Claimant nurse's discharge for pre-pouring medications constituted both a knowing violation and deliberate misconduct, where she admitted to the conduct, knew the policy and expectation, and had previously been warned about medication issues. Because claimant ignored DUA emails, she did not see the hearing notice.

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Issue ID: 0023 0805 63

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 following her separation from employment. Benefits were denied on the grounds that the employer established the claimant was discharged for both a knowing violation of a reasonable and uniformly enforced policy or rule, as well as for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was granted in a determination issued by the agency on November 11, 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 reversed the agency's initial determination and denied benefits in a decision rendered on February 13, 2018. The claimant sought review by the Board, which dismissed the appeal due to lack of jurisdiction.[1]

After receiving the notice of dismissal, the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42. On November 5, 2019, the District Court ordered the Board to review the merits of the review examiner's decision.[2]

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's discharge for pre-pouring medications constituted both a knowing violation of a reasonable and uniformly enforced policy as well as deliberate misconduct in wilful disregard of

[1] Dismissal was necessitated because the claimant filed her appeal on March 22, 2019, which was over a year after the decision was issued, and well beyond the 30-day statutory appeal period set forth under G.L. c. 151A, § 40. In entering its dismissal of the case, the Board relied on not only the clear statutory language, but the ruling by the United States Supreme Court in Hamer v. Neighborhood Housing Services of Chicago, *et al.*, 138 S.Ct. 13, 16 (2017), *citing* Bowles v. Russell, 127 S.Ct. 2360 (2007) (any filing deadline which is prescribed by statute is jurisdictional and any late filing of that appeal notice necessitates dismissal of the appeal).

[2] Jurisdictionally, the Board disagrees with the District Court order remanding this matter for review. Nevertheless, the Board has fully complied.

the employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, we affirm the review examiner's decision to deny unemployment benefits.

Findings of Fact

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

1. The claimant worked full-time as a Licensed Practical Nurse for this employer's nursing home from 10/03/15 until she was discharged on 09/21/17.

2. The final incident that triggered the discharge occurred on 09/12/17 when an inspection of the claimant's medicine cart by the Regional Vice-President revealed that the claimant had pre-poured medication for her patients in violation of the employer's policy for medication delivery.

3. During the course of the investigation of the 09/12/17 final incident, the claimant was given an opportunity to explain her actions but the claimant offered no defense for her actions.

4. The claimant was aware of the employer policies from the employer's training and handbook and because this is common knowledge in the employer's workplace.

5. The claimant had received two prior disciplinary warnings on 03/01/16 and on 08/26/17 for incidents involving pre-pouring of medicine.

6. The claimant was told in the final warning on 08/26/17 that her job was in jeopardy if she again pre-poured medication.

7. On 09/24/17, the claimant filed a claim for unemployment benefits. The employer requested a hearing on the initial determination that the claimant was eligible to receive benefits.

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 original 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.

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

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

At the outset, we note that the employer has established the existence of reasonable policies that, among other things, prohibit employees from pre-pouring medications for their residents. *See* Finding of Fact # 2 and Exhibit 6, page 9. Because the employer has not shown that other individuals who violated this policy were similarly disciplined, it has not met its evidentiary burden to establish that this policy is uniformly enforced. As such, we conclude the employer has not met its evidentiary burden under the knowing policy violation prong of G.L. c. 151A, § 25(e)(2).

With regard to the second prong, for the employer to establish that it discharged the claimant for deliberate and wilful misconduct within the meaning of this provision, it must first show that the claimant engaged in the behavior which ultimately led to her discharge. Here, the employer presented its medication dispensing policy through its medication training manual. *See* Exhibit 6. This manual expressly states that employees shall "NOT pre-pour by setting up several medication passes ahead of time." Id. at page 9. On September 12, 2017, the employer performed an inspection of the claimant's medicine cart and it showed that the claimant had pre-poured medication for her patients, in violation of this policy. Finding of Fact # 2.

Even if it is established that the claimant engaged in misconduct by pre-pouring the residents' medications, that act alone is insufficient to disqualify a claimant from receiving benefits. The misconduct must be shown to have been deliberate and in wilful disregard of the employer's interests. The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Vital to this analysis is the claimant's state of mind at the time of the conduct which caused the separation. *See* 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, 377 Mass. at 97 (citation omitted).

The review examiner found that the claimant was made aware of this policy when she received the employer's handbook, and also when she received the medication training. Finding of Fact # 4. The review examiner also found that, on March 1, 2016, and August 26, 2017, the claimant received disciplinary warnings for incidents involving the pre-pouring of medication. Finding of Fact # 5. On August 26, 2017, the claimant was informed that her job was in jeopardy if she again pre-poured medication. Finding of Fact # 6. Thus, when on September 12, 2017, the claimant's medicine cart showed another instance of pre-poured medication, she was ultimately discharged. During the course of the investigation, the claimant was given an opportunity to explain her actions, but the claimant offered no defense. Thus, she has offered no mitigating circumstances.

In the claimant's March 22, 2019, appeal to the Board, and her April 1, 2019, supplemental appeal documents, the claimant has offered no compelling rationale to alter our ruling. First, the claimant argues that she was never informed of the hearing and never received any notices that may have been sent to her via e-mail, as her Apple equipment was not compatible with the DUA. We find this claim without merit and inconsistent with the agency records, which show the claimant successfully accessing her UI Online inbox 24 times, between September 24, 2017, and November 11, 2017. During this time, she also created a new password, requested weekly benefits, agreed to a Data Privacy Authorization, and reported earnings from self-employment electronically. *See* Affidavit of Jeannie Peña, dated May 31, 2019, filed with the Falmouth District Court. After receiving notice on November 11, 2017, that a paper check in the amount of $1,797.00 was processed, the record shows that the claimant stopped requesting benefits and did not check her inbox again until March 20, 2019, even though automatically generated emails were sent to the claimant's email address notifying her to log into her UI Online account to review communications. Id. In short, had the claimant not chosen to ignore the emails from DUA during this period, she would have been aware of the employer's appeal and seen the notice of hearing.

Secondly, the claimant's appeal asserts that she did not commit the medication errors alleged in her two prior warnings and, if anything, the final incident was not intentional but rather a mistake. Because the claimant's separation was triggered by the September 12, 2017, medication error, our focus is solely on whether the incident constituted deliberate misconduct in wilful disregard of the employer's interest. It is not necessary to consider the merits of the prior disciplinary warnings except insofar as they establish that the claimant had been made aware of the employer's prohibition about pre-pouring medications. We reject the claimant's assertions of "mistake" in the pre-pouring of medication, as the act itself requires forethought and pre-meditation. Having been warned that this behavior was unacceptable only a month earlier, it is apparent that pre-pouring the medication on September 12, 2017, was done in wilful disregard of the employer's interest.

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

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 23, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 5, 2019

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
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

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.

CAS/rh