

When the claimant, an alcoholic, appeared for work slurring her speech, stumbling, smelling of alcohol, and admitting that she was “buzzed,” the review examiner reasonably rejected the claimant’s testimony that she was just tired. However, because the claimant was making sincere efforts to control her illness at the time, but was unable to do so, she established mitigating circumstances for her misconduct, and she is entitled to 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**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0083 8883 77

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 her position with the employer on September 26, 2024. She filed a claim for unemployment benefits with the DUA, effective September 29, 2024, which was denied in a determination issued on October 22, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on November 23, 2024. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal.

The issue before the Board is whether the review examiner’s decision, which concluded that the claimant, an alcoholic, violated the employer’s reasonable and uniformly enforced drug and alcohol policy when she reported to work under the influence of alcohol, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant is an alcoholic. She attended an in-patient treatment program in 2012 and an out-patient treatment program in 2013. She is a member of

Alcoholics Anonymous (AA). She has a sponsor and tries to attend daily meetings.

2. The claimant was maintaining her sobriety until 2023, when her sister died. She started drinking again after this event.
3. Prior to June 2024, the claimant had been diagnosed with stage 3 breast cancer and takes a number of medications, some of which help with anxiety and can cause her to feel tired.
4. On February 26, 2023, the claimant began working, as a banker I, for the employer, a financial institution. In July 2023, she was promoted to assistant branch manager. This was a full-time position.
5. The employer had a policy which disallowed coming to work [sic] under the influence of alcohol, as doing so could result in poor performance and an unprofessional appearance which could damage the employer's reputation.
6. The claimant received a handbook during her onboarding which included the above discussed policy.
7. The employer has discharged all employees whom it has found to have violated the above policy.
8. On November 29, 2023, and January 26, 2024, the claimant's branch manager noticed that the claimant was stumbling and slurring her words. He suspected that she might be under the influence of alcohol or some other drug but accepted the claimant's explanation that she was just tired.
9. On Sunday, September 22, 2024, the claimant attended a football party where she was drinking alcohol. She was given a ride home from the party around 2:00 a.m. and did not go to sleep until around 4:00 a.m.
10. When the claimant reported to work at 8:15 a.m. on Monday, September 23rd, the branch manager noticed that she was stumbling and slurring her words. He also noticed a smell of alcohol about her. He escorted her to her office where he asked if she was OK. She stated that she was just very tired because she went to bed very late. The branch manager suspected that she was under the influence of alcohol.
11. For the rest of the day, the branch manager had the claimant work primarily on paperwork while he and others provided serviced [sic] the clients with whom she normally would have worked.
12. Around 9:45 a.m., the Branch Manager spoke to the claimant again about her appearance and physical state of being. She stated that she was a little buzzed.

The Branch Manager suggested she go home for the day. The claimant declined to do so.

13. The Branch Manager attempted to reach the District Manager, his supervisor, who was on vacation, for direction on how to handle the situation with the claimant. He was unable to reach her. He also attempted to reach someone in human resources but was unable to reach anyone.
14. The claimant worked through her shift on Monday, September 23, 2024.
15. On Tuesday, September 24, 2024, the Branch Manager was able to speak with a generalist from human resources. He told her what he has [sic] observed the day before and that the claimant had admitted to being under the influence. She told him that she would get back to him by the end of the day. Around 3:45 p.m., she called the Branch Manager and informed him that the claimant would be discharged for reporting to work under the influence.
16. The termination did not take place until Thursday, September 26, 2024, as the employer needed to arrange for a Senior Manager to be present with the Branch Manager for the termination. On Thursday, September 26, 2024, the Senior Vice President of Market Analysis, the human resources generalist, and the Branch Manager met with the claimant and informed her that she was being discharged.
17. The claimant filed a claim with the Department of Unemployment Assistance (DUA) effective September 29, 2024.
18. On October 22, 2024, DUA issued a Notice of Disqualification stating that, under MGL c. 151A, Section 25(e)(2), the claimant was subject to disqualification for the period starting September 22, 2024, and until she worked for 8 weeks and earned an amount equal to or in excess of 8 times her weekly benefit amount.

[Credibility Assessment:]¹

The claimant's testimony that she was just tired and not under the influence of alcohol was not found to be credible for the following reasons:

- 1) When asked if she reported to work under the influence of alcohol, she avoided answering the question directly. Instead of answering yes or no, she testified that she had been drinking the night before, which does not necessary mean that she was not still under the influence of alcohol when she reported to work at 8:15 a.m.

¹ We have copied and pasted here the portion of the review examiner's decision that includes her credibility assessment.

- 2) When pushed by opposing counsel on the above point, the claimant again, rather than answering yes or no, questioned what it meant to be “under the influence.”
- 3) The record indicates that the claimant told the Branch Manager that she was “buzzed,” which is a term usually used to describe feeling the influence of an intoxicant, not just feeling tired.
- 4) The claimant is an alcoholic, which suggests that once she started drinking at the football party, she would have had difficulty stopping after just one or two drinks. She would be more likely to drink to excess, even to the point of still being under the influence the following morning.
- 5) The claimant’s appearance on Monday, September 23rd suggested that she was under the influence of alcohol. Based on testimony from the Branch Manager, and the employer fact finding, the claimant was stumbling and slurring her words and had an odor of alcohol about her.

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 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 findings of fact except as follows. We reject Finding # 7, as this is unsupported by the record. 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. However, as discussed more fully below, we disagree with the review examiner’s legal conclusion that the claimant is not entitled to benefits.

Because the claimant was terminated from her employment, her 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] . . . (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 for appearing at work under the influence of alcohol. *See* Findings of Fact ## 15 and 16. The employer maintained a policy that prohibits employees from coming to work under the influence of alcohol. *See* Finding of Fact # 5. We reject Finding of Fact # 7, which states that all employees are discharged for violating this policy. This is because the employer's Drug and Alcohol Abuse policy specifically states that any "violations of this policy are subject to disciplinary action up to and including termination." *See* Exhibit # 1.² On its face, the policy grants the employer discretionary authority as to the form of discipline. Because there is no evidence showing that other employees who engaged in similar behavior were also terminated, the employer has failed to meet its burden to show that the claimant violated a *uniformly enforced* rule or policy.

Alternatively, the employer may show that the claimant's actions constitute deliberate misconduct in wilful disregard of the employer's interest.

To prove deliberate misconduct in wilful disregard of the employer's interest, the employer must first show that the claimant engaged in the conduct for which she was discharged. The employer in this case discharged the claimant for appearing at work under the influence of alcohol. *See* Findings ## 15 and 16. On September 23, 2024, the employer's branch manager observed the claimant stumbling, slurring her words and noticed the odor of alcohol about her. *See* Finding of Fact # 10. A little later, the claimant admitted to her supervisor that she was "buzzed" from attending a party the night before. *See* Findings ## 9, 10 and 12. These facts, combined with the fact that she had been drinking alcohol at the party and did not leave until 2:00 a.m., constitute substantial evidence that the claimant had appeared at work under the influence of alcohol. *See* Finding of Fact # 9. Thus, the claimant engaged in the misconduct for which she was discharged. Since there is no indication that the claimant's consumption of alcohol was accidental, we can reasonably infer that her conduct was deliberate.

However, establishing 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) (citation omitted). 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).

The employer's policy prohibiting employees from entering the workplace under the influence of alcohol is reasonable, as it prevents poor work performance and protects the employer's reputation. *See* Finding of Fact # 5. Further, the claimant's acknowledgment of receipt of the employee

² The employer's Drug and Alcohol Abuse Policy is Exhibit # 1. While not explicitly incorporated into the review examiner's findings, this exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

handbook, which contains the policy, shows that she was aware of the employer's expectation not to report to work under the influence of alcohol. *See* Finding of Fact ## 5 and 6.

We next consider whether the record demonstrates mitigating circumstances for the misconduct. Here, the claimant does not contend that her misconduct was mitigated by her alcoholism. In fact, she denied the misconduct and asserted that her conduct was the result of her being tired due to lack of sleep. It is well settled that the defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found).

However, the review examiner rejected that assertion as unsubstantiated. The review examiner's credibility assessment concludes that the claimant's behavior was not the result of being tired, but rather that her behavior was the direct result of being under the influence of alcohol when she appeared at work stumbling and slurring her words. 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 review examiner's credibility assessment is supported by a reasonable view of the evidence.

Moreover, Finding of Fact # 1 provides that the claimant is an alcoholic. Because the claimant is an alcoholic, we must decide whether her alcoholism affected the willfulness of her behavior. In *Shepherd*, the Supreme Judicial Court considered whether alcoholism mitigated the willfulness of the misconduct for which the claimant was discharged. 399 Mass. at 740 (remanded to obtain evidence of the claimant's state of mind). *Shepherd* does not stand for the proposition that alcoholism is an absolute defense to disqualification under G.L. c. 151A, § 25(e)(2). If the employer can prove that the claimant either had control of her alcoholism, or that she refused to accept help in controlling it at the time of the misconduct, then the employer may meet its burden of proof that the claimant acted in wilful disregard of its interest pursuant to G.L. c. 151A, § 25(e)(2). *Id.* at 740. In the present appeal, the employer has not met its burden.

The review examiner found that the claimant had attended both in-patient and out-patient treatment programs for her disease, is a member of Alcoholics Anonymous with a sponsor, and maintained her sobriety for over ten years. However, she started to drink again in 2023, when her sister died. *See* Findings of Fact ## 1 and 2. Then, she was diagnosed with stage three breast cancer sometime prior to June, 2024. *See* Finding of Fact # 3. We can reasonably infer that she relapsed due to losing her sibling and this subsequent cancer diagnosis. *See* Findings of Fact ## 1–3 and 8. Thereafter, the record indicates that she continued to consume alcohol, appearing for work on two other occasions where she was observed slurring her speech and stumbling. *See* Finding of Fact # 8.

Thus, despite making sincere efforts to control her disease by attending daily Alcoholic Anonymous meetings and working with a sponsor, the record shows that the claimant was not in control of her alcoholism when she reported for work under the influence on September 23, 2024. *See* Finding of Fact # 1. Further, there is no evidence to suggest that the claimant deliberately and willfully refused to accept help in controlling her alcoholism at the time of the misconduct. *See*

Shepard, 399 Mass. at 740. Under these circumstances, we conclude that the claimant's alcoholism mitigated the willfulness of her misconduct.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest or for knowingly violating 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 ending September 28, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2025



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

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.

DY/rh