

**Following a District Court order to decide the claimant's separation under G.L. c. 151A, § 25(e)(2), the Board held the claimant's failure to respond to a request to let the employer know when she could return to work to be deliberate misconduct in wilful disregard of the employer's interest. The claimant's inability to remember why she did not call back was not proof of any mitigating circumstances.**

**Board of Review  
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**Issue ID: 0033 3140 06**

### 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 claimant voluntarily left her employment without making reasonable efforts to preserve her job and, therefore, she was ineligible pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on January 9, 2020. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on February 4, 2020. 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 December 11, 2020, the District Court remanded the case. It ordered the Board to analyze the claimant's separation as involuntary and to consider whether the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2). Thus, the issue before the Board is whether the review examiner's original decision to disqualify the claimant from receiving benefits is supported by substantial and credible evidence and is free from error of law, if we treat her separation as an involuntary discharge and analyze the facts under G.L. c. 151A, § 25(e)(2).

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and the District Court's Order, we affirm the review examiner's decision to deny benefits.

### Findings of Fact

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

1. From June 1, 2018, until August 8, 2019, the claimant worked as a full-time (40 hours per week) preschool teacher for the employer, a preschool and daycare.

2. The claimant reported to the employer's owner ("the owner").
3. Sometime during the summer of 2019, the claimant, who was pregnant at the time, discussed her upcoming unpaid maternity leave with the owner. The claimant initially told the owner that she wanted a short maternity leave as she needed the income from work. The owner suggested to the claimant that she take at least 8 weeks from work so that her baby ("the baby") would get her vaccinations prior to her going back to work. The claimant and the owner also agreed that the baby would be enrolled at the employer's preschool at a discounted rate.
4. The claimant worked for the employer until August 8, 2019.
5. Beginning on August 9, 2019, the claimant went on an unpaid maternity leave.
6. On August 14, 2019, the claimant gave birth to the baby, a girl.
7. Sometime in early September 2019, the claimant visited the employer's preschool with the baby and met with the owner. The claimant gathered her paystubs and agreed with the owner that she would return to work on September 30, 2019. The owner wrote a note on her calendar that the claimant would return to work on September 30, 2019.
8. Sometime in September 2019, the baby developed a tumor on her lip and experienced severe colds and high fevers. The claimant had to take the baby to multiple medical appointments.
9. A few days prior to September 30, 2019, the claimant called the owner and told her that the baby was sick. The owner then offered to extend the claimant's maternity leave until October 8, 2019.
10. Around this time, the claimant, who was interested in purchasing a car, asked the owner for a letter confirming her employment with the employer. The owner wrote a letter for the claimant indicating that she was "scheduled to return back to work on 10/8/2019." The claimant's father picked up the letter from the employer's workplace and provided it to the claimant.
11. Around this time, the claimant's preschool teacher license ("the license") was called into question by the state. The claimant and the owner communicated regarding the license.
12. On October 8, 2019, the claimant texted the owner asking if she had heard anything regarding the license. The owner responded she had heard nothing yet.
13. On October 10, 2019, the owner met with a state representative regarding the license and managed to get the license cleared for the claimant to return to work.

14. On October 10, 2019, the claimant and the owner spoke over the phone. The owner told the claimant that the license was all set and that she could come back to work. The claimant and the owner then decided that the maternity leave would be extended and that the claimant would return to work on October 28, 2019. The claimant agreed to return to work on that day.
15. The claimant was initially unable to get the baby vaccinated because of the baby's illnesses.
16. On October 15, 2019, the owner sent the claimant a text which read, in relevant part, "Could you start in October 25th"? The owner asked the claimant if she could return to work on October 25, 2019, as she had another employee going out on maternity leave.
17. On October 16, 2019, not having heard from the claimant, the owner sent her a follow-up text which read, in relevant part, "Did you change your phone number?"
18. On October 18, 2019, the owner sent another text to the claimant, which read, in relevant part, "Hope everything is well. [. . .] Please call me then [sic] Available. I also applied for grant, may be I will available to use it for [the baby's] daycare tuition cut."
19. The claimant did not respond to any of the owner's text messages.
20. As of October 27, 2019, the claimant had a working phone.
21. On October 28, 2019, the claimant did not report to work.
22. At no time did the claimant inform the owner that she would not be returning to work on October 28, 2019.
23. On October 28, 2019, at 3:30 p.m., the owner sent the claimant a text, which read, "Hello [the claimant], I hope this message found you well. We had a conversation on 10/10/19 that you are returning to work on 10/28/19 from maternity leave. You didn't show up to work today and not responding to my previous messages. I am assuming that you are quit [sic] your position. I wish you the best."
24. On October 28, 2019, at 5:06 p.m., the claimant sent the owner a text, which read, "I did not quit my position I have had no phone because I dropped it in the sink while trying to give the baby a bath so if you texted me before 10/22 I did not receive it because I Have a whole new phone with no old messages. My child is sick she has been sick for over 30 days I am waiting on EKG results to see what is going on she has a tumor on her right lip. I have been in and out of children's hospital and doctor appointments with her almost daily. Again, I did

- not quit my job! You asked if I could come back on the 28th and I said yes as long as everything is well and she had her shots, she still has not had her shots, she still has not got vaccinated due to her being sick they will not give her the shots.”
25. On October 28, 2019, at 7:42 p.m., the owner sent the claimant a text, which read, “Thank you for your response. I will be happy to help you if you need. Please let me know your plans.”
  26. On October 30, 2019, at 10:30 a.m., the claimant sent the owner a text, which read. “Okay is I’ll let You know as soon as she gets her results and the doctors tell me what is going on with her.”
  27. On November 2, 2019, the baby was given her vaccines.
  28. On November 5, 2019, the owner called the claimant in order to inquire about her return to work date. The owner did not reach her and left a voicemail asking the claimant to call her back. The owner intended to ask the claimant to produce medical documentation if she needed additional time away from work.
  29. The claimant received the owner’s November 5, 2019, call and voicemail but, for unknown reasons, chose not to respond to the owner, effectively quitting her employment for unknown reasons.
  30. Had the claimant called back the owner, the owner would have requested medical documentation and considered an extension of her maternity leave.
  31. The claimant never provided the owner with a return to work date.
  32. On November 7, 2019, at 7:47 p.m., the owner sent a text to the claimant, which read, “Hello [the claimant], hope everything is going well. I called you 11/5 and left a message asking you to contact me to follow up. You have not responded. Your maternity leave is excessive and already more than 13 weeks with unknown reasons. You has [sic] not contacted us. The ignorance of contacting us is considered as quitting. Based on your actions I need to close your file at [the employer]. The Best wishes.”
  33. On November 7, 2019, at 10:24 p.m., the claimant texted the owner, “I spoke to you 1 week ago and told you I would let you know what is going on after she has her follow at Hospital [A], she has not had her follow up. I don’t understand why you keep saying that I am quitting my job when I have not once stated that I quit. I am not voluntarily quitting my job at [the employer] and due to unforeseen circumstances that were not able to be predicted I need to extend my maternity leave to take care of my child. From what I am reading from your last text message you sent to me is that you are “closing my file at [the employer]” does that mean you are terminating me?”

34. On November 9, 2019, the claimant filed a claim for unemployment benefits with an effective date of November 3, 2019.

Credibility Assessment:<sup>1</sup>

As an initial matter, the claimant contended that she and the owner never agreed on any return to work date, and that a firm return to work date was never set in stone. The owner, however, directly rebutted the claimant's contentions, indicating that they had initially agreed on a September 30, 2019, return to work date and testifying that she had written a note on her calendar. Furthermore, after the claimant informed the owner that the baby was sick and the owner extended her leave, the owner produced a letter dated September 30, 2019, (which the claimant requested as she was in the process of purchasing a vehicle) in which she wrote the claimant was "scheduled to return back to work on 10/8/2019." Moreover, the claimant admitted that, on October 10, 2019, she and the owner agreed that her leave would be further extended and that she would return to work on October 28, 2019. Although the claimant contended that this date was contingent upon the baby receiving her vaccinations, where the owner directly refuted this, and where everything else on the record supports the owner's version of events (including written documentation and specific testimony), it is concluded that the claimant was aware of her various return to work dates and that she was expected to return to work on October 28, 2019.

After the claimant did not report to work on October 28, 2019, (without having reached out to the owner and despite having a working phone at least as of October 27, 2019), the owner asked the claimant to let her know of her plans. Although the claimant contended that the baby's vaccinations were the impediment to her returning to work, the claimant admitted that the baby got her vaccinations on November 2, 2019, and she made no attempts to inform the owner of such at the time. Furthermore, the claimant admittedly received a phone call and a voicemail from the owner on November 5, 2019, (asking her to call her back) and could not provide a reason as to why she did not return the owner's call. Although the claimant testified that she was ready to return to work on November 11, 2019, where she had made no attempts to reach out to the owner as of late in the day on November 7, 2019, where she did not provide the owner with a return to work date, and where she was already aware, per the owner's October 28, 2019, email, that her failure to communicate would be interpreted as job abandonment, it is concluded the claimant initiated her separation and Section 25(e)(2) does not apply to this matter.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible

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<sup>1</sup> The review examiner's credibility assessment appears in the Conclusions and Reasoning section of his decision. We have copied and pasted it here for purposes of review.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that even if we view the separation as an involuntary discharge, the claimant is ineligible for benefits.

Viewing the claimant's separation from the employer as job abandonment, the review examiner disqualified the claimant pursuant to G.L. c. 151A, § 25(e)(1). Because the claimant had been on an approved leave of absence, the District Court viewed the claimant's separation as a discharge, and it has remanded this case for us to analyze her separation under G.L. c. 151A, § 25(e)(2). The latter provision states, 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, 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).

The findings of fact show that the claimant was granted a leave of absence for maternity purposes on August 9, 2019, and that her return-to-work date was extended a couple of times. *See* Findings of Fact ## 5, 9, and 11–14. After October 28, 2019, it seems that a definitive return-to-work date had not been agreed upon. *See* Findings of Fact ## 23–26. The event which triggered her separation is the claimant's failure to respond to the employer's November 5, 2019, voicemail message asking the claimant to contact the employer about a return-to-work date. *See* Findings of Fact ## 28–32. Thus, we consider the claimant's failure to communicate when asked to on November 5, 2019, to be the misconduct for which the employer ended her employment.

Since there is nothing in the record to show that this behavior violated a specific policy, we cannot conclude that the separation was due to a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2). Alternatively, we consider whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

In order to determine whether an employee's actions constitute 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 “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 v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The claimant had been made aware that the employer expected her to return her telephone calls and texts and that failure to do so would be deemed a quit. In fact, this was communicated only the week before the employer's November 5, 2019, voicemail message through the employer's October 28, 2019, text. *See* Finding of Fact # 23. The employer's request for the claimant to return a telephone call about a return-to-work date is a reasonable expectation. Since there is no indication that the claimant made any effort to return the telephone call, and no indication that she may have simply forgotten to return the employer's call, the only reasonable inference is that she deliberately chose not to respond.

The question remains whether there were mitigating circumstances for the claimant's failure to return that voicemail message. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

Here, the claimant had no explanation for not responding to the employer's November 5<sup>th</sup> voicemail message. She testified that she could not remember. *See* Finding of Fact # 29.<sup>2</sup> As such, there is no evidence from which we could conclude that circumstances beyond her control prevented her from contacting the employer, as asked. The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

We, therefore, conclude as a matter of law 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).

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<sup>2</sup> *See also* Boston Municipal Court Memorandum of Decision, M. Bolden, Associate Justice (Dec. 9, 2020), p. 3.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning November 3, 2019, 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 - January 28, 2021**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS  
STATE DISTRICT 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.

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