

**The review examiner reasonably rejected as not credible the claimant's testimony that he had not consumed alcohol and was not intoxicated while at work. His actions demonstrate he understood the employer expected its employees not to be intoxicated while working and his denial precluded him from presenting mitigating circumstances. Held 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: 334-FHHM-DRP2**

### 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 February 28, 2025. He filed a claim for unemployment benefits with the DUA, effective March 9, 2025, which was denied in a determination issued April 25, 2025. 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 June 27, 2025. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 about the reasons for the claimant's separation. Only the employer 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 employer had not shown that the claimant reported to work while 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 consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant worked for the employer, an emergency services organization as a full-time construction supervisor from approximately September 2024, until approximately February 28, 2025, when he separated from the employer.
2. The claimant's direct supervisor was the general manager (employee A).
3. No written rules or policies were presented.
4. The employer maintained the expectation that employees would remain drug/alcohol free when working, including when working on-call.
5. The purpose of the expectations was to ensure employees maintained a safe state of mind when providing emergency services.
6. The employer communicated the expectations to the claimant through the employee handbook upon hire.
7. The claimant is not an alcoholic.
8. The claimant has been treated for alcohol related issues.
9. The claimant was admitted to [Hospital A] from February 14, 2025, through February 19, 2025.
10. During his employment, the claimant did not work at a job site (job site A) that caused him to walk over asbestos, arsenic, lead, dead bodies and then contact State or Federal government agencies regarding job site A.
11. During his employment, employee A did not arrive at job site A with a gun, point the gun at the claimant, call the claimant names, and say the claimant would rot and not receive a dime.
12. On February 27, 2025, employee A discovered the claimant passed out in a vehicle while he was working and smelled alcohol on the claimant.
13. Employee A asked the claimant if he had been drinking.
14. The claimant admitted to employee A that he was drinking.
15. On the evening of February 27, 2025, employee A notified the chief business officer (employee B) that he discovered the claimant passed out in a vehicle while he was working, that the claimant smelled of alcohol, and the claimant admitted to drinking when questioned.
16. On the morning of February 28, 2025, employee B called the claimant into an in-person meeting, at which time the claimant admitted to drinking during his February 27, 2025, shift.

17. Employee B offered the claimant assistance with treatment such as detoxification and counseling, but the claimant declined.
18. When speaking to employee B, the claimant admitted to having a drinking problem but could not stop.
19. Employee B informed the claimant that he was being discharged from his employment for drinking during his scheduled shift.

Credibility Assessment:

During the original hearing, the claimant asserted that he called government agencies and employee A regarding walking over asbestos, arsenic, lead, and dead bodies at a job site (job site A), which caused employee A to arrive to job site A with a gun, point the gun at the claimant, call the claimant names, and said the claimant would rot and not receive a dime. The claimant further asserted he was hospitalized due to working at job site A, that in February 2025, he had a beer when off the clock but was called back into work and that employee A discharged the claimant for drinking alcohol when he was off the clock, and for betraying the employer by speaking to government agencies. During the remand hearing, the chief business officer (employee B) provided credible and consistent testimony that during the claimant's employment he did not work at a job site that included asbestos, arsenic, lead, and dead bodies, that there was no notification the claimant ever contacted government agencies, and that employee A did not arrive at job site A with a gun. Employee B further credibly and consistently testified that on February 27, 2025, employee A discovered the claimant passed out in vehicle smelling of alcohol while working, and when questioned by employee A, the claimant admitted to drinking. Lastly, employee B provided credible and consistent testimony that when he spoke to the claimant on February 28, 2025, the claimant admitted drinking during his February 27, 2025, shift, declined employer assistance regarding alcohol treatment, and was subsequently discharged for drinking during his shift. It is not reasonable or logical that if the claimant was admitted to the hospital following working at job site A, he would be unable to provide medical documentation supporting his testimony. Furthermore, it is not reasonable or logical that if the claimant worked at job site A, that employee B would indicate no such event occurred. Lastly, it is not reasonable or logical that if the claimant was discharged for drinking alcohol when he was off shift, and for betraying the employer by speaking to government agencies, that employee B would have detailed information regarding a February 28, 2025, discharge conversation, whereby the claimant admitted to drinking on February 27, 2025, and was subsequently fired for said act. As such, employee B's testimony is deemed more credible than that of the claimant's testimony.

## 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).

The employer did not present any specific policy prohibiting employees from reporting to work while intoxicated. Consolidated Finding # 3. As such, it has not met its burden to show a knowing violation of a reasonable and uniformly enforced rule or policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged.

In this case, the claimant was discharged for reporting to work while under the influence of alcohol on February 27, 2025. Consolidated Findings ## 16 and 19. Following remand, the review examiner rejected as not credible the claimant's testimony that he had not reported to work under the influence of alcohol on February 27, 2025. *See* Consolidated Findings ## 12–14, and 16. 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, we believe that the review examiner's assessment is reasonable in relation to the evidence presented.

Pursuant to the review examiner's credibility assessment, Consolidated Findings ## 12, 14, and 16 confirm that the claimant engaged in the misconduct for which he was discharged. As the claimant chose to report to work after consuming alcohol, we can reasonably infer that his decision to do so was deliberate.

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). 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). 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 maintained an expectation that employees would not report to work while under the influence of alcohol. Consolidated Finding # 4. This expectation is facially reasonable as it serves to ensure its employees are safe while providing emergency services to clients. *See* Consolidated Finding # 5.

There is no explicit finding as to whether the claimant was aware of the expectation not to report to work while intoxicated. However, the claimant testified that, at some point in February 2025, when employee A called him into work, the claimant volunteered that he had already consumed a beer. We can reasonably infer from this statement that he said this because he was aware of the employer's expectation not to work under the influence.<sup>1</sup>

We finally consider whether the record indicated the presence of mitigating circumstances. On remand, the claimant maintained that he did not report to work while intoxicated. 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). His denial precludes him from demonstrating mitigating circumstances for his wilful misconduct.

We, therefore, conclude as a matter of law that the employer has met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

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<sup>1</sup> While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week of March 9, 2025, 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 - October 20, 2025**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

**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