

**The employer failed to prove that the claimant engaged in the alleged misconduct of lying about his cellular phone usage, for which it discharged him. Thus, the claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0083 2665 03**

### 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 July 22, 2024. He filed a claim for unemployment benefits with the DUA, effective July 14, 2024, which was approved in a determination issued on August 31, 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 September 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 afford the claimant an opportunity to testify and present evidence. Only the claimant 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 by lying about his personal cellular phone use while at work, 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 employer is a truck repair shop. The claimant worked as a parts runner and maintenance technician for the employer. The claimant worked for the employer from 10/10/2016 to 7/22/2024.

2. The employer's manager (Manager 1) supervised the claimant. The employer's president (President 1) also had supervisory authority over the claimant.
3. The employer's handbook features a policy titled "Personal Phone Calls." The policy reads: "The Company's telephone facilities must be kept clear for customer calls. Incoming personal phone calls need to be limited to family members and emergency situations. All other incoming calls will have messages taken in order that employees may return such calls on their own time. Employees may have their cell phones turned on while on duty[,] however, extensive use of cell phones for personal use, either talking or texting, will be grounds got [sic] disciplinary action at the exclusive discretion of the President or General Manager."
4. The employer presented its Personal Phone Calls policy to the claimant. The claimant read the policy before 7/22/2024.
5. The employer never presented a policy to the claimant that addressed dishonesty about work-related matters.
6. The employer presented an attendance policy to the claimant. The contents of the policy are unknown.
7. The employer presented a discipline [sic] document to the claimant on 7/18/2022. The document indicated that the claimant had poor attendance.
8. The employer never warned the claimant about his attendance after 7/18/2022.
9. The employer never told the claimant that he faced discharge if he did not improve his attendance.
10. The employer allowed the claimant to report late to work every other Monday. The claimant provided care for his children every other weekend and he sometimes had childcare responsibilities on these Mondays.
11. The claimant missed work on 7/15/2024, 7/16/2024, and 7/17/2024. The claimant missed work on these days because he was sick. The claimant reported all of these absences to Supervisor 1. The claimant did not miss work after 7/17/2024.
12. The claimant did not leave work early without permission on Thursdays and Fridays. The claimant had permission from the employer when he left work early.
13. The claimant has an infant son (Son 1). Son 1's mother worked at night. The claimant provided care for Son 1 at night.

14. The claimant worked on 7/22/2024. The employer assigned the claimant to wash service trucks. The claimant began to clean a truck. Son 1's mother called the claimant on the claimant's cellular telephone. The claimant placed the call on speaker. The employer's dispatcher approached the claimant. The dispatcher accused the claimant of sleeping. The dispatcher said, "You Puerto Ricans only sleep." Son 1's mother told the claimant over the speaker that Son 1 had a stomach ailment and appeared to be in severe pain. The claimant asked Son 1's mother to tell him what her plan was. President 1 then approached the claimant. President 1 ordered the claimant to hang up the telephone. The claimant hung up and put the telephone in his back pocket. President 1 asked the claimant why he was on his telephone. President 1 told the claimant that he had been watching the claimant. President 1 told the claimant that he had been standing near the claimant. The claimant told President 1 that he would have heard the conversation if he had been standing nearby. The claimant told President 1 that he had an emergency with his son. President 1 then pointed his finger in the claimant's face. President 1 bumped his chest to the claimant's chest. President 1 said, "I do not give a fuck who is in pain." Manager 1 was in the area. President 1 told manager 1 that the claimant was fired and to collect the employer's keys from the claimant.
15. Manager 1 talked to the claimant after President 1 announced that the claimant was fired. Manager 1 asked the claimant what happened. The claimant surrendered the employer's keys to Manager 1 and left.
16. President 1 discharged the claimant because he concluded that the claimant lied to him about a work-related matter on 7/22/2024.

#### Credibility Assessment:

President 1 testified in the hearing session held on 9/25/2024. The claimant did not attend that session. President 1 testified about why the employer discharged the claimant and provided details about what happened on 7/22/2024. The claimant testified in the remand session held on 11/6/2024. The employer did not attend that session. The claimant testified about why the employer discharged the claimant and provided details about what happened on 7/22/2024. Given the totality of the testimony and evidence presented, the claimant's testimony in its entirety is accepted as more credible than President 1's testimony because President 1 did not attend the remand session on 11/6/2024 and thus did not make himself available for cross-examination or additional questions from the examiner.

#### 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 ineligible 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).

As a threshold matter, the employer must demonstrate that the claimant engaged in the misconduct or policy violation for which he was discharged. The review examiner found that the employer discharged the claimant after it concluding that the claimant had lied about a work-related matter on July 22, 2024. *See Consolidated Finding # 16*. Specifically, the president of the company contended that the claimant had lied to him about the length of time he had spent on his cellular phone and the substance of his conversation with the other party. *See Consolidated Finding # 14*.

In his hearing decision, the review examiner had credited the employer's testimony and concluded that the claimant had lied about his cellular phone usage while at work. During the remand hearing, however, the claimant denied lying about any work-related matter at any time, including his cellular phone usage on July 22, 2024. After remand, the review examiner determined that the claimant's testimony was more credible than that of the employer. 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 record does not contain substantial evidence to support the employer's allegations that the claimant lied to him about any work-related matter, including his cellular phone usage. *See Consolidated Finding # 14*. Nothing in these consolidated findings shows that the claimant engaged in this conduct as alleged. In addition, nothing in this record supports the conclusion that the claimant violated the employer's personal phone calls policy on July 22, 2024. *See Consolidated Finding # 3*. According to this policy, employees were allowed to have their cellular phones turned on while on duty, and incoming personal calls were allowed, but limited to family members and emergency situations. *Id.* Because it is undisputed that the claimant's cellular phone use was limited to his speaking about an emergency concerning his infant son on July 22, 2024, he complied with the employer's personal calls policy. *See Consolidated Finding #14*. Given this

record, the review examiner's assessment is reasonable in relation to the evidence presented. Accordingly, the employer has failed to show that the claimant's discharge was attributable to misconduct or a policy violation.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that he knowingly violated a reasonable and uniformly enforced policy 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 July 14, 2024, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 26, 2024**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

JMO/rh