Claimant assistant store manager, who was fired for bringing her grandchildren to work after a final warning that threatened discharge if she brought the children to work again, established mitigating circumstances. She had no alternative care for her grandchildren, her daughter did not pick up the children as scheduled (or respond to messages), her manager did not return calls asking how to proceed, and the claimant was afraid she would be discharged if she failed to open the store she managed.

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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. Benefits were denied on the ground that the employer established that the claimant had engaged in deliberate misconduct in wilful disregard of the employer's interest without mitigating circumstances pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on December 23, 2017. 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 in a decision rendered on January 27, 2018. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On August 2, 2018, the Boston Municipal Court allowed a Joint Motion to Remand between the claimant and the DUA. The Motion remanded the case to the Board for a *de novo* hearing to afford both parties an opportunity to present testimony and evidence surrounding the claimant's separation. Consistent with this order, we remanded the case for a *de novo* hearing, which the Board itself conducted on September 20, 2018. Both parties attended. Our findings of fact are set forth below.

The issue before the Board is whether the DUA's determination that the claimant's discharge for bringing her grandchildren to work after being issued a final warning for this conduct constituted deliberate misconduct in wilful disregard of the employer's interest without mitigating circumstances is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time assistant manager for the employer shoe retailer, at its store in [Town A], Massachusetts, from April 3, 2017, through November 30, 2017. The claimant was paid $15 per hour and was not yet eligible for any paid vacation or sick time at the time of her separation.

2. The claimant resides in [Town B], Massachusetts. She does not drive; she uses ride sharing services like Uber or Lyft to get to work and back.

3. The claimant has two grandchildren, who were seven and nine years old in November, 2017. The grandchildren reside with the claimant's daughter and son-in-law in [Town C], Massachusetts. The claimant's grandchildren regularly stay with her in [Town B] on the weekends and/or while their mother works.

4. The claimant's most recent direct supervisor, the store manager, became her supervisor in approximately October, 2017. The claimant was told that if she were unable to report to work, she should call the store manager or the assistant store manager at the employer's Woburn store.

5. The employer has a back-room policy, which restricts unauthorized personnel from entering the store's back room. Discipline for violating the policy is determined on a case-by-case basis, depending on the severity of the violation. The employer retains this policy to ensure people's safety, to maintain the integrity of its computer and IT equipment, and to guard against theft and cash handling infractions.

6. Arising from the employer's back room policy is an expectation that employees will not permit unauthorized personnel from entering the store's back room.

7. The claimant understood that she was not to allow unauthorized people into the store's back room. On November 9, 2017, the store manager issued the claimant a final written warning after she had brought her grandchildren to work and left them in the back room of the store (Exhibit # 7). The warning noted that the claimant violated the employer's Code of Conduct and cautioned that the claimant would be discharged if she brought her grandchildren to work again. The store manager told the claimant to call out or find someone to cover her shift, rather than bring her grandchildren to work again.

8. The claimant understood she would be discharged if she brought her grandchildren to work again. After receiving the final written warning, the claimant told her daughter that her job was in jeopardy.

9. On Friday, November 17, 2017, the claimant's grandchildren came to stay at her home in [Town B] for the weekend. On Saturday, November 18, 2017, the claimant's daughter came to watch her children in [Town B] while the claimant worked. The daughter told the claimant she would pick up her children on Sunday morning, before the claimant had to go to work and open the store at 10:00 a.m.

10. On Sunday, November 19, 2017, the claimant woke up at 7:00 a.m. and called her daughter to pick up her children. The claimant tried calling her daughter repeatedly and left voicemail messages, but her daughter did not answer her phone or return the claimant's messages. The claimant also tried calling her son-in-law, but he did not answer his phone. The claimant had nobody else available to watch her grandchildren while she worked that day.

11. After she was unable to reach her daughter, the claimant tried to call the store manager approximately four times, leaving messages that she did not have child care and asking the store manager to cover her shift. The store manager did not return the claimant's calls or messages.

12. The claimant did not call the assistant store manager of the Woburn store because the Woburn store was not open at the time the claimant had to leave to open her own store in [Town A].

13. The claimant brought her two grandchildren to work on Sunday, November 19, 2017, and left them in the store's back room. The claimant knew that, by doing so, she was disobeying the November 9 warning she had received. The claimant was also afraid that she would be discharged if she did not open the store as scheduled.

14. On November 30, 2017, the employer's loss prevention manager visited the claimant's store to conduct an audit and investigation into cash losses at the store. As part of his investigation, the loss prevention manager asked the claimant if there were any instances when she had violated company policies or procedures. The claimant disclosed that she had brought her grandchildren to work on November 19, 2017, because she did not have child care at the time she had to open the store. The claimant also disclosed that the store manager had issued her the final written warning on November 9, 2017.

15. The loss prevention manager reviewed the claimant's personnel file and asked her to write a statement. The claimant wrote a two-page statement and gave it to the loss prevention manager (Exhibit # 5). In the statement, the claimant admitted that she knew that she had violated the employer's policy by bringing her grandchildren to work and apologized for her conduct.

16. The loss prevention manager sent the claimant's written statement to the employer's human resources department and the senior managers who supervised the claimant's store manager. They instructed the store manager to discharge the claimant for violating the employer's back room policy.

17. On December 1, 2017, the store manager discharged the claimant by telephone for violating the employer's back room policy by bringing her grandchildren to work on November 19, after receiving the written warning issued on November 9, 2017.

Credibility Assessment:

The claimant testified that she had made numerous attempts to contact her daughter on the morning of November 19, 2017, but that her daughter did not respond to any of her calls or voicemail messages. The claimant also testified that she called her store manager four times that morning, and that the store manager did not respond to any of her calls or messages that day.

The employer's loss prevention manager testified that the store manager is no longer employed by the employer. The loss prevention manager did not recall whether the claimant told him on November 30 if she tried to call the store manager on November 19, 2017. Consequently, we credit the claimant's direct and unrefuted testimony that she attempted to call the store manager for advice as to how to proceed, when she was scheduled to open the store and she had no alternative child care for her grandchildren.

The claimant further credibly testified she was afraid that she would be discharged if she did not report to work to open the store as scheduled on November 19, 2017. The claimant's belief was largely confirmed by the loss prevention manager, who testified that the claimant would have been written up or discharged if she had not gone to work to open the store as scheduled that day.

Ruling of the Board

The claimant did not quit her employment, so G.L. c. 151A, § 25(e)(1), is not applicable in this case. 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).

Based on the facts, the employer has not met its burden of proof.

At the *de novo* hearing before the Board, the employer failed to produce a copy of any relevant policies outlining their reasons for terminating the claimant. In addition, the loss prevention manager testified that the employer applies discretion when determining discipline for such violations as the claimant was alleged to have violated. Consequently, we conclude that the employer did not discharge the claimant for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

Alternately, we consider whether the employer has established that the claimant's conduct constituted deliberate misconduct in wilful disregard of the employer's interest. There is no dispute that, after the claimant received the final warning on November 9, 2017, (1) she was aware of the employer's reasonable expectation that she would not bring her grandchildren to work; (2) she was aware that she could be discharged if she brought her grandchildren to work again; and (3) notwithstanding her awareness of the expectation and the penalty for violating it, the claimant brought her grandchildren to work again on November 19, 2017, barely ten days after receiving the warning. Thus, the claimant's bringing her grandchildren to work was deliberate. The issue before us is whether her bringing her grandchildren to work constitutes deliberate misconduct in wilful disregard of the employer's interest.

As the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. A person's intent may be adduced from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984).

In the present case, our findings show that the claimant knew that bringing her grandchildren to work was contrary to the employer's interest. Our findings also reflect that the claimant tried to accommodate the employer's interest by calling her daughter to pick up the grandchildren and by calling the store manager, before she had to go to work and open the store. However, in spite of the claimant's efforts to reach her daughter or the store manager, she was unable to either find child care for her grandchildren or guidance from her manager about how she should proceed.

In Garfield v. Dir. of Division of Employment Security, the SJC stated:

> When a discharged worker seeks [unemployment] compensation, the issue before the board is not whether the employer was justified in discharging the claimant but whether the Legislature intended that benefits should be denied in the circumstances. . . . The apparent purpose of § 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."

377 Mass. 94, 96 (1979) (citations omitted). In evaluating a claimant's state of mind, we must consider the reasonableness of the employer's expectation and the presence of any mitigating factors. Id. at 97. As noted above, the employer's expectation that the claimant would not bring her grandchildren was reasonable. But our inquiry does not end there.

Serious personal family problems may constitute mitigating factors. In Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30 (1987), the Appeals Court refused to deny benefits to a night-shift maintenance worker who had been fired for falling asleep on the job. The maintenance worker was going through a divorce and was responsible for the care of both his 78-year-old mother, who was in a hospital intensive care unit, and his 80-year-old father, who was at home terminally ill with cancer. Id. at 31–32. The Appeals Court held that these constituted mitigating factors that prevented his act of sleeping on the job from being considered deliberate misconduct in wilful disregard of the employer's interest. Id. at 33.

In the case before us, the claimant's state of mind is embedded in Findings ## 10 and 13. Her daughter had not come to pick up her grandchildren on Sunday morning as arranged, the grandchildren were too young to leave at home unsupervised, the claimant had to go to work and open the store by 10:00 a.m., and she was afraid she would be discharged if she did not open the store on time.

The claimant attempted to comply with the employer's reasonable expectation, as set forth in Findings ## 10 and 11. The claimant tried to call her daughter to pick up her grandchildren, and she tried to call her store manager for direction about what to do under the circumstances — to go to work with the children or stay home because she could not let them be unattended. Despite the claimant's efforts, neither her daughter nor her store manager returned her calls.

Whether these circumstances mitigated the willfulness of the claimant's misconduct requires an exercise of judgment that is not purely factual. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

Applying the law to the facts here, we conclude that the claimant's lack of child care and her inability to reach either her daughter or store manager posed an unwinnable dilemma for the claimant: risk discharge by bringing her grandchildren to work and opening the store as scheduled, or stay home to care for her grandchildren and risk discharge for not opening the store. These options, over which the claimant had no control, constituted mitigating circumstances that prevented her from complying with the employer's directive against bringing her grandchildren to work. Put more simply, the claimant brought her grandchildren to work because she had no viable alternative, and her manager did not respond to her inquiries about how to proceed. In this context, the claimant's personal circumstances mitigated her conduct and did not constitute wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant either knowingly violated a reasonable and uniformly enforced policy or 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 ending December 2, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 2018

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.

JPC/rh