

The claimant did not provide a credible explanation for why he failed to comply with a resident's care plan, conduct which ultimately placed the resident's health and safety in jeopardy. He engaged in deliberate misconduct in wilful disregard of employer's interests.

**Board of Review
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Issue ID: 0047 7693 68

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on July 2, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 11, 2020. The claimant 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 awarded benefits in a decision rendered on January 9, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's state of mind. Only the employer participated in the remand hearing. Thereafter, the review examiner issued his 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that neither management nor the clinical staff advised the claimant that he could deviate from Resident A's care plan when Resident A became angry.

Findings of Fact

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

1. The claimant worked full-time for the employer, a residential home provider for individuals with disabilities, as a Direct Support Professional, from December 21, 2017 until July 2, 2020. The claimant was paid \$13.26 per hour.
2. The Employee Handbook states, in part:

5-7 Standards of Employee Conduct

Introduction

Our people are role models for people supported. We expect that our employees uphold the highest standards of conduct at work because that creates and fosters the best environment for the people we support and for employees. The standards of conduct below are designed to create that environment ensuring that [t]he rights, boundaries and/or property of people supported, coworkers and the agency are respected at all times.

Failure to adhere to the following policies and guidelines will not be tolerated and may result in immediate termination, depending on the severity of the offense, the employee's work record and history, and other relevant factors. This list is for illustrative purposes only and is not intended to be exhaustive.

4. Placing the health or safety of people [supported] in jeopardy.

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3. The policy is a measure to ensure the safety of residents and compliance with the Department of Developmental Services requirements.
 4. All employees are subject to the policy.
 5. Violation of the policy may result in immediate termination.
 6. The Director of Human Resources (DHR) has not had occasion to previously enforce the policy.
 7. The DHR did not know if other employees had violated the policy prior to the time period covering his current employment.
 8. The claimant was issued the employee handbook.
 9. The claimant believed he was subject to a corrective action procedure rather than immediate termination.
 10. The claimant underwent two prior investigations concerning jeopardizing the safety of residents, which were not substantiated.

11. A resident (Resident A) suffers from Cognitive Delay, Congenital Encephalopathy and Agenesis of the Corpus Callosum, Cerebral Palsy, Scoliosis, Impulse Control Disorder, Anxiety ADHD and Seizure Disorder.
12. Resident A had an updated care plan effective October 9, 2018, which stated, in part:

SIB (Self Injurious Behavior):
 - Maintain line of sight supervision (within two feet of [Resident A], so you can physically intervene (if necessary) while he is displaying SIB behavior.
13. The claimant had worked with Resident A for about 8 months and was aware from Resident A's care plan he was required to keep Resident A in his line of sight and to stop Resident A from attempting to harm himself.
14. Resident A was a "spitter", "slapper" and a "hitter."
15. Resident A's "thing" is music.
16. On May 21, 2020, the claimant, who was seated in the residential home living room, wanted to listen to music.
17. A coworker (Coworker A) wanted to watch a movie on television.
18. Resident A got agitated.
19. The claimant escorted Resident A to his room and told Resident A to calm down.
20. The claimant returned to the living room.
21. The claimant had the hallway to Resident A's room in his line of sight from the living room.
22. Resident A, who was alone in his room, was not in the claimant's line of sight.
23. The claimant was not within two feet of Resident A.
24. The claimant heard a "thud" from the claimant's room.
25. Another coworker (Coworker B) went to the claimant's room.
26. Resident A wanted to take a shower.
27. Coworker B called the claimant to Resident A's room.

28. The claimant observed two big bruises on Resident A's back.
29. The claimant took a picture of the bruises and reported the incident.
30. The claimant's supervisor reported the incident to Human Resources.
31. The employer notified the Disabled Persons Protection Commission of the incident.
32. On May 21, 2020, the claimant was suspended with pay pending investigation.
33. On July 2, 2020, the claimant was discharged for violation of the employer's policy, which prohibited direct support professionals from placing a resident's (Resident A) safety and health in jeopardy.
34. The claimant had not been previously disciplined for placing a resident's safety or health in jeopardy.
35. The claimant did not follow the care plan which required direct care staff to keep Resident A in his line of sight and not be left alone because "you try to get along and you go off how well you work with him [Resident A] and if he [Resident A] had a tantrum in his room and other residents would be kept safe."
36. The employer has three board certified clinicians. Only one clinician (Clinician A) was assigned to the claimant's program.
37. Clinician A wrote Resident A's care plan.
38. Clinician A trained the claimant and reviewed Resident A's care plan with him.
39. Clinician A did not tell the claimant it was "Ok" to take a resident who was having a behavior issue to their room to take out their anger.
40. Clinician A did not make any variations to Resident A's care plan.
41. The claimant's Program Manager (PM), previously a direct care worker, had worked with Resident A.
42. The PM never told the claimant it was "Ok" to leave Resident A alone.
43. Resident A's behavior plan had not been changed, relieving direct care staff from keeping Resident A in their line of sight.
44. The claimant did not have permission to vary and not follow Resident A's care plan.

Credibility Assessment:

The claimant testified in the initial hearing, Clinician A had told him it was “Ok” to take a resident who was having a behavior issue to their room to take out their anger. Clinician A, who did not testify at the initial hearing, testified at the remand hearing that she trained the claimant; she wrote Resident A’s care plan; she reviewed Resident A’s care plan with him; she did not make any variations to Resident A’s care plan; and she did not tell the claimant it was “Ok” to take a resident who was having a behavior issue to their room to take out their anger. In light of Resident A’s diagnoses and absence of documentation of a change in Resident A’s care plan by Clinician A, it is unreasonable to believe Clinician A told the claimant he could vary from Resident A’s care plan. The claimant’s testimony Clinician A had told him it was “Ok” to take a resident who was having a behavior issue to their room to take out their anger is not credible.

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 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 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. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer’s interest.

Because the claimant was terminated from his employment, his 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

In his original decision, the review examiner analyzed the claimant’s discharge under both the knowing violation and deliberate misconduct standards, after concluding that the employer presented a health and safety policy that was reasonable and uniformly enforced. However, after remand, the review examiner found that the employer had discretion in determining what discipline to impose for violation of the health and safety policy. Based on this finding, we cannot conclude that the claimant was discharged for a knowing violation of a reasonable and *uniformly* enforced policy of the employer. Thus, the issue before us is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interests on May 21, 2020, when he

deviated from Resident A's care plan by leaving him alone in his room, thereby placing Resident A's health and safety in jeopardy.

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). In order to determine whether an employee's misconduct was deliberate, 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, 377 Mass. at 97.

After the initial hearing, the review examiner found that, on May 21, 2020, Resident A became agitated and the claimant left him alone in his room, out of the claimant's line of sight, so that the resident would calm down. While alone in his room, Resident A appeared to sustain injuries to his back. The claimant was discharged for jeopardizing Resident A's health and safety when he left him alone in his room. We remanded this case to the review examiner to obtain clear findings pertaining to the claimant's state of mind at the time he left Resident A alone, as the review examiner had originally made findings on this matter that were confusing and contradictory.

After hearing the testimony of the employer's clinician and program manager at the remand hearing and reviewing Resident A's care plan, the review examiner determined that the claimant's testimony that he was permitted to deviate from Resident A's care plan and leave Resident A alone was not credible. The review examiner's credibility assessment is within the scope of his role as a fact finder, and, because we find it is reasonable in relation to the evidence presented, we will not disturb it on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

Based on this credibility determination, the review examiner found that the claimant was aware he was required to follow the care plan's instruction to keep Resident A within two feet and in his line of sight when Resident A was displaying self-injurious behavior. The review examiner further found that neither the clinician nor the program manager assigned to the claimant's program advised the claimant that he could leave Resident A alone in his room to take out his anger. Finally, the review examiner found that the claimant deviated from Resident A's care plan and left him alone in his room because, "you try to get along and you go off how well you work with him [Resident A] and if he [Resident A] had a tantrum in his room and other residents would be kept safe."

The above findings establish that the claimant intentionally took Resident A to his room and left him alone, so that Resident A would calm down and not hurt other residents during his tantrum. Thus, the only remaining question is whether the claimant acted in wilful disregard of the employer's interest when he engaged in this conduct.

Since the claimant was aware of Resident A's care plan, we must consider whether mitigating circumstances existed to excuse the claimant's failure to comply with the expectation that he follow the care plan in order to avoid jeopardizing his health and safety. 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).

The claimant's explanation for his actions indicates that he took an agitated Resident A to his room to keep other residents safe, presumably because Resident A was exhibiting dangerous behavior during a tantrum. However, this explanation does not explain why the claimant then left Resident A alone, precisely during the type of situation that required the claimant to keep a close eye on Resident A to prevent injuries such as those he ultimately sustained while alone in his room. Nor is there anything in the record to suggest that the claimant was unable remain in close proximity to Resident A at the time. Absent mitigating circumstances to excuse the claimant's misconduct, we must conclude 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 as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 28, 2020, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 28, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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

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.

SVL/rh