The employer established that the claimant continually failed to follow proper diapering safety procedures despite being aware of the procedure and being repeatedly warned that she must always adhere to the procedure to ensure child safety. Therefore, the employer met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0059 2736 03

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 separated from her position with the employer on November 6, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 27, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on December 1, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the employer did not meet its burden to show the claimant intentionally disregarded the employer's policies and expectations regarding child supervision and safety, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked part-time as an assistant teacher for the employer, a daycare and preschool, from 8/25/20 to 11/6/20. She worked two days per week.

2. The employer has a written disciplinary action policy which states that the Director will provide regular feedback, coaching and training, and when specific behavioral or performance improvements must be made, the employee will be subject to disciplinary actions which may be on a progressive basis, from verbal or written warnings to immediate suspension or termination, where appropriate.

3. The employer has a written policy that lists examples of misconduct that states, in part, "…In addition to the school's right to dismiss an employee for any reason, and without diminishing said right of dismissal, it should be noted that if an employee's conduct constitutes a serious violation of the [employer's] policy or is potentially detrimental to …childcare, that employee may be terminated immediately."

4. According to the policy, misconduct includes refusal to perform assigned duties and refusal to adhere to employer policies and expectations as described in the employer handbook.

5. The policy is in place to ensure that employees perform the work they were hired to perform and to promote a safe and professional workplace.

6. The claimant acknowledged receipt of the employer handbook on 8/19/20.

7. The claimant received no documented warnings prior to her separation from employment.

8. The employer has written diapering instructions. Per the diapering instructions, employees must have at least one hand on the child receiving a diaper change.

9. The claimant received the diapering instructions at hire.

10. Employees are expected to have at least one hand on the child receiving a diaper change to ensure that the child is safe and to prevent injury.

11. The Director had to remind the claimant to make sure at least one had was on the child while diapering on more than one occasion prior to 11/6/20.

12. The claimant received no discipline during the course of her employment.

13. On 11/4/20, the Director observed the claimant put a cot against a door in a classroom and observed a teacher walk through the door, causing the cot to fall and hit a child.

14. On 11/6/20, the Director observed the claimant turn around to ask a question while diapering a child, with no hand on the child. The Director told the claimant to face the child and put at least one hand on the child. The claimant said, "Yeah, yeah."

15. On 11/6/20, the Director observed the claimant assisting a child with washing his hands. The claimant was holding the child while the child washed his hands. Another child bit the child the claimant was helping.

16. The claimant said, "Oh, oops" when this occurred.

17. There was another teacher in the room, as well as the Director, when the child was bitten.

18. The child who bit the other child did this more than once in the past, to the same child.

19. The Director expected that the claimant would have created a better barrier to the children and take action to separate the children.

20. The Director terminated the claimant's employment on 11/6/20 for failing to provide adequate supervision to the children she was hired to care for.

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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the employer did not present sufficient evidence to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

Because the claimant was discharged 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 . . . .

Under this provision of the statute, "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).

As an initial matter, there is insufficient evidence in the record for us to conclude that the employer's policy, which the claimant is alleged to have violated, was uniformly enforced. Therefore, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only 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).

As a threshold matter, the employer must show that the claimant engaged in the conduct for which she was discharged. The review examiner found that, on November 6, 2020, the claimant failed to properly secure a child during the diapering process. Finding of Fact # 14. Thus, there is no question that she engaged in the behavior for which she was fired.

There is also no question that the claimant was aware that the employer had certain expectations about child safety and specific procedures about how to diaper a child. Findings of Fact ## 8–11. While the claimant was not formally disciplined for her actions, the employer's director had instructed the claimant to ensure that she kept at least one hand on a child when diapering them on several occasions prior to November 6, 2020. Finding of Fact # 11. Since nothing in the record suggests that the claimant's continued failure to follow the employer's diapering procedure was unthinking or accidental, we can further infer that her failure to do so on November 6, 2020, was deliberate.

Despite the evidence discussed above, the review examiner concluded that the claimant was entitled to benefits because the employer had failed to show that the claimant intended to disregard the employer's diapering procedure. However, there is no question that the claimant was aware that she needed to keep one hand on a child at all times during the diapering process. While the claimant was not formally disciplined for her previous failures to follow procedure, the claimant had reviewed the employer's written diapering procedure at time of hire and had been repeatedly cautioned by the Director when she failed to follow the proper procedure. Findings of Fact # 8, 9, and 11. Thus, the claimant's termination for her continued failure to follow this procedure could not fairly be characterized as a surprise.

The record did not contain any evidence of mitigating circumstances that caused the claimant to continue to disregard the employer's diapering procedure. 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 employer has met its burden to show that the claimant was discharged for 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 denied benefits for the week of November 1, 2020, 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 25, 2023

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

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.

LSW/rh