

**A discharge for a hotel housekeeper's failure to properly maintain her room board checklist on days that she was very busy or to perform her work up to the employer's cleanliness standards was not deliberate and in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0021 8860 85**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by Rose McDuffy, 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 May 9, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 10, 2017. 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 August 19, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had 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 present evidence. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 conclusion, that the claimant deliberately and in wilful disregard of the employer's interest performed substandard work and falsified paperwork, 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 assessments are set forth below in their entirety:

1. The claimant filed an initial claim for unemployment benefits effective May 7, 2017.
2. The claimant worked full time as a room attendant for the employer, a hotel, from approximately January 22, 2015 until May 9, 2017, when she was discharged from employment.
3. The claimant worked 8:30 a.m. to 4:30 p.m. Tuesday through Friday and 9:00 a.m. to 5:00 p.m. on Saturday. The claimant was paid \$11.00 per hour.
4. The claimant's immediate supervisor was the General Manager (the manager).
5. The claimant's job was to clean guest rooms.
6. The employer maintained a policy that states: "Falsification of any Hotel and or/departmental document, form or report including, but not limited to, the following: a) Employment records b) Hotel and/or department forms, documents or reports c) Time sheets d) Medical reports, forms or inquires" is prohibited. The employer maintained the policy to ensure the accuracy and validity of the business flow. The consequence for violation of this policy will result in "Application of disciplinary procedure, including discharge, is at the discretion of the General Manager and Director of Operations." The claimant received a copy of the policy sometime in April 2017.
7. The room cleaning process includes: 1) spray the bathroom with chemicals; 2) open the windows; 3) put trash outside of room; 4) scrape the bed; 5) make the bed; 6) dust the room; 7) vacuum the room; 8) clean out the refrigerator; 9) wipe down bathroom mirror; 10) clean the bathroom sink; 11) clean the toilet; 12) replace toilet paper; 13) replace towels; 14) fill the shampoo; 15) fill the condition [sic].
8. Once the room is cleaned to the hotel standards, the hotel requires all room attendants to mark their clipboard with the status of the room. The board marking is essential to the flow of the hotel business because it identifies room cleanliness and occupancy availability.
9. The clipboards remain on top of the cleaning cart while the housekeepers clean the rooms.
10. The normal process for marking the boards is to mark vacant clean or occupied clean upon completing each room.
11. On busy days, the claimant would mark her board while she went on break.
12. At break time, the room attendants turn in their boards to the manager to inspect the rooms.

13. The manager would notify the room attendants, if there were any inadequacies with the cleanliness of the rooms and permit the attendants to correct the problem.
14. The claimant attended a video and computer training on the hotel standards of cleaning a room in October, 2016 and February 7, 2017.
15. The claimant was responsible for conducting new employee trainings for the hotel standards of cleaning rooms and marking the board until April 2017. The manager removed the claimant's training responsibilities due to the claimant's substandard work performance.
16. Sometime around October, 2016, the employer hired a new manager.
17. Sometime during the claimant's employment, the claimant could not open a door to a room she was scheduled to clean. The claimant called the manager. The manager told the claimant that maybe the room was already clean. The claimant wrote on the board vacant clean. The manager went to the room and saw that the room was dirty.
18. The manager called the claimant and verbally reprimanded her for marking the room clean when it was dirty.
19. On February 1, 2017, a hotel guest made a complaint that the room the claimant was assigned to clean was not cleaned upon check-in.
20. On February 1, 2017, the claimant cleaned a room and marked the board vacant and clean, the room had water in the sink and an empty toilet paper roll on the counter.
21. On February 6, 2017, the manager issued the claimant a verbal warning for substandard work.
22. On February 13, 2017, the manager inspected room 226 marked vacant clean by the claimant. The Manager found trash behind a stool and trash sticking out of the connecting door.
23. On February 14, 2017, the manager issued the claimant a first written warning regarding substandard work. The claimant signed an acknowledgement for receipt of the warning.
24. On April 19, 2017, the claimant was assigned to clean room 231. The claimant marked it as vacant clean on her board.
25. On April 20, 2017, a guest checked into room 231 and found urine in the toilet.

26. On April 23, 2017, the manager issued the claimant a second written warning for substandard work.
27. On April 27, 2017, the claimant signed a receipt for acknowledgment of the second written warning.
28. On April 29, 2017, the claimant was trained in accordance with the employer's bed making policy and signed an acknowledgment for receipt of the policy.
29. The bed making policy requires 4 pillow cases, 2 firm and 2 soft.
30. On May 9, 2017, the claimant was instructed to do "deep cleaning." Deep cleaning means to take extra time cleaning specific areas of the room, the room is already cleaned and the bed is already made. The housekeeper assigned to the deep cleaning are to check for hair, vacuum the room, and change the pillow cases.
31. On May 9, 2017, the claimant was assigned to clean six check out rooms and seven stay over rooms.
32. On May 9, 2017 sometime prior to 12:00 p.m., another employee (employee A) checked the claimant's board on her cart. The claimant did not have her cleaned rooms marked on the board.
33. On May 9, 2017, at approximately 12:00 p.m., the claimant brought her board down with her to take her 30 minute break.
34. On May 9, 2017, on the way to break, the claimant marked the status of the rooms she had cleaned on her board that morning.
35. The claimant hadn't marked the rooms she cleaned on her board when she cleaned them that morning because she was busy working.
36. On May 9, 2017, the manager observed that the claimant marked seven rooms completed on the board.
37. On May 9, 2017, during the claimant's break, the manager inspected the claimant's vacant/clean marked rooms 232, 235, 238 and 242. Upon inspection of room 232 and 235, the beds were made improperly. In room 238, there was hair on top of the sheets as well as 5 pillows were not up to the hotel standard. In room 242, the toilet was not clean and the bed was made improperly.
38. On May 9, 2017, the claimant returned from her break to complete the rooms she had begun cleaning prior to her break. The claimant went downstairs to get new pillow cases for the rooms she had marked clean.

39. On May 9, 2017, the manager issued the claimant a termination notice for lack of adhering to the company policy.

40. The claimant was discharged for falsifying the room board and performing substandard work.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 original 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for 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).

Consolidated Finding # 40 states that the employer fired the claimant for falsifying the room board checklist and for performing substandard work. There is no evidence that the employer uniformly disciplined employees who committed the same offenses. For this reason, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

We consider whether, alternatively, the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. In order to determine whether an employee's actions constitute such deliberate misconduct, 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 “[T]ake 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).

First, we consider the employer’s assertion that the claimant falsified her room board checklist. Consolidated Findings ## 36 and 37 state that, on May 9, 2017, the claimant marked on her room board checklist that she had finished cleaning seven rooms, but that, when the manager checked them, she found beds made improperly, hair on top of the sheets, pillows not up to hotel standard, and a toilet that was not clean. But we see nothing in the record that shows that the claimant failed to perform her other cleaning tasks in these checked off rooms. *See* Consolidated Finding # 7. Nor is there evidence that, on that date, the claimant deliberately made those beds improperly, left hair on the sheets, failed to clean the toilet, and so forth. Absent such proof, the only logical inference is that the claimant believed she had finished cleaning those rooms when she checked them off, but her work was simply not satisfying the employer’s expectation for a fully cleaned room. Thus, we are not persuaded that the claimant falsified the checklist.

As for performing substandard work, the evidence shows that in the several months before her termination, the claimant’s new manager had on-going problems with how the claimant cleaned her rooms. Consolidated Findings ## 19–28 refer to multiple instances during February and April, when guests had complained about the cleanliness of the claimant’s assigned rooms. The question before us is not whether the employer was justified in discharging the claimant for poor work performance, but whether she acted deliberately and in wilful disregard of the employer’s interest. “When a worker is ill equipped for his job . . . , any resulting conduct contrary to the employer’s interest is unintentional; a related discharge is not the worker’s intentional fault, and there is no basis under § 25(e)(2) for denying benefits.” Garfield, 377 Mass. at 97. Because there is no indication that the claimant was not working to the best of her ability, the employer has not proven that her substandard performance was deliberate.

Finally, there is some inference that, by waiting until noon on May 9, 2017, to record which rooms had been cleaned, the claimant also failed to meet the employer’s expectation to check off each room as she cleaned them. *See* Consolidated Findings ## 10, 32–34. The review examiner found that, on that date, the claimant did not check off her rooms as she finished each one because she was busy. Consolidated Finding # 35. It had been the claimant’s practice on days when she was very busy to go from room to room and complete the checklist just before her 12:30 break. *See* Consolidated Findings ## 11 and 12. She did the same thing on May 9<sup>th</sup>. Consolidated Finding # 34. As the claimant explained, she checked off all the completed rooms at once on her way to her 12:30 break on days when she was assigned 17, 18, or 19 rooms, or when she encountered a room that was very dirty, because she was working hard to finish cleaning in time to take the mandatory break and to get to all the rooms by the end of her shift.<sup>1</sup> In trying to meet the employer’s expectation that she get her work done, the claimant worked around another expectation for completing the checklist. This does not demonstrate a wilful disregard of the employer’s interest. Rather, it suggests the claimant was trying to meet both expectations. *See* Jones v. Dir. of Division of Employment Security, 392 Mass. 148 (1984).

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<sup>1</sup> This portion of the claimant’s testimony, while not explicitly incorporated into the review examiner’s findings, 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).

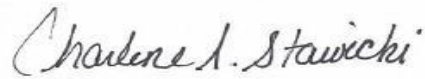
In short, the employer has demonstrated that it discharged the claimant because it was not satisfied with her work performance. We, therefore, conclude as a matter of law that the employer did not sustain its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest 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 May 7, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 22, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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.

AB/rh