

The claimant was aware that the employer expected her to conduct medication counts at the start and end of her shift and keep the medication secured during her shift. She was discharged for deliberate misconduct in wilful disregard of the employer's interest because she failed to conduct a medication count at the start of her shift and left the medication cabinet unsecured during her shift. Held she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 April 26, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 4, 2021. 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 December 31, 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 circumstances surrounding the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 employer did not meet its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest after leaving medication unattended, is supported by substantial and credible evidence and is free from error of law.

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 as a full-time overnight residential counselor for the employer, a human services agency, from March 11, 2019, until April 26, 2021, when she separated.
2. The claimant's direct supervisor was the residential director (Supervisor).
3. The claimant worked forty (40) hours per week from 10:00 p.m. until 8:00 a.m., earning \$13.75 per hour.
4. The employer maintains a "Medication Administration Program Policy" (MAP) that details that "medication counts are to be conducted whenever control of the medication key is passed." The claimant completed a training to be MAP certified.
5. A violation of MAP leads to disciplinary actions, up to and including termination.
6. The claimant became aware of the MAP policy when she became MAP certified.
7. The employer also maintains a "Storage and Labeling of Medications" policy (storage policy) which states "medications for all individuals who are not self-administering shall be labeled and stored in a locked container or area, which is devoted strictly to medication storage, supplies, and records relevant to medication administration." A violation of the storage policy leads to disciplinary actions, up to and including termination.
8. The employer also maintains a "Code of Professional Ethic," which provides that employees should provide a complete, truthful and accurate reporting in all written and oral documentation and records that are prepared or review [sic] in the course of their job duties. A violation of the policy leads to disciplinary actions, up to and including termination.
9. The claimant was made aware of the storage policy and code of professional ethic at the beginning of her employment.
10. The employer expected employees to count the medications and provide the correct and truthful paperwork regarding the count.
11. The employer expected that employees would keep the medications stored away in a locked area.
12. A violation of these expectations leads to disciplinary actions, up to and including termination.
13. The claimant was aware of these expectations.

14. The controlled medications for the clients are stored away in a locked closet inside a room in the staff office. The key for the closet is kept in a locked box. The procedure is that the closet, locked box, and office should be always closed and the person on duty would have the office key.
15. There is no other way to access the medicine closet when it is locked by the keys.
16. Per the MAP policy, the employees, including the claimant are required to complete a medication count at the start and end of the respective shifts once the medicine closet key is passed to them.
17. The employer has a book called the “medication count book”. Each employee is required to complete this book after they have counted the medications at the beginning and end of their shifts. The medication count book is divided into columns that show the date, time, whether the count is correct, the name of staff coming on duty, and the name staff going off duty. If the medication is counted by only one employee, then it is noted in the book as a single count either in the staff coming on and the staff going off columns, respectively.
18. Employees are not allowed to write in the medication count book if they have not completed a medication count.
19. On March 14, 2021, a medication count was done at 9:00 a.m.
20. At 8:00 p.m. on March 14, 2021, the residential counselor (counselor) on duty completed a medication count at 8:00 p.m. prior to the claimant’s 10:00 p.m. shift. This was a single count.
21. There were no medications missing during the count at 8:00 p.m. on March 14, 2021. The counselor completed the medication book indicating that the count was correct.
22. The counselor was the only individual that would have had access to the medicine closet during the 2:00 p.m.-10:00 p.m. shift.
23. The claimant was scheduled to work her regular shift on March 14, 2021. The claimant was scheduled to work alone.
24. On March 14, 2021, the claimant was running late for her shift.
25. The medicine closet key was in the lock box at the start of the claimant’s shift. The counselor was in control of the closet key during the 2:00 p.m.-10:00 p.m. shift. The counselor put the closet key into the lock box at the end of the counselor’s shift, and the claimant retrieved the key from the lock box.

26. Since no medication was missing at the start of the claimant's shift, she was not notified of any missing medication.
27. On March 14, 2021, the claimant wrote in the medication count book indicating that at 10:00 p.m. she did a single count. The claimant also initialed the book but left the "count correct" column blank. The claimant did not indicate whether the count was correct or not.
28. On March 14, 2021, the claimant wrote in the medication book before completing the medication count.
29. The claimant did not complete a medication count on March 14, 2021.
30. No other staff were present at the residence during the claimant's shift who would have had access to the medication cabinet.
31. During her shift on March 15, 2021, the claimant went to use the bathroom and left the medicine closet unattended and unlocked.
32. While the claimant was in the bathroom, a client (client) was able to access the medicine closet and take three medications.
33. On March 15, 2021, between 5:30 a.m. and 6:00 a.m., the claimant counted the medications when she started the medicine administration. During that count the claimant realized that the count was off by three (3) tablets. The previous count stated that it was nineteen (19) tablets, but the claimant counted sixteen (16) tablets.
34. On March 15, 2021, the claimant reported the discrepancy to her supervisor.
35. On March 15, 2021, the claimant was suspended due to allegations of client mistreatment, because the employer alleged that due to the claimant leaving the medication closet unlocked, the client had taken the medications that were missing.
36. On March 17, 2021, the employer's quality department started an investigation into the incident by interviewing the claimant, the client, and the program director. There was also a review of the documentation. The counselor was not interviewed.
37. During the interview, the client told the investigator that he took three medications from closet on the morning of March 15, 2021, while the claimant was using the bathroom. The investigation also revealed that the residue from the medications was found in the client's room.
38. During the interview, the claimant was asked if she left the staff office unattended and she said no and that she did not do the count at 10:00 p.m.

39. Based on the investigation, the employer concluded that the claimant had violated the employer's policies and expectations by leaving the medications unattended so that the client could take it and by signing that the medicine count was correct when it was not.
40. On April 26, 2021, the senior human resources manager sent a letter to the claimant discharging her from her employment effective immediately for leaving the medications unattended so that the client could take it and by signing that the medicine count was correct when it was not.

Credibility Assessment:

At the remand hearing, Remand Exhibit 6, a copy of the employer's medication book, was entered into record.

During the remand hearing, the employer presented the copy of the medication book from March 14 and 15, 2021. The book shows that the claimant wrote in the medication count book on March 14, 2021, but did not indicate whether the count was correct or not. The claimant testified that she [sic] although she wrote in the book during her shift on March 14, 2021, she had not completed the count and had intended to do it later. However, the employer's policy requires that each employee, including the claimant, complete the medication count and document it at the start of their shift. Additionally, the employer's witness testified that employees are not allowed to write in the medication book before, if they have not actually completed the medication count.

During the remand hearing, the evidence also established that the medication count was correct when it was completed at 8:00 p.m. on March 14, 2021, and there was no report of discrepancy. The claimant testified that she did not complete the count on March 14, 2021, and was therefore unaware of any discrepancy in the count. She testified that on the morning of March 15, 2021, she noticed that there were three medications missing. The employer testified that during the investigation, the client reported that he took three medications while the staff was in the bathroom. Although the client does not remember the claimant's name, the evidence established that that claimant was the only one working during her shift. Although the claimant testified that two other people were present when she started her shift, that testimony is rejected as not credible. She did not mention them at the initial or continued hearing, and no other evidence in the record indicates that three people were on shift or in the residence during the counselor's shift or the claimant's shift. Therefore, it is more plausible that the medications were taken by the client during the claimant's shift while she was in the bathroom, since there was no report of discrepancy prior to March 15, 2021, and the client stated that he took three medications on the morning of March 15, 2021. The claimant's testimony that she did not leave the medicine closet unattended is not accepted as 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 employer failed to meet its burden to show that the claimant was discharged for deliberate misconduct.

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, "[T]he 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).

There was insufficient evidence in the record to determine whether the employer had imposed the same discipline for similar violations of its MAP and Storage and Labeling policies in the past. *See Consolidated Findings ## 5, 7, and 8.* For this reason, the employer has not established that the claimant was discharged for knowingly violating a *uniformly* enforced policy. We, therefore, consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

At the outset, the employer must show that the claimant engaged in the behavior which ultimately led to the discharge. In this case, the employer contended that the claimant failed to complete a required medication count and did not secure the medication safely in accordance with the employer's policies and expectations. Consolidated Findings ## 28, 29, and 31. While the claimant denied leaving medication unsecured during her shift, the review examiner rejected her testimony as not credible, on the grounds that the employer presented documentary evidence corroborating its contentions about the claimant's actions. *See Consolidated Findings ## 36–39.* Such an assessment is within the scope of the fact finder's role, and, unless the assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Our analysis does not end here, however. In this case, the dispositive issue is whether, in engaging in the misconduct in question, the claimant acted deliberately and in wilful disregard of the employer's interest. "Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). This analysis turns on an examination of the claimant's state of mind at the time of the misconduct. 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) (citation omitted).

The claimant understood that part of her job responsibilities as a residential counselor included proper storage, monitoring, and disbursal of medications for clients living in the employer's residence. Consolidated Findings ## 4-13. However, as discussed above, she failed to comply with the employer's expectations regarding safe use and storage of medication. The claimant did not allege that this was done by accident. In the absence of any evidence of mitigating factors for the claimant's behavior, and we see none, we conclude that the review examiner erred in finding that the employer had not met its burden.

We, therefore, conclude as a matter of law 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 June 13, 2021, 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2022



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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