their systems while they worked. The employer does not allow workers to drink alcohol while on break or lunch break regardless of whether the workers are punched out of work. The employer has these prohibitions in order to ensure worker safety. The employer had these prohibitions when the claimant worked for it. The employer determined that it communicated these expectations to its workers via its Drug and Alcohol policy.

5. The employer will always discharge workers who work with alcohol in their systems. The employer will always discharge workers who drink alcohol while on lunch break.

6. The employer allowed the claimant and its other workers to take a [sic] twenty-minute breaks in the mornings. The employer did not require the claimant and its other workers to punch out for this break. The employer allowed the claimant and its other workers to take a thirty-minute lunch break. The employer required the claimant and its other workers to punch out for this lunch break.

7. The claimant worked in the employer's plant. There is a restaurant (Restaurant 1) across the street from the employer's plant. Restaurant 1 has a bar. Restaurant 1 serves alcohol. Restaurant 1 has never served or sold [Brand A] soda.

8. The claimant worked on 2/16/2024. The claimant went on lunch break. The claimant punched out for this lunch break. The claimant went into Restaurant 1. The claimant procured a bottle of [Brand B] beer in Restaurant 1. The claimant drank the beer. The claimant then returned to work and operated the employer's equipment.

9. The employer's purchasing manager (Manager 1) had a lunch scheduled for 2/16/2024. The employer scheduled this lunch with its suppliers. The employer scheduled the lunch to happen at Restaurant 1.

10. Manager 1 went into Restaurant 1 for the scheduled lunch on 2/16/2024. Manager 1 observed the claimant in Restaurant 1. Manager 1 saw the claimant drinking a [Brand B] beer in Restaurant 1. Manager 1 then reported this to the employer's human resources director.

11. The claimant spoke to a certain worker (Worker 1) on 2/16/2024. The claimant told Worker 1 that another worker saw him drink alcohol that day.

12. The employer's human resources director spoke to Worker 1 on 2/16/2024 after he received the report from Manager 1. Worker 1 told the human resources director that the claimant spoke with him that day. Worker 1 reported that the claimant told him that another worker saw him drink alcohol that day.

13. On 2/16/2024, the employer did not assess the claimant via observation or any other method to determine whether the claimant experienced the effects of alcohol.

14. The employer discharged the claimant on 2/16/2024. The employer discharged the claimant because he drank alcohol on his lunch break that day.

15. The DUA sent a questionnaire to the claimant. The claimant filled it out and returned it. The questionnaire featured the question, "Did you consume alcohol on your breaks? Why?" The claimant responded in the questionnaire. In his response, the claimant reported, "11:45am that day lunch time I ran across the street to get lunch. I drank a [Brand A] Pineapple flower Soda."

16. The employer's human resources director contacted Restaurant 1 and inquired whether it sells [Brand A] soda. Restaurant 1 told the human resources director that it does not sell that product. Restaurant 1's regional manager wrote a note and gave it to the human resources director. The note reads, "[Restaurant 1] has never sold [Brand A] Soda at our location." The note features the regional manager's name, address, telephone number, and signature.

17. The claimant submitted a note to the DUA. The note reads, "To whom it may concern, I [person's name] work at [Restaurant 1]. I know [the claimant] personally from coming in on lunch times to pick up lunches. In all of the times I've seen him he has never had any alcohol or beer of any sorts. He would only drink a soda or juice if he had to wait for his lunch to be ready." The note reads, "Sign manager + bartender" followed by a signature and a telephone number.

Credibility Assessment:

Credibility assessment about whether the claimant drank alcohol on his lunch break on 2/16/2024:

In the hearing, the claimant testified that he did not drink alcohol while on his lunch break on 2/16/2024. Given the totality of the testimony and evidence presented, the claimant's testimony is rejected as not credible and it is concluded that the claimant drank alcohol in Restaurant 1 on 2/16/2024 because the employer submitted sufficient testimony and evidence to defeat the claimant's denial. In the hearing, the claimant testified that he drank [Brand A] soda. The claimant submitted a purported note from Restaurant 1's bartender to support his claim. In the hearing, the employer asserted that the claimant drank alcohol while on his lunch break on 2/16/2024. The employer relied on testimony from Manager 1 and Worker 1 and a note from Restaurant 1. Manager 1 testified that he observed the claimant in Restaurant 1 and that the claimant had a bottle of [Brand B] beer. Worker 1 testified that the claimant told him on 2/16/2024 that another worker saw him drink alcohol that day. The employer submitted a note from Restaurant 1 that indicates that it does not sell [Brand A] soda. Manager 1's testimony in conjunction with Worker 1's testimony and the written statement from Restaurant 1 defeats the claimant's testimony and the claimant's note. The claimant's note is not dispositive because the note does not indicate that the bartender served, observed, or monitored the claimant on 2/16/2024. Also, the claimant diminished his credibility because he asserted that he brought a [Brand A] soda into Restaurant 1 and that he drank this and not [a] [Brand B]. The notion that a restaurant and bar would allow a patron to bring his own beverage in is dubious and this assertion weakened the claimant's credibility.

Credibility assessment about whether the claimant knew he was not allowed to work with alcohol in his system and whether the claimant knew he was not allowed to drink alcohol on his lunch break:

> In the hearing, the claimant testified that he did not know that he was not allowed to work with alcohol in his system, and that he did not know that he was not allowed to drink alcohol while on his lunch break. Given the totality of the testimony and evidence presented, the claimant's testimony is rejected as not credible and it is concluded that the claimant knew he was not allowed to work with alcohol in his system, and that he knew he was not allowed to drink alcohol while on his lunch break. The claimant's testimony is rejected as not credible because he was untruthful about whether he drank alcohol at work on 2/16/2024. In the hearing, the claimant doubtless would have admitted that he drank alcohol on his lunch break if he indeed believed that he was allowed to drink alcohol on his lunch break. The claimant's testimony that he did not drink alcohol on his lunch break was an attempt to conceal the fact that he drank alcohol on his lunch break. The claimant's attempt to conceal the fact that he drank alcohol on his lunch break is affirmation that the claimant knew that he was not allowed to drink alcohol on his lunch break.

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. However, we reject the portion of the credibility assessment stating that the claimant was aware of the employer's expectations. As discussed more fully below, we do not believe that this portion of the credibility assessment is reasonable in relation to the evidence presented. We further reject the review examiner's legal conclusion that the claimant is not eligible for benefits.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 because he drank a beer during his lunch break on February 16, 2024. Consolidated Finding # 8. The employer believed that the claimant violated

its Drug and Alcohol Policy by reporting to work after his lunch break with alcohol in his system. Consolidated Finding # 4.

The employer's policy provides, in relevant part, that the "use, possession, sale or distribution of drugs or alcohol while on company premises or reporting to work under the influence of drugs or alcohol will not be tolerated. . . [and] [t]he use, possession, sale or distribution of drugs or alcohol off the job is prohibited when the use affects the employee's on-the-job ability to do his/her job or directly affects the company's reputation, products or services." Consolidated Finding # 2. It is undisputed that the claimant did not consume alcohol while on the employer's premises. Consolidated Finding # 8. Further, it has not been alleged that, when the claimant returned to work after consuming one beer at a restaurant during his lunch break, he showed any signs of impairment or being under the influence of alcohol, as that term is commonly understood. Consolidated Finding # 13. In light of these findings, and because the employer's policy does not explicitly state that employees are prohibited from having alcohol in their system when reporting to work, or that employees are prohibited from consuming alcohol during their lunch break, we cannot conclude that the claimant engaged in conduct that violated the employer's Drug and Alcohol Policy. Consolidated Finding # 3. Alternatively, we consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the employer must show that the claimant engaged in the misconduct for which he was discharged. On February 16, 2024, the claimant clocked out of work and had lunch at a restaurant, where he consumed a beer. Consolidated Finding # 8. After his 30-minute lunch, the claimant reported to work to continue his shift. Consolidated Findings ## 6 and 8. Inasmuch as the employer expected employees to refrain from drinking during their lunch break or having alcohol in their system when reporting to work, we agree that the claimant engaged in misconduct. Consolidated Finding # 4. We further believe that the misconduct was deliberate, as nothing in the record indicates otherwise.

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).

Here, the employer testified that it believed that the language in its Drug and Alcohol Policy effectively communicated to employees its expectation that they not report to work with alcohol in their system or drink alcohol while on their lunch break, whether or not they clocked out of work. *See* Consolidated Finding # 4. However, the employer's policy does not contain any language prohibiting employees from drinking a beer during their lunch break. Consolidated Finding # 3. Further, while the employer's policy prohibits employees from reporting to work under the influence, it does not contain any language prohibiting employees from reporting to work with alcohol in their system. Consolidated Findings ## 2–3. The employer contended that the

language prohibiting employees from reporting to work under the influence should be understood to prohibit employees from reporting to work with alcohol in their system. We disagree.

The phrase "under the influence" is commonly understood to mean that a person's blood alcohol content exceeds the legal limit set by statute, or that a person is exhibiting physical signs of intoxication. Thus, we do not believe that the language in the employer's policy prohibiting employees from reporting to work under the influence could reasonably communicate to employees the expectation that they cannot report to work with any alcohol in their system whatsoever.

The employer is not contending that it otherwise communicated its expectation to the claimant. Nonetheless, in his credibility assessment, the review examiner determined that the claimant was aware of the employer's expectation that he refrain from drinking alcohol during his lunch break and reporting to work with alcohol in his system. 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.)

In arriving at this credibility determination, the review examiner reasoned that the claimant's denial that he drank alcohol during his lunch break on February 16, 2024, indicates that the claimant knew his conduct was prohibited by the employer; otherwise, he would have admitted to drinking. We disagree with this determination, as it is unreasonable in relation to the evidence presented.

The employer has not shown that it communicated its expectation to the claimant either via its Drug and Alcohol Policy or by other means. Further, the claimant's denial that he was drinking, after it became evident that he could lose his job or his unemployment benefits, without more, is not indicative of knowledge of the employer's expectation at the time of the final incident on February 16, 2024. Rather, it appears that the claimant's denial stemmed from a desire to preserve his job and, later, his unemployment benefits.

Where the claimant had no knowledge of the employer's expectation that he refrain from consuming alcohol while on his lunch break or reporting to work with alcohol in his system, he may not be disqualified from receiving benefits. *See* Garfield, 377 Mass. at 97. We note that, in arriving at this decision, we form no opinion about the employer's decision to discharge the claimant in an effort to provide its employees with a safe work environment. *See* Consolidated Finding # 2. The only issue before us is the claimant's eligibility for unemployment benefits.

We, therefore, conclude as a matter of law that the claimant's discharge was not 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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 18, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 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.

SVL