

**Despite incurring frequent absences in a short period of time, the claimant continually failed to provide the employer with requested documentation explaining why she was unable to be at work when scheduled. The employer's decision to verbally reprimand the claimant rather than discharge her for past incidents is not evidence that the employer condoned such behavior. Held the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest and she is ineligible for benefits under G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0073 6692 11**

### 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 October 15, 2021. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 9, 2022. 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 October 20, 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.

The issue before the Board is whether the review examiner's decision, which concluded that employer had not shown that the claimant understood her failure to provide documentation for her frequent absences was contrary to the employer's expectations because she had not been disciplined for failing to provide such documentation in the past, 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 full time as a preschool classroom teacher for the employer, a preschool, from December 9, 2019, through October 15, 2021.
2. The employer has a written policy prohibiting certain types of conduct from its employees. A portion of the policy relates to attendance of employees. The policy reads, "Employees are prohibited from engaging in conduct listed below and may receive discipline up to and including termination. This list has been established to provide examples of behavior that could warrant a range of disciplinary sanctions. ... A pattern of unauthorized absences or late arrivals, being absent without notice or reason satisfactory to the company or leaving one's work assignment without appropriate authorization."
3. The purpose of the policy is to ensure the employer meets the State's mandated ratios of employees to children in its facility and in its classrooms each day.
4. The claimant became aware of the employer's policy when she signed an acknowledgment that she received it on December 9, 2019.
5. The employer has an expectation that each employee will adhere to the attendance policy and not take unnecessary time off without proper authorization. If an employee calls out for two consecutive days, the employer requires documentation of the reasons for the absences from the employee.
6. The employer communicated its expectation to the claimant through its written policy and by verbally warning the claimant that her absences were against the policy each time she called out of work.
7. Beginning in August of 2021, the claimant began a pattern of calling out of work at least once per week for various reasons that included illness, death in the family, and lack of transportation to work.
8. The claimant called out of work or left work early on the following dates:
  - a. August 3, 2021, called out with doctor's note;
  - b. August 4, 2021, scheduled day off per claimant's request;
  - c. August 11, 2021, claimant called out stating her father was in the hospital. No documentation was provided to the employer;
  - d. August 13, 2021, scheduled day off per claimant's request;
  - e. August 16, 2021, scheduled day off per claimant's request;
  - f. August 24, 2021, left early stating she would provide doctor's note, but did not provide note to employer;
  - g. August 25, 2021, called out;
  - h. August 30, 2021, left early due to not having a ride home;
  - i. September 7, 2021, left early due to not having a ride home;
  - j. September 9, 2021, called out due to cracked tooth that needed to be pulled by dentist. No documentation provided to employer;
  - k. September 13, 2021, called out due to not having a ride to work;

- l. September 17, 2021, called out due to not having a ride to work;
  - m. September 23, 2021, called out without reason given;
  - m. September 30, 2021, called out due to severe cramps. No documentation provided to employer.
  - n. October 1, 2021, called out stating she would bring a doctor's note to cover dates of September 30th and October 1st. No documentation was provided to the employer.
  - o. October 4, 2021, called out due to not having a ride to work;
  - p. October 5, 2021, called out because DCF needed to visit claimant's home. No documentation provided to employer.
  - q. October 6, 2021, called out because cousin passed away and claimant wanted to be with her family. No obituary provided to employer.
  - r. October 12, 2021, called out because claimant's child was sick. No documentation provided to employer.
  - s. October 14, 2021, called out because claimant had miscarriage. No documentation provided to employer.
  - t. October 15, 2021, claimant went home after working 15 minutes because DCF was at claimant's home. No documentation provided to employer.
9. Each time the claimant called out for a medical or other reason that could have been documented, the employer would ask the claimant to provide documentation. The claimant did not provide the requested documentation to the employer.
  10. Each time the claimant returned to work following an absence, the claimant received a verbal warning from the preschool director. The claimant did not receive any written warnings.
  11. The claimant was not told that her job was in jeopardy.
  12. On October 15, 2021, the claimant was removed from the schedule by the employer and told that she would not be put back on the schedule unless and until she provided the preschool director with documentation for her most recent absences.

### 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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 11 as inconsistent with the record. In adopting the remaining findings, we deem 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 claimant did not understand her failure to provide the documentation requested by her employer was contrary to the employer's expectations.

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).

While the employer presented a written attendance policy at the hearing, it retains substantial discretion in determining what disciplinary actions would be taken in response to infractions of said policy. Finding of Fact # 2. Accordingly, we cannot conclude that the employer’s attendance policy was uniformly enforced, and 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 the claimant had been absent or tardy numerous times during the period between August 3, 2021, and October 15, 2021, but had failed to provide the employer with documentation explaining the reason for her repeated absences. Findings of Fact ## 7–9. Thus, there is no question that she engaged in the behavior for which she was fired.

There is also no question that the claimant understood her employer expected her to provide documentation of the reason for her frequent absences. The claimant was issued repeated verbal warnings by the employer’s director each time she failed to present the documentation requested by the employer. Finding of Fact # 10. Since nothing in the record suggests that the claimant’s failure to provide this documentation was unthinking or accidental, we can further infer that her failure to do so was deliberate.

Despite the evidence discussed above, the review examiner concluded that the claimant did not possess the requisite state of mind because the employer had failed to discipline the claimant for similar omissions in the past. This was an error. It is true that, if the employer fails to discipline employees who violate a certain rule, a claimant may over time come to believe that such conduct

is in fact acceptable to the employer. See Gold Medal Bakery, Inc. v. Comm’r of Division of Unemployment Assistance, 74 Mass. App. Ct. 1105 (2009) and New England Wooden Ware Corp. v. Comm’r of Department of Employment and Training, 61 Mass. App. Ct. 532, 533–535 (2004).

However, here, the record shows that the employer did not ignore the misconduct. The claimant had repeated received verbal warnings for her failure to provide the requested documentation. Even if the claimant had previously been uncertain as to whether her actions were acceptable, the employer’s directive on October 15, 2021, was an unequivocal instruction to the claimant that she needed to provide documentation explaining her absences if she wanted to continue to work with the instant employer. Finding of Fact # 12. It is, therefore, clear from the record that the claimant understood her job was in jeopardy if she did not provide the required documentation in accordance with the employer’s expectations.

While this evidence was omitted from the findings of fact, the employer’s uncontested testimony was that they did not receive any further communications from the claimant after she left work on October 15, 2021.<sup>1</sup> Consequently, her subsequent termination could not fairly be characterized as a surprise.

There was no evidence in the record suggesting that mitigating circumstances precluded the claimant from providing documentation that verified the reasons for her frequent attendance issues. 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).

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<sup>1</sup> 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).

The review examiner's decision is reversed. The claimant is denied benefits for the week of October 10, 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 - December 15, 2022**



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](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.

LSW/rh