

**Claimant is not subject to disqualification where she did not follow a newly revised medication order because she believed that it was incorrect, visited the doctor's office, and obtained a corrected signed protocol, which reinstated the original order which claimant had continued to follow.**

**Board of Review  
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**Issue ID: 0019 5495 30**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Heidi Saraiva, 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 August 12, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 12, 2016. 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 March 9, 2016. 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 conclusion that the claimant was discharged for her refusal to follow a client's newly revised prescription order is supported by substantial and credible evidence and is free from error of law, where the findings and the record confirm that the new revised order had been a mistake.

### **Findings of Fact**

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

1. The claimant worked full time as a Program Supervisor for the employer, an organization that supports individuals (clients) with developmental disabilities,

from March 2011 until August 12, 2016, when she was discharged from employment.

2. The claimant worked Monday through Friday 8 a.m. to 4 p.m. She was paid \$25.00 per hour. The claimant supervised two residential homes, a day program, a program in a nursing home.
3. The claimant's immediate supervisor was the Individual Support Supervisor.
4. On May 3, 2011, the claimant signed an acknowledgement for receipt of the employee handbook. The employer maintained a rule, which advised employees he/she is [sic] required to follow a supervisor's instructions. The employer maintained this policy to ensure job responsibilities are being met and to keep clients safe. The handbook states the consequence for violation of the rule "may be cause for written counseling in a three-step process or if the behavior or problem is serious enough, suspension followed by discharge may occur."
5. The employer maintained an expectation the claimant would follow a direction given to her by her supervisor. The purpose of the employer's expectation was to ensure the program ran effectively and to ensure the safety of its clients.
6. On July 1, 2016, the claimant was placed on performance improvement plan for 30 days because the claimant was not performing her assigned work to the satisfaction of her supervisor.
7. The client's files in the home the claimant was assigned to work had out of date documentation including doctor's orders. This deficiency was included in the claimant's performance improvement plan.
8. On July 8, 2016, the claimant's supervisor requested from a physician the most recent physical information, immunizations, dietary/seizure protocols and current medication orders for one of the claimant's clients (Client A).
9. Client A's primary care physician provided the claimant's supervisor with an updated physician's order. On the order the physician [ordered that] Client A was to be given constipation medication (milk of magnesia) 1x per day.
10. The claimant's supervisor created medication tracking sheets for each of the clients' files and gave them to the claimant on July 14, 2016.
11. The claimant told her supervisor there was an error on Client A's constipation medication (milk of magnesia) order. In the past, Client A was administered the constipation medication "daily if no bowel movement for 3 days." Milk of Magnesia is an over-the-counter constipation medication.

12. The supervisor told the claimant to contact Client A's physician to verify the prescription.
13. The Department of Developmental Services (DDS) requires that medication prescriptions for disabled individuals be verified within 24 hours, if there is a question of its validity.
14. The supervisor told the claimant to administer the constipation medication as written on the physician's order.
15. The claimant did not administer medication to clients.
16. One of the claimant's job responsibilities was to delegate physicians' orders to the certified nursing assistants to ensure the medication is administered.
17. The claimant did not direct the certified nursing assistants to administer Client A the constipation medication 1x per day.
18. The claimant did not provide them with the instruction because she did not agree with the physician's order.
19. The claimant believed Client A would become dependent on the medication to have a bowel movement, if she takes it daily.
20. The claimant contacted Client A's physician's office, but was not able to speak with the physician. The claimant left a voicemail message.
21. Client A's mother is also a client of the employer's. Client A's mother called the physician's office to no avail.
22. On August 5, 2016, the claimant's supervisor reviewed the medication sheets in the claimant's clients' files. The supervisor found that Client A was not being administered the constipation medication 1x per day.
23. The supervisor asked the claimant if she was correct about the physician's current order for the milk of magnesia being incorrect.
24. The claimant told her supervisor she was unable to reach the physician.
25. The supervisor asked the claimant the reason the medication hadn't been administered 1x per day in accordance with the physician's orders.
26. The claimant told the supervisor she didn't have her staff administer it because she believed the order was incorrect.
27. The claimant does not have a medical license.

28. The claimant's supervisor called Client A's physician and verified the constipation medication was to be administered 1x per day.
29. The employer discharged the claimant for failing to follow her supervisor's instruction to verify the physician's order and to have the constipation medication administered as written on the physician's current orders.
30. Sometime during the summer of 2016, the claimant went to Client A's physician and obtained a copy of Client A's bowel movement protocol. A nurse practitioner [sic] from the physician's office signed the protocol, which stated, "If there is no bowel movement after 3 days, then give milk of magnesia 4T."
31. A protocol is not a physician's order.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence, except as follows. We find that Finding of Fact # 31 is not supported by the record, as it was never raised or discussed at the hearing or referred to in the record.

As discussed more fully below, we reject the review examiner's legal conclusion that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. We believe that the review examiner's findings of fact support the conclusion that the claimant did not have the requisite state of mind for deliberate misconduct, because she believed that she was acting in the best interests of the client and the employer by not following a medication order which she thought to be harmful to the client.

The review examiner denied benefits after analyzing the claimant's qualification for benefits under 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 . . . .

The review examiner's findings establish that the claimant believed that the new revised medication order was incorrect because it called for medication to be administered daily, while the existing order in the patient's file indicated that it be used as needed. The claimant sought a resolution by telling her supervisor that there was an error in the medication order, and that she was concerned about the effect on the client. After being told by her supervisor to contact the physician's office to verify the prescription, the claimant did not administer the new order until she was able to confirm the new order with the patient's medical provider. The claimant contacted

the physician's office and left a message for the physician but received no response. She contacted the client's mother, who called the physician but also did not get a response. The claimant advised her supervisor that she had been unable to reach the physician, and that the medication was not being administered in accordance with the revised order because she believed it to be incorrect. When the claimant did not hear back from the physician, the claimant visited the physician's office and obtained a new signed protocol, which corrected the erroneous order received by the employer, and which reinstated the original prescription providing that the medication be used as needed. The claimant provided the corrected prescription to the employer.

The findings of fact establish that the claimant failed to comply with the employer's expectation, and that her misconduct was deliberate in the sense that she knew she was not following the revised doctor's order regarding the client's laxative medication. However, due to the critical nature of an employee's state of mind and surrounding mitigating circumstances, mere violation of an employer's rule or expectation does not automatically justify a disqualification from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass. 776 (1982). In order to deny benefits, it must be shown that the claimant acted with intentional disregard of the standards of behavior that the employer has a right to expect. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Neither the review examiner's findings nor the underlying record provide any evidence that the claimant acted in wilful disregard of the employer's interests. The review examiner's conclusion makes it clear that she erred as a matter of law when she decided that the claimant engaged in disqualifying misconduct, when, "regardless of whether the doctor's order was correct or not", the claimant did not follow it. The findings and the evidence reflect that the claimant reasonably and in good faith believed that the doctor's new order was inconsistent with the client's previous treatment, that it was a mistake that the claimant could get corrected, and that it would be harmful to the client if implemented. There is no indication that the claimant understood that she was doing something contrary to the employer's interest when she continued with the client's prior laxative protocol, which was eventually confirmed to be the correct one by the doctor's office.

The record in this case fails to support a conclusion that the conduct for which the claimant was discharged was the result of a wrongful intent. The claimant had nothing to gain personally from her actions, and she believed that she was helping the client and acting in the client's best interests as well as the employer's. This was an attempt to do the right thing, rather than a wilful disregard of the employer's expectations. See Jones v. Dir. of Division of Employment Security, 392 Mass. 148 (1984) (claimant who believed that he was serving the employer's interests was entitled to benefits).

We, therefore, conclude as a matter of law that the claimant did not engage in disqualifying misconduct, 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 August 7, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 26, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL 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.

SPE/rh