The claimant did not act in wilful disregard of the employer's interest, where she informed the supervisor that she had to bring her child to work with her due to a last minute babysitter cancellation, asked that another worker come to relieve her, and continued to work until that worker arrived. Held she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

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Issue ID: 0076 8711 01

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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from her position with the employer on May 5, 2022. She filed a claim for unemployment benefits with the DUA, effective May 22, 2022, which was approved in a determination issued on June 15, 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 overturned the agency's initial determination and denied benefits in a decision rendered on March 8, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to provide the claimant with an opportunity to testify and present other evidence. Both parties attended 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 engaged in deliberate misconduct in wilful disregard of the employer's interest by bringing her child to the employer's worksite and working while the child was present, 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 employer is a mental health and addiction treatment center. The claimant worked as a full-time opioid treatment program nurse for the employer. The claimant worked for the employer from 4/1/2021 to 5/5/2022.

2. The claimant administered methadone to the employer's patients. Methadone is a controlled substance.

3. The employer does not allow its workers to bring their children to work. The employer does not allow this because it provides care for patients and because health information privacy laws govern its organization.

4. The claimant worked Monday through Friday. The claimant's shifts started at 5:00 a.m. The claimant and the employer's office manager opened the facility together each morning. The claimant and the office manager were the only two workers assigned to start work at 5:00 a.m.

5. The claimant has a child ("Child 1"). Child 1 was an infant in May 2022. The claimant became a single mother in April 2022.

6. The claimant had a babysitter. This babysitter cared for Child 1 while the claimant worked. The babysitter came to the claimant's house in the mornings.

7. The employer scheduled the claimant to work on 5/5/2022 from 5:00 a.m. to 10:45 a.m.

8. The claimant's babysitter was sick on the morning of 5/5/2022. The babysitter told the claimant that she could not provide care that day because she was sick. The babysitter told this to the claimant around 4:45 a.m. or 4:50 a.m. The claimant's commute to work was five minutes. The claimant did not have any other childcare option. The claimant called the employer's office manager. The office manager was the only worker at the claimant's worksite. The claimant told the office manager that her babysitter was sick. The claimant explained that she must either not work or bring Child 1 with her. The office manager told the claimant to bring Child 1 to work with her. The claimant told the office manager that she would arrive a few minutes late. The claimant needed time to wake Child 1 and dress her.

9. The claimant went to work with Child 1 on 5/5/2022. The claimant arrived and began to set up. The claimant set up a methadone pump. The claimant then sent a text message to her direct supervisor ("Supervisor 1"). The claimant informed Supervisor 1 that she was at work with Child 1 because the office manager told her to come to work. The claimant asked Supervisor 1 to summon another worker to replace her so she could remove Child 1 from the workplace. Supervisor 1 told the claimant that another nurse would relieve her and that she could then leave with Child 1.

10. The claimant did not contact Supervisor 1 earlier on 5/5/2023 because she was concerned about the office manager. The claimant concluded that the office manager was waiting for her in the dark in the employer's parking lot.

11. The claimant continued to work on 5/5/2022 after she messaged Supervisor 1. The claimant worked at the employer's methadone counter. The claimant dispensed methadone to the employer's clients. The claimant kept Child 1 in a stroller. When Child 1 cried, the claimant kept the child in her lap at the counter. The other nurse arrived and relieved the claimant around 7:30 a.m. or 7:45 a.m. The claimant gave a report to the other nurse and the claimant performed a narcotic count. The claimant then left with Child 1.

12. The claimant returned home after she left work on 5/5/2022. The employer's site director then called the claimant within a few hours. The site director told the claimant that she was with Supervisor 1. The site director asked the claimant what happened that day. The site director told the claimant that she did not understand the claimant's judgement. The site director told the claimant that she was suspended pending an investigation. The site director then left a voice message for the claimant a few hours later. This voice message informed the claimant that she was fired.

13. The employer discharged the claimant because the claimant brought Child 1 to work and worked with Child 1 present with her.

Credibility Assessment:

In the hearing, the claimant described the interactions that she had with the office manager and Supervisor 1 on 5/5/2023. In the hearing, the employer also testified about these interactions. Given the totality of the testimony and evidence presented, the claimant's testimony about these interactions is accepted as more credible because the employer relied on mere hearsay. Neither the office manager nor Supervisor 1 attended the hearing.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 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 is ineligible for benefits.

Because the claimant was terminated from her employment, this case is properly analyzed as a discharge. G.L. c. 151A, § 25(e)(2), 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. . . .

"[The] 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).

On the record before us, the employer has not met its burden to establish that the claimant knowingly violated a reasonable and uniformly enforced policy. The employer has not presented a written policy pertaining to the prohibition against employees bringing children to its worksite or any information regarding the type of disciplinary action it implements to enforce the policy. Therefore, it cannot be said that the employer uniformly enforces the policy. Accordingly, our inquiry will focus on whether 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 consolidated findings show that the employer expected employees to refrain from bringing children to the worksite. Consolidated Finding # 3. The review examiner did not make any findings as to whether this employer policy was reasonable. However, we believe that the reasonableness of the policy is self-evident, because the employer's business involves the administration of methadone, a controlled and potentially harmful substance. *See* Consolidated Findings ## 1–2.

The review examiner further found that, on May 5, 2022, the claimant brought her child to work with her and worked while the child was present until another nurse relieved her. *See* Consolidated Findings ## 9 and 11. Prior to the remand hearing, the review examiner noted in his decision that the claimant "doubtless understood this expectation." *See* Remand Exhibit 2.[1] However, after the remand hearing, the review examiner did not find that the employer ever made the claimant aware that she was prohibited from bringing children to the workplace. Instead, the consolidated findings show that the claimant had received permission from the office manager to bring her child to work with her on May 5, 2022, and that the claimant's immediate supervisor "told the claimant that another nurse would relieve her and that she could then leave…" Consolidated Findings ## 8 and 9. In the absence of any evidence to the contrary, it is reasonable to infer that the supervisor did not inform the claimant that it was unacceptable to have the child present at work under the circumstances, and that the supervisor allowed the claimant to continue working until the replacement nurse arrived.

The Supreme Judicial Court has made clear that a claimant may not be disqualified from receiving benefits when the worker had no knowledge of the employer's expectation. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Here, it is evident from this record that the claimant did not understand that she was prohibited from bringing her child to work and continuing to work with the child present on May 5, 2022. The claimant informed her supervisor that she was at work with the child because the office manager told her to come to work and asked

[1] Remand Exhibit 2 is the original hearing decision, dated March 8, 2023.

that another nurse replace her so that she could remove her child from the workplace. Consolidated Finding # 9.

While the claimant's desire to remove her child from the workplace could suggest that she was aware that having the child present while at work was disfavored by the employer, nothing in the record demonstrates that the claimant's desire to do so stemmed from anything other than a personal desire to remove her child from a situation she did not consider to be ideal. Specifically, the claimant provided unrefuted testimony that, while she believed that "it was not ideal to bring my baby to a methadone clinic," the employer never informed her that she was not allowed to bring children into the workplace at any time, including on May 5, 2022, the day in question.[2]

In light of these findings, we cannot conclude that the claimant was aware that her actions were contrary to the employer's expectations that she refrain from bringing her child to work and working while her child was present. *Compare* Board of Review Decision 0026 9644 46 (September 18, 2019) (Board awarded benefits where, even though claimant was aware of employer's attendance policy, there was no evidence that employer informed claimant his leaving early was unacceptable at the time he left work).

Even assuming, *arguendo,* that the claimant understood that the employer would not want her to bring her child to work with her, the facts in this case show that the claimant did so only due to mitigating circumstances. 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). Here, the claimant's babysitter informed her that she was unavailable 15 minutes before the claimant's shift began, and she had no alternative child-care option. *See* Findings of Fact ## 7 and 8.

Moreover, behavior is also not considered to be done in wilful disregard of the employer's interest, where the claimant acts to further the employer's goals. Garfield, 377 Mass. at 98 (claimant took alternative steps to prepare store for his absence, where he believed he could not reach the district manager); *see also* Fallon Community Health Plan v. Acting Dir. of Department of Unemployment Assistance, No. SJC-13440, 2024 WL 899770 at 4 (Mass. Mar. 4, 2024), Slip Opinion (rather than disregarding employer's interest, claimant offered to take several measures in lieu of vaccination to safeguard employer's vulnerable patient population). Here, the claimant acted conscientiously in furtherance of the employer's interest to open the clinic given these last-minute childcare circumstances that were beyond her control. She immediately notified the employer's office manager, who was waiting for her in the dark, reported for work, and contacted her supervisor after arriving. *See* Findings of Fact ## 9 and 10.

Thus, the claimant did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest when she brought her child to work and worked while the child was present.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that

[2] 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).

she knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 1, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 14, 2024

Paul T. Fitzgerald, Esq.
Chairman

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.

JMO/rh