

A charge nurse administering medication to a resident, who decided to leave the pills on the bedside table and go to the bathroom, believed she acted appropriately by responding to a distraught daughter of another resident calling her into the hallway, while waiting for the first resident to emerge from the bathroom. The employer fired the claimant for leaving the pills unattended. Held the claimant did not act in wilful disregard of the employer's interest.

**Board of Review
19 Staniford St., 4th Floor
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: 0022 3363 59

BOARD OF REVIEW DECISION

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 July 10, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 5, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on February 22, 2018. 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, she 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 obtain more information about the final incident, the reason for the claimant's discharge, and the claimant's state of mind. Both parties participated in 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 decision, which concluded that the claimant deliberately left medication in a patient's room unattended in wilful disregard of the employer's interest, 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 are set forth below in their entirety:

1. The claimant worked for the employer, a nursing home, from 1972 until July 10, 2017. She most recently worked as a part time charge nurse / registered nurse.
2. The claimant's job description, which she most recently signed in July 1996, indicated that she was expected to follow established standards of nursing practices as well as internal policies and procedures. This essential job duty served to ensure the health and safety of the employer's fragile client population and to protect the employer from liability.
3. The employer presented a handwritten document at the initial hearing which was represented as having been copied from the U.S. Code of Federal Regulations (Chapter IV, Part 483.45) and contained on the website of the Centers for Medicare and Medicaid Services. The written statement read:

"Medication Access and Storage
F-431 483.45
During a medication pass, medication must be under the direct supervision of the person administering the medication."
4. A copy of the regulation itself was not presented at the hearing.
5. The claimant, though not familiar with the origin of the applicable regulation, understood the requirement described in the employer's handwritten statement. She was aware that this established standard of nursing practice prevented residents from taking medications not prescribed to them, and ensured that they took all of their required meds.
6. In October 2008, the claimant passed an assessment covering, in part, her understanding of the requirement that a "Resident is observed to ensure medication is swallowed".
7. The employer expected nursing staff to comply with established standards of nursing and applicable legal regulations to protect the employer from liability and to ensure the health and safety of the facility's residents. The claimant understood that she was expected to adhere with [sic] these reasonable guidelines.
8. No specific policy of the employer was presented which was applicable to the claimant's separation.
9. The employer maintained a Disciplinary Procedure policy stating that, should disciplinary action be required for any of multiple reasons, an employee will generally be issued a first written warning, followed by a second written

- warning and / or suspension, and then a third written notice that normally resulted in termination.
10. On September 23, 2016, the claimant received a 1st warning notice for working through lunch on multiple occasions after numerous educations regarding the same behavior.
 11. On approximately December 28, 2016, she received a 2nd warning notice for continuing to work after punching out several days prior.
 12. On May 30, 2017, the claimant was issued an additional 2nd warning notice for working beyond the end of her scheduled shift without authorization.
 13. At the time she received each disciplinary action, the claimant was reminded that her job was in jeopardy.
 14. On July 3, 2017, the claimant was the charge nurse on duty and was responsible for administering medication to residents. She understood that she was required to observe each patient ingest their medications and that she was not to leave medication unattended at any time.
 15. The claimant entered a resident's room with her allocated medication, and handed the medication to the patient.
 16. The resident then indicated that she needed to use the rest room and placed the pills down on her bedside table.
 17. The claimant waited in the resident's doorway while she used the restroom. While by the door, the claimant heard an individual in the hallway crying and asking to speak to the charge nurse immediately.
 18. The claimant notified the resident in the bathroom that she would be right back, and instructed the resident to wait for her before taking the meds. The resident was of sound mind and the claimant had no reason to believe the patient was incapable or unwilling to follow her instruction.
 19. The claimant was aware the pills remained on the resident's table when she exited the room. She did not feel they were unattended because the resident was in the bathroom with the door shut and the claimant had a direct view of the room.
 20. At the time she left the resident's room, the claimant did not believe that she was violating any rule or regulation or acting in any manner that would not be acceptable to the employer.

21. The claimant stepped into the hallway to deal with the distraught individual, the resident of a daughter, because she believed the individual's level of distress warranted immediate attention.
22. The claimant did not leave the immediate vicinity of the resident's room while the patient's pills remained on her table.
23. The claimant's patient remained in the restroom with her medications on the table while the claimant spoke to the family member in the corridor, no more than 10 feet from the resident's doorway.
24. The claimant was able to maintain a view of the resident's room, excluding the restroom, from her location in the hallway. She would have been able to hear the toilet flush or restroom door open.
25. The resident's room was the last at the end of the hallway.
26. No one would have been able to enter the patient's room without being seen by the claimant and no other person was present in the room when the claimant left to speak to the distraught relative.
27. While the claimant was speaking to the family member in the corridor, she observed the administrator walking toward her. She made no effort to conceal the pills that remained on the resident's table when she saw the administrator.
28. The administrator passed by the claimant and entered the resident's room while conducting rounds.
29. She observed the cup of pills on the patient's table while the resident remained in the bathroom with the door closed.
30. The employer considered the pills unattended and expected that the claimant would have locked them away before departing the room.
31. The claimant returned to the resident's room when the patient exited the bathroom. She recounted the patient's meds and watched her ingest the pills.
32. If not for her prior disciplinary history, the employer would likely have suspended the claimant pending an investigation as the result of the July 3, 2017 events.
33. On July 10, 2017, the claimant was discharged for leaving a resident's medications unattended on July 3, 2017.

NOTE:

All parties agreed that the Review Examiner would print the regulation referenced in Finding of Fact # 3 from the website of the Centers for Medicare & Medicaid Services (cms.gov), and that the document would be marked and entered as Remand Exhibit 8. No reference to the specified regulation could be readily located by the Review Examiner.

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 fact¹ and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree 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).

As a preliminary matter, the employer must show that it discharged the claimant for violating a rule or otherwise engaging in misconduct. On this measure, the record is somewhat unclear. Consolidated Findings ## 15–18, 21–23, and 31 describe the final incident that caused her discharge. In short, the claimant gave a resident some pills, the resident then left the medication on a bedside table to go use the bathroom. Meanwhile, another patient's distressed family member called out for the charge nurse, and just after the claimant went into the hallway to respond, an administrator entered the resident's room and saw the unattended pills. The claimant returned to the room, the resident came out of the bathroom, and the claimant watched her take the pills.

¹ We note a typographical error in Consolidated Finding # 21, where the review examiner wrote, “resident of a daughter,” but obviously intended this to be daughter of a resident.

The review examiner concluded that the incident was not a knowing violation of a reasonable and uniformly enforced policy. First, the review examiner did not find any policy specifically applicable to the incident for which the claimant was discharged. Consolidated Finding # 8. We believe this is a fair reading of the evidence. Exhibit # 7, a medical administration observation sheet, states that a resident must be observed to ensure that medication is swallowed.² Since the claimant was actually with the resident at the time she ingested the pills, we see no violation of this policy. Although the employer alleged that the claimant's behavior violated a federal regulation, it did not present a copy of the regulation, as we specifically requested on remand. It offered as evidence only a portion of a document entitled "Guidance to Surveyors," which states, "During a medication pass, medications must be under the direct observation of the person administering the medications or locked in the medication storage area/cart." See Consolidated Finding # 3, Exhibit # 8, and Remand Exhibit # 7. This document appears to be some sort of informal guidance from an unknown source. In any case, it is unclear whether a "medication pass" would encompass the period of time that the resident was in the bathroom.

Even if it were a policy violation, the review examiner observed that the employer laxly enforced its progressive disciplinary policy. For example, following the second written warning given to the claimant, the employer gave her another written warning rather than a suspension or termination, as stated in the policy. See Consolidated Findings ## 9–12.

In the absence of a written policy expressly tied to the alleged misconduct or demonstrated uniform enforcement, we agree with the review examiner's conclusion that the employer did not satisfy its burden under the knowing violation of a reasonable and uniformly enforced policy of the employer prong of G.L. c. 151A, § 25(e)(2).

Alternatively, the employer may show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. We remanded, in part, to clarify the reason that the employer fired the claimant. Consolidated Finding # 33 states that it was for leaving medication unattended on July 3, 2017. The claimant was aware that she was not to leave medication unattended. See Consolidated Finding # 14. When the employer's administrator walked into the residents room, saw the pills sitting on the bedside table and the claimant not there, we believe the employer could reasonably conclude that those pills had been left unattended.

However, "[t]he issue . . . is not whether [the claimant] was discharged for good cause . . . It is whether the Legislature intended that . . . unemployment benefits should be denied . . . Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted.)

The review examiner found that the claimant did not believe she was doing anything wrong. See Consolidated Finding # 20. She had instructed the resident, whom she knew to be of sound mind, cooperative, and capable of following instructions, to wait for the claimant before taking

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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 medication. Consolidated Finding # 18. The claimant did not feel that the pills were unattended because the resident was in the bathroom with the door closed, the claimant did not leave the immediate vicinity, and she had a direct view of anyone else who would enter the room. Consolidated Findings ## 19 and 22. Moreover, she had to deal with another resident's distraught, crying daughter, who was calling for the charge nurse. *See* Consolidated Findings ## 17 and 21. In this situation, the claimant's job duties were pulling her in two directions. She believed the daughter's level of distress warranted her immediate attention. *See* Consolidated Finding # 21. In her view, she appropriately responded to both situations.

At the hearing, the employer testified that before the claimant left the room, she should have taken the pills with her and locked them in her med cart. *See* Consolidated Finding # 30. On reflection, this may have been the best practice. However, we believe that, in the moment, the claimant's failure to do so was not deliberate or in wilful disregard of the employer's interest. At most, it was an exercise of poor judgment. "When a worker . . . has a good faith lapse in judgment or attention, 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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Similarly, the circumstances in this case do not warrant denying benefits.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to 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 July 9, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 9, 2018



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 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

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