

Where the review examiner reasonably found that the employer presented more credible evidence that the claimant failed to perform mandatory checks on the students in his charge and then falsely reported that he had done them, the employer met its burden to show deliberate misconduct in wilful disregard of the employer's interest. The claimant 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 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 engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he was disqualified pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on November 26, 2021. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, attended only by the employer, the review examiner reversed the agency's initial determination in a decision rendered on January 13, 2023. The claimant sought review by the Board, which dismissed his appeal because it was filed after the 30-day statutory appeal deadline set forth under G.L. c. 151A, § 40, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 28, 2023, the District Court ordered the Board to review the case on the merits and on October 4, 2023, denied the DUA's Motion to Reconsider. Although we continue to maintain that we do not have jurisdiction to review this late appeal, we have complied with the District Court's order. We reviewed the recorded testimony and evidence from the original hearing, the review examiner's decision, and the claimant's appeal, then remanded the case to the review examiner to afford the claimant an opportunity to present evidence. Both parties participated in the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant had deliberately failed to perform bed checks and falsified a report in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the additional recorded testimony and evidence from the remand hearing and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full-time as a direct support residential worker for the employer, a residential school for [autistic] students, from November 1, 2004 until September 10, 2021.
2. The claimant worked an overnight shift 11 p.m. to 9 a.m. The claimant had an overnight supervisor who is [sic] his direct manager.
3. The employer has a Zero Tolerance and Staff Supervision policy in the employee handbook. The Zero Tolerance Policy covers the falsification of documents. The staff supervision policy covers staff duties and assignments.
4. The employer has an expectation that employees are performing their assigned duties when working and providing accurate documentation on their daily work reports.
5. The employer maintained this expectation to ensure a safe environment for the students and to comply with the regulations from the Department of Early Education and [Care].
6. The expectation was conveyed to the claimant when he underwent new hire training and yearly training updates provided by the employer.
7. The claimant's job duties required him to monitor the two floors in the facility in his assigned residential house. The claimant had to monitor the upstairs bedrooms via several cameras that are located in the facility. The claimant was required to perform 15-minute bed checks by checking his assigned student during sleep time. The claimant was required to record the bed checks on his daily report (bed check notepad) that is submitted at the end of his shift.
8. On August 17, 2021, through August 18, 2021, the claimant was working an overnight shift 11 p.m. to 9 a.m. The claimant remained sitting on the living room couch from 11:30 p.m. until 2:43 a.m., and from 4:13 a.m. to 5:11 a.m.
9. The claimant's actions were captured by the employer's video camera.
10. At around 11:33 p.m., the claimant pulled the curtain to obscure the camera that was covering the living room area. The claimant's sitting on the couch was partially obscured by the curtain, but the employer could see when the claimant was sitting on the couch and when he left the couch.
11. The claimant did not complete his 15-minute bed checks on the second floor from 11:30 p.m. to 2:43 a.m. and 4:13 a.m. to 5:11 a.m. because the claimant was sitting on the couch per video camera's footage.

12. The claimant checked off that he completed the 15-minute bed checks (11 p.m. through 7:30 a.m.) when he initialed the bed check documentation report (bed check notepad log).
13. On or around August 18, 2021, in the morning (time of report not recorded), student # 3 reported to a staff member that another student, # 1, had entered another student's, # 2, bedroom (claimant assigned student) during sleep time. The staff member reported the incident to management who in turn assigned the then human resource business partner to investigate.
14. The employer's nursing team evaluated the two students and did not find any physical injuries and did not recommend a further review.
15. The HR business partner reviewed the second-floor camera footage and saw that student # 1 left her/his bedroom and entered [the] student # 2 bedroom (claimant assigned bed check student) and stayed in the room for a prolonged period of time, before leaving the bedroom and returning to his/her bedroom. The employer did not record the time student # 1 entered the student # 2 bedroom, and the time student # 1 left the student # 2 bedroom.
16. Upon further investigation by the employer (human resource business partner) the claimant's bed check initials was [sic] not accurate because, on two separate time frames from 11:30 p.m. to 2:43 a.m. and 4:13 a.m. to 5:11 a.m., the claimant was sitting on the living room couch for the duration per the records from the camera footage. The claimant was not seen in the camera's video footage sitting in the living room couch from 2:44 a.m. through 4:12 a.m.
17. Had the claimant conducted the required 15-minute bed check for his assigned student, he would have discovered student # 1 in [the] student # 2 bedroom during sleep time.
18. On August 18, 2021, at around 6 p.m. to 6:30 p.m. prior to claimant's shift (11 p.m. to 9 a.m.), claimant was placed on unpaid administrative leave pending the internal investigation's completion.
19. On August 19, 2021, the claimant told the HR business partner he was aware of the expectation that he had to perform a bed check the [sic] on his assigned student every 15 minutes during his overnight shift. The claimant told HR that he moved the curtain around the couch to block the light coming in from the window.
20. The HR business partner checked the living room and determined there is "neither a window nor a light positioned in that angle."
21. On September 10, 2021, the employer's human resources business partner discharged the claimant for falsifying documents and failing to provide

adequate supervision to his assigned student during the overnight shift on August 17, 2021, through August 18, 2021.

Credibility Assessment:

The employer's witness was [sic] human resource business partner (HR), but not the same HR person who conducted the internal investigation and who spoke with the claimant. The employer's witness testimony was the from the employer's internal investigation report, the bed check notepad records, video camera footage, and the employer's termination notice.

The claimant testified that he did not pull the curtain to obscure the camera in the living room; the curtain was already pulled over the camera when he reported to work. The claimant's testimony is not credible because the employer's witness testified that [the] claimant was observed on camera on August 18, 2021 pulling the curtain across in an attempt to obscure the camera's view on the living room. Furthermore, the HR business partner checked the living room and concluded that there was no reason to pull the curtain over the window because there is "neither a window nor a light positioned in that angle." The claimant further testified that he completed all of his assigned student bed checks on his shift from 11 p.m. to 7:30 a.m. The employer through the HR witness refuted that because they gave credible testimony that [the] claimant was seen sitting on the living room couch on two different time frames from 11:30 p.m. through 2:43 a.m. and 4:13 a.m. through 5:11 a.m. The employer further testified that the claimant was sitting on the couch for the duration from 11:30 p.m. through 2:43 a.m. and for the duration from 4:13 a.m. through 5:11 a.m. The HR witness acknowledged that the claimant was not seen sitting on the living room couch per video camera footage from 2:44 a.m. through 4:12 a.m. The employer did not challenge the accuracy of those 15-minute bed check[s] (on the bed check notepad) because he was not seen sitting on the living room couch from 2:44 a.m. through 4:12 a.m. The employer further acknowledged that the claimant did put his initials on the bed check notepad that he conducted the 15-minute bed-checks. However, the HR witness is challenging the veracity of claimant's testimony because the claimant was seen sitting on the living room couch on two separate intervals from 11:30 p.m. through 2:43 a.m. and 4:13 a.m. through 5:11 a.m. for the entire duration of those two separate intervals. The claimant testified that he did conduct his assigned students' bed-checks (assigned to check on 3-4 students). The HR witness was not aware that the claimant had 3-4 assigned students bed-check assigned to him that evening. The claimant testified that on two student bed checks, he had received permission from his shift supervisor that he could do an "eyeball check" (do not fully open the door to enter the room to thoroughly check) because the bed checks tended to bother the students by awaking them and they tended to become unruly afterward. The claimant further testified that the eyeball check was on the assigned student room where student # 1 had entered [the] student # 2 room, but the claimant insisted that only the assigned student was sleeping in his/her bed. However, the claimant did not mention that he had received prior approval from his supervisor to perform an "eyeball" bed check when he spoke with the then HR business partner (on 8-19-2021), who conducted

the investigation. In addition, the claimant failed to mention that he had received [sic] supervisor's permission to perform an "eyeball" check in his fact-finding statement. The only thing the claimant stated on [sic] in his fact-finding statement that was germane to the incident was that he was not sleeping on the couch. The employer did not allege that the claimant was sleeping, only that he was sitting on the couch for an extended period of time at two separate time frames---[sic] failed to complete his 15-minute bed checks in those time frames. The claimant's testimony is not credible. He had an opportunity to explain to the employer the discrepancies and provide any mitigating circumstances and he did not do so. Hence, I do not find credible his testimony that he completed his 15-minute bed checks from 11:30 p.m. through 2:43 a.m. and 4:13 a.m. through 5:11 a.m. are [sic] accurate.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except to note as follows. There is a discrepancy between Consolidated Finding # 7, which states that the claimant was assigned to perform a bed check on only one student and the review examiner's credibility assessment, which states he was assigned to check three to four students on his August 17–18, 2021, overnight shift. However, the number of assigned students is immaterial to our decision. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

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. . . .

“[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).

In this case, the employer discharged the claimant for falsifying documents and failing to provide adequate supervision to his assigned student(s) during his overnight shift August 17–18, 2021. Consolidated Finding # 21. Specifically, he was fired for submitting a report to the employer

checking that he had performed the required physical bed checks on his assigned student(s) every 15-minutes from 11:00 p.m. to 7:30 a.m., when, in fact, he had not. *See Consolidated Findings ## 7 and 11.*

The primary dispute in this case is whether or not the claimant performed the bed checks as he reported. As noted in the credibility assessment, the claimant alleged that his supervisor had given him permission to perform “eyeball checks” on all of his students so as not to open the door and wake them, and he insisted that he had done so during this shift. The review examiner did not find this testimony to be credible, instead accepting the employer’s assertion that the claimant failed to perform any bed checks. Such 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). “The test is whether the finding is supported by ‘substantial evidence.’” *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). We believe that the review examiner’s credibility assessment is reasonable in relation to the evidence presented.

Although not in the consolidated findings, the employer’s testimony during both hearings indicated that it imposed progressive discipline up to and including termination for the first offense for violating its policies.¹ Given this discretion, we are unable to conclude that the claimant knowingly violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest.

As there is no suggestion that the claimant forgot or inadvertently failed to perform all of his required bed checks on the August 17-18, 2021, shift, we can infer that his failure to do so was deliberate. However, “deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer’s interest.” *Goodridge v. Dir. of Division of Employment Security*, 375 Mass. 434, 436 (1978) (citations omitted). In order to determine whether an employee’s actions were in wilful disregard of the employer’s interest, 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) (citation omitted).

Consolidated Finding # 19 indicates that the claimant was aware of the employer’s expectation that he perform a bed check on his assigned students every 15 minutes. Given that the employer’s bed check expectation was implemented as a safety measure and to comply with state regulations, we believe that it was reasonable. An expectation to submit truthful reports is also self-evidently reasonable.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); *Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

Finally, we consider whether the claimant has shown mitigating circumstances for his failure to perform all of his 15-minute bed checks that night and for submitting a report stating that he had. 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). However, the defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See Lagosh v. Comm'r of Division of Unemployment Assistance*, No. 06-P-478, 2007 WL 2428685, at *2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant's defense of full compliance, the review examiner properly found that mitigating factors could not be found). In this case, the claimant denied engaging in the conduct for which he was discharged. Therefore, the defense of mitigation is not available.

We, therefore, conclude as a matter of law that the employer has met its burden to show 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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning September 12, 2021, 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 - January 9, 2024



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
(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.

AB/rh