

The claimant was discharged because the employer concluded she was intoxicated in the workplace. Because the three breathalyzer tests it conducted appeared unreliable, and the claimant provided medical evidence explaining that an inflated reading may be related to using her prescribed inhaler, the employer did not meet its burden to show that the claimant engaged in the misconduct for which she was fired. Therefore, the claimant 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**

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

Issue ID: 334-FHHV-M489

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 separated from her position with the employer on September 26, 2024. She filed a claim for unemployment benefits with the DUA, effective September 22, 2024, which was denied in a determination issued on January 17, 2025. 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 April 29, 2025. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 not entitled to benefits because she knew her decision to work while under the influence of alcohol was contrary to the employer's reasonable expectations, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the instant employer as a Surgical Technician from 8/29/2022 until her last physical day of employment on 9/13/2024.

2. The employer has a policy titled Substance Abuse/Fitness for Duty which informs employees that the employer maintains a drug and alcohol free work environment that ensures a safe, healthy, productive and efficient environment for colleagues, patients and visitors. Employees are prohibited from reporting to work in a condition free from being [sic] under the influence of alcohol or drugs. The employer's policy prohibits reporting to work after consuming alcohol or drugs.
3. The employer's Substance Abuse/Fitness for Duty policy explains that the employer conducts alcohol/drug testing for reasonable suspicion of being under the influence.
4. Violation of the employer's Substance Abuse/Fitness for Duty will result in disciplinary action up to and including termination of employment, even for a first offense.
5. The claimant was provided with the Substance Abuse/Fitness for Duty in writing at the time of hire.
6. On 9/13/2024, the Operating Nurse informed the Nurse Manager that the claimant eyes had been closing while working. The claimant had been [sic] worked approximately 4 hours into her shift.
7. The Nurse Manager called the claimant into her office and the claimant told the Nurse Manager that she did not feel well.
8. While speaking to the claimant, the Nurse Manager noticed that the claimant kept closing her eyes, fumbled with words and was blowing her nose.
9. The Nurse Manager asked the claimant if she had been drinking alcohol and the claimant told the Nurse Manager that she does not drink alcohol.
10. The Nurse Manager did not smell alcohol on the claimant's breath.
11. The claimant was wearing a surgical mask while speaking to the Nurse Manager.
12. The claimant had been crying prior during her shift because she had been having a difficult time with [sic] passing of her husband months prior.
13. The Nurse Manager decided to send the claimant for an alcohol and drug test because she seemed impaired and unfit for duty.
14. The Nurse Manager completed a Visual Observation Checklist which stated she observed the claimant staggering, rambling/slurred speech, sleepy, drowsy, eyes closed, pale and fumbling.

15. The claimant signed a written consent to submit to drug and alcohol screening through the employer's Employee Health Department.
16. The claimant used her prescribed Albuterol inhaler to assist with breathing and a cough.
17. According to medical documentation from the claimant's doctor, Albuterol can cause a false positive breathalyzer test since some inhalers contain a very small amount of alcohol as a cosolvent. The increase in blood alcohol content (BAC) is small and transient usually within 3-5 minutes of taking the inhaler and tends to drop down to normal levels within 5 minutes.
18. The claimant took a breathalyzer test at 17:07 producing result which showed an alcohol content of 0.010.
19. The claimant took a second breathalyzer test at 17:28 producing a result which showed an alcohol content of 0.080.
20. The claimant did not use her Albuterol inhaler in between breathalyzer tests.
21. The employer's hospital security transported the claimant back to her home.
22. The employer placed the claimant on administrative leave while they investigated the matter.
23. The employer paid the claimant her accrued vacation and personal time while the claimant remained out of work.
24. After reviewing the breathalyzer test result, the employer made the decision to terminate the claimant's employment.
25. On 9/26/2025, the Nurse Manager informed the claimant that her employment was terminated due to being unfit for duty based upon her positive breathalyzer tests.

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 of Fact # 20 as inconsistent with the evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to 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

“[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 maintains a policy prohibiting employees from reporting to work while under the influence of drugs and alcohol. Finding of Fact # 2. However, the employer did not provide evidence showing that it discharged all similarly situated employees who were suspected of being intoxicated while at work. As such, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* 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 she was discharged.

The employer discharged the claimant for violating its Substance Abuse/Fitness for Duty policy while at work on September 13, 2024, because she had failed a breathalyzer test. Findings of Fact ## 2, 19, 24, and 25. In his decision, the review examiner rejected as not credible the claimant's testimony that she had not consumed alcohol, and that her elevated BAC level in the breathalyzer test was a result of her use of her inhaler. 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). Based upon the record before us, we cannot accept this assessment.

Although the Nurse Manager reported that she observed the claimant was slurring her words, staggering, fumbling, pale, and drowsy in the Visual Observation Checklist, the operating nurse who initially raised concerns about the claimant's behavior did not make such a report until four hours into the claimant's shift. Findings of Fact ## 6, 14, and 19. Assuming that the claimant was slurring her words and staggering while performing her duties in the operating room on September

13, 2024, it seems unusual that this behavior was not noticed or reported for approximately four hours. The Nurse Manager who spoke with the claimant on that day did not smell alcohol on the claimant's breath and further testified that she noted the claimant repeatedly blowing her nose. Findings of Fact ## 8 and 10. When the claimant was asked about her condition, she explained that she was tired, felt unwell, and had been crying. Findings of Fact ## 7 and 12. The claimant's persistent need to blow her nose and issues with exhaustion appear consistent with her explanation of her condition. Given these particular facts, we do not believe that the Nurse Manager's observations are, by themselves, substantial and credible evidence showing the claimant engaged in the misconduct for which she was discharged on September 13, 2024.

The review examiner apparently agreed because, in finding the claimant's testimony not credible, he relied primarily on the outcome of the claimant's second breathalyzer test on September 13, 2024. The first breathalyzer test the claimant completed registered her BAC level at 0.010. Finding of Fact # 18. The second test, which was completed approximately twenty minutes later, registered her BAC level at 0.080. Finding of Fact # 18. However, the testing form submitted by the employer, which was admitted into evidence as Exhibit 4, shows the claimant underwent a third breathalyzer test approximately four minutes after the second test was administered. This third test registered the claimant's BAC at 0.009.¹ These substantial variations in the test results, without further explanation or evidence, raise questions as to the reliability of the test results.

Although neither party could provide a definitive explanation for these variations, the claimant did provide evidence from her medical provider explaining that the claimant's inhaler could cause a false positive breathalyzer test if the readings are taken shortly after the claimant used it. Findings of Fact ## 16 and 17. Further, although claimant could not recall exactly when she had used her inhaler on September 13, 2024, she explained that she does use it regularly throughout the day and recalled advising the technician conducting the breathalyzer test that she had done so recently.² Her testimony seems logical, as she uses her inhaler to assist with breathing and coughing and may have needed to use it on September 13, 2024, to help ameliorate some of the respiratory effects of crying and congestion. See Findings of Fact ## 8, 12, and 16. Given this testimony, and because the results of the claimant's three breathalyzer tests appear more consistent with the medical evidence that the claimant's inhaler caused a transitory false positive reading, we conclude that the employer has not met its burden to show by substantial and credible evidence that the claimant engaged in the misconduct for which she was discharged. See Findings of Fact ## 17, 18, and 19.

We, therefore, conclude as a matter of law that the employer has failed to demonstrate that the claimant's discharge was due 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. The claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of September 22, 2024, and for subsequent weeks if otherwise eligible.

¹ Exhibit 4 is part of the unchallenged evidence introduced at the hearing and placed into 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).

² The claimant's uncontested testimony in this regard is also part of the unchallenged evidence introduced at the hearing and placed into the record.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 29, 2025



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

LSW/rh