

The findings show that the claimant did not engage in the specific conduct for which the employer terminated her. The conduct admitted to by the claimant—pushing a child away to avoid being bitten—did not constitute corporal punishment or child abuse. Held the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0030 3412 73

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 February 20, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 25, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties via telephone, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 24, 2019. 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. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant committed deliberate misconduct in wilful disregard of the employer's interest by violating the employer's prohibition of corporal punishment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time co-director for the employer, a before and after school child care program, from August 2018 to February 20, 2019 when she separated.
2. The claimant's direct supervisor was the area manager.
3. The employer had a Respect and Protect Children Policy (policy) prohibiting any form or [sic] physical punishment or restraint of children. The purpose of the policy was to protect the children. The disciplinary consequence for violating this policy is not set forth within the policy.
4. The claimant received the policy in August 2018.
5. The employer expected employees not to engage in any type of physical punishment or restraint of children. The purpose of this expectation is to protect the children.
6. The claimant was aware of the expectation to not physically punish or restrain children.
7. On February 12, 2019, the claimant's daughter, a student at the program, was fighting with another student (student A) over a book. The claimant approached both children and asked them to find something else to do. Student A walked away. The claimant's daughter became angry and began hitting and kicking the claimant. As the claimant reached in front of her daughter to grab the book, her daughter attempted to bite her. The claimant put her hand on her daughter's mouth and pushed her away. The claimant then walked away and left her daughter sitting at the table.
8. The claimant's daughter told another employee (employee A) about the incident. Employee A told the area director what the child had reported to her.
9. On February 20, 2019, the area director contacted the claimant via telephone, terminated the claimant for violating the policy, and filed a 51A.
10. The Department of Children and Families conducted an investigation. Per the claimant, the Department of Children and Families did not support the allegations of abuse by the claimant.

Credibility Assessment:

The area director testified at the hearing that the claimant slapped her daughter during the February 12, 2019 incident. The area director's testimony however, was based on hearsay and was not supported by any independent evidence or other witnesses. As such, it is concluded, based on the claimant's first-hand testimony, that the claimant pushed her daughter by the mouth.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is disqualified from receiving unemployment 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 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

Here, the employer testified that the claimant was discharged specifically for slapping her daughter. However, the review examiner discredited the employer's version of events, instead crediting the claimant's testimony that she merely pushed her daughter away in an attempt to avoid being bitten. Such credibility assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). For the reasons stated in her credibility assessment, we believe these findings are reasonable in relation to the evidence presented.

Nevertheless, the review examiner's analysis concluded that the claimant's conduct in pushing her daughter away was "contrary to the employer's expectation." However, this conclusion is not supported by the record. Both the employer witness and the claimant testified that the employer prohibited "corporal punishment," and the review examiner used this same phrase in her analysis when referring to the relevant expectation. The written policy specifically refers to "discipline methods [. . .], including: [s]panking, grabbing, pinching, or any physical punishment or restraint." In pushing her child away, the claimant did not engage in any of the specifically-enumerated actions. There is no indication that the claimant's actions were motivated by anger, or intended as punishment, or could reasonably be considered to constitute "corporal punishment." Rather, the record suggests that the claimant pushed her child away merely in order to avoid being bitten. The reason for discharge presented by the employer — slapping the child — was not found credible, and there is no indication from the record that the employer would have discharged the claimant if she had merely pushed the child in the circumstances indicated by the findings.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit'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 ending February 23, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – September 27, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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

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.

JRK/rh