

**The claimant's self-described "fugue" state was not mitigating circumstances for failing to treat a mental health patient with dignity and respect. She presented no medical evidence to show that she could not control her behavior. Although she had not slept for the two nights before the incident, she chose not to take her prescribed sleep medication. Any inability to properly function was not due to a circumstance beyond her control. Held the claimant is ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
100 Cambridge Street, Suite 400  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0078 6460 37**

### 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 was discharged from her position with the employer on November 21, 2022. She filed a claim for unemployment benefits with the DUA, effective November 20, 2022, which was denied in a determination issued on December 7, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 1, 2023. 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, she 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 afford the employer the opportunity to present evidence and to obtain additional information about the claimant's medical condition. 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 did not have the necessary state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest due to her self-described "fugue" state at the time, 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 psychiatric nurse practitioner for the employer's predecessor from April 1, 2019, until May 17, 2021, and for the employer from May 17, 2021, until her separation on November 21, 2022.
2. The employer provides outpatient mental health services.
3. The claimant was supervised by a nurse manager.
4. The employer maintains a Code of Conduct which requires employees to treat served individuals with dignity and respect and which prohibits verbal or physical abuse and neglect.
5. The purpose of the policy is to "create a well-defined set of policies, procedures, and quality standards that create a level of support and consistency unavailable elsewhere."
6. The policy is applicable to all of the employer's employees and is uniformly enforced.
7. The claimant was aware of the policy from the time of hire.
8. The employer expected employees to understand their responsibilities to the individuals served, their colleagues, and the company.
9. The purpose of the expectation is to ensure employees understand and act consistent [sic] with the employer's standards.
10. The claimant was aware of the expectation from the time of hire.
11. On May 4, 2022, the claimant received a written warning for failure to follow the Code of Conduct regarding unprofessional communication.
12. On September 28, 2020, the claimant participated in a meeting with her supervisor and human resources regarding inappropriate comments included in an email to staff.
13. On September 2, 2021, the claimant received a second written warning for not adhering to the standards of the Code of Conduct regarding communications.
14. On April 12, 2022, the claimant received a final written warning for not following a directive of her supervisor and not following the Code of Conduct in an email communication.

15. On November 10, 2022, the claimant had 5 virtual appointments for medication review beginning at 9:00 a.m. and then on the half hour: 9:30, 10:00, 10:30 and 11:00, all of which she recalled and documented.
16. On November 10, 2022, the claimant had a virtual appointment at 11:30 with a patient (hereinafter referred to as “patient A”).
17. On November 10, 2022, at 12:06 p.m., the claimant emailed the Medical Director and her supervisor about concerns about Patient A and a separate email to the Patient A’s clinician.
18. On November 10, 2022, the claimant conducted virtual appointments at 12:00 p.m. [and] 12:30 p.m.
19. On November 10, 2022, at 2:00 p.m., the claimant participated in a regularly scheduled weekly virtual meeting with the medical director during which he asked if the claimant had been drinking because her speech was slurred.
20. The claimant did not attend the 3 virtual appointments which had been scheduled for after the weekly session with the medical director.
21. The claimant did not notify any of the 3 clients, one of whom was considered to be at high risk for self-harm, or anyone at the employer that she would not be keeping the 3 afternoon appointments.
22. On November 10, 2022, the employer received a complaint from Patient A that during the virtual appointment, the claimant had refused to refill his medications and laughed after stating he could call her if he had any suicidal or homicidal tendencies.
23. On November 11, 2022, the employer placed the claimant on unpaid administrative leave pending an internal investigation.
24. On November 16, 2022, the claimant was interviewed by the Employee Relations Manager as part of their investigation.
25. During the meeting of November 16, 2022, the claimant initially denied conducting the session with Patient A but, after reviewing her email of that date, stated she did not recall conducting the session or sending the email.
26. On November 17, 2022, the claimant had an appointment with her primary care physician. The claimant had scheduled the appointment in response to concerns about her mental status which had been raised by the medical director during the virtual meeting of November 10, 2022.
27. Following the November 17, 2022, appointment with her primary care [sic], the claimant underwent a series of tests ordered by her doctor. No diagnosis was

- reached, and her primary care physician had no clinical explanation for the claimant's conduct or experience on November 10, 2022.
28. The claimant described her condition as a "fugue" state in which she had no recollection of her actions on that date.
  29. The claimant testified that she thought she had notified the last three clients that she would not be conducting the sessions because her mental status had been questioned by the medical director earlier that day.
  30. The claimant testified that she thought she had notified the medical director that she would not be conducting the last three sessions following his question about her sobriety.
  31. The claimant did not drink any alcohol on November 10, 2022.
  32. For the 2 nights prior to November 10, 2022, the claimant had not slept for more than 2 or 3 hours due to post-menopausal symptoms.
  33. Prior to November 10, 2022, the claimant had been prescribed a medication (Adderall) [sic] to assist with sleep.
  34. The night of November 9, 2022, the claimant did not take the prescribed sleep medication.
  35. On November 10, 2022, the claimant had not taken any medications.
  36. On November 10, 2022, the claimant had emailed the medical director that she "had a medical procedure" on Tuesday.
  37. The claimant could not recall what medical procedure she had undergone in November of 2022.
  38. The employer discharged the claimant on November 21, 2022, for responding to persons served in a nontherapeutic manner and to her coworkers in an unprofessional manner.

Credibility Assessment:

The Employee Relations Manager offered credible testimony that when she met with the claimant on November 16, 2022, as part of the investigation of the patient complaint about the claimant's conduct, the claimant initially denied seeing Patient A and, only after being presented with her email of November 10, 2022, detailing concerns with the patient, did she admit to seeing the patient. The employer's witness also offered credible testimony that the claimant stated during that meeting that she did not recall seeing Patient A or making the comments alleged by the patient. The Employee Relations Manager also offered credible testimony that the

claimant did not notify the 3 patients she had scheduled for the afternoon of November 10, 2022, or anyone at the employer, that she would not be attending the virtual appointments. The claimant testified that she did not recall seeing Patient A on November 10, 2022, or making the comments as alleged by the patient. The claimant also testified that she thought she had notified the 3 patients and the medical director that she would not be attending the 3 virtual appointments scheduled for after the November 10, 2022, weekly session she had had with the Medical Director.

Reviewing the totality of the testimony and evidence presented, the testimony of the employer's Employee Relations Manager in its entirety is accepted as more credible. The claimant was able to recall seeing the 5 patients before Patient A and the 2 afterwards, but not able to recall seeing Patient A, making comments about his medications and suicidality, or sending 2 emails immediately after the appointment. The only lapse of memory was regarding her appointment with Patient A and the failure to cancel the 3 afternoon appointments, the conduct which led to her discharge. There was also no medical explanation for the alleged lapse of memory.

#### 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 6 insofar as it states the employer's policy was uniformly enforced, as this is unsupported by the record. In adopting the remaining findings, we deem 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. Based upon the record after remand, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Where a claimant is discharged from employment, her eligibility 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. . . .

“[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).

Consolidated Finding # 38 states that the employer discharged the claimant for two reasons: responding to persons served in a nontherapeutic manner and responding to coworkers in an unprofessional manner. This accurately reflects the stated reasons for discharge in Exhibit 7, the employer’s termination notice.<sup>1</sup> Notably, these reasons for discharge do not include the claimant’s failure to attend or notify her clients that she would not attend the three afternoon appointments on November 10, 2022. *See* Consolidated Findings ## 20 and 21. Therefore, we need not address whether these missed appointments were deliberate misconduct in wilful disregard of the employer’s interest or a knowing violation of a reasonable and uniformly enforced rule or policy.

The employer issued several warnings to the claimant over the course of her employment pertaining to poor communication. *See* Consolidated Findings ## 11–14. Although the termination notice indicates that this disciplinary history was considered in the employer’s decision to end her employment, our focus is on the final incident which triggered her discharge. The final incident involved the claimant’s behavior on November 10, 2022. *See* Consolidated Findings ## 15–22 and Exhibit 7.

As for responding to her coworkers in a non-professional manner, nothing in the record details what exactly the claimant said or did in this regard at or around November 10, 2022. Consolidated Finding # 17 merely states that, at 12:06 p.m. on November 10, 2022, the claimant emailed the Medical Director and her supervisor about concerns about Patient A, and it refers to a separate email to Patient A’s clinician. Additionally, the termination notice states that, in an email to her supervisor and two co-workers regarding a client appointment, she was “unprofessional towards the person’s clinician regarding the person’s care.” *See* Exhibit 7. However, the employer has not presented copies of the emails, and there is no testimony about what she wrote in them. The employer’s characterization of them as “unprofessional” is not enough. Without this detail, we cannot assess whether the claimant’s statements constituted deliberate misconduct in wilful disregard of the employer’s interest or a knowing violation of a reasonable and uniformly enforced rule or policy.

Thus, we consider only whether the employer has met its burden with respect to the claimant responding to persons served in a nontherapeutic manner. Because there is no evidence showing that employees who engaged in similar behavior were terminated, the employer has not shown that the claimant violated a *uniformly enforced* rule or policy. However, we believe that it has met its burden to prove deliberate misconduct in wilful disregard of the employer’s interest.

The employer expected its employees to treat the individuals that they served with dignity and respect. *See* Consolidated Finding # 4. On November 10, 2022, the claimant had a virtual appointment with Patient A, in which the claimant apparently refused to refill his medications and laughed after telling him to call her if he had any suicidal or homicidal tendencies. *See* Consolidated Findings ## 16 and 22. The claimant did not deny engaging in this behavior. Rather,

---

<sup>1</sup> While not explicitly incorporated into the review examiner’s findings, the employer’s statements in Exhibit 7 are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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 contended that she did not remember the session. *See Consolidated Finding # 25.* Her failure to remember the event after the fact does not negate that it took place.

Although we have no way to determine whether there may have been a clinical reason not to refill the medications, there's no question that laughing at the prospect of a mental health patient calling with suicidal or homicidal tendencies is showing a lack of dignity and respect. Thus, the employer has established that the claimant engaged in the misconduct for which she was discharged.

Because there is nothing in the record to indicate that the claimant did this by mistake, we can also reasonably infer that her conduct was deliberate.

However, deliberate misconduct alone is not enough. Such misconduct must also be in "wilful disregard" of the employer's interest. 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). 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).

There is no dispute that the claimant was aware of the employer's expectation to treat persons served with dignity and respect. *See Consolidated Findings ## 4 and 7.* It is self-evidently a reasonable expectation for dealing with the employer's mental health patient population.

In his original decision, the review examiner accepted the claimant's explanation that she was in a "fugue" state on November 10, 2022, and seemed to accept this as a mitigating factor for her misconduct. *See Consolidated Finding # 28.* We do not. Being in a "fugue" state is how the claimant characterized what she was experiencing. She has presented no medical evidence about what a "fugue" state is or how it affects one's state of mind. Moreover, after undergoing medical tests, her primary care physician could not reach any diagnosis or provide a clinical explanation for her conduct on November 10, 2022. *See Consolidated Finding # 27.* Absent such evidence, the claimant has failed to show that a medical condition caused her misconduct.

The consolidated findings do indicate that the claimant may have been very tired on November 10, 2022. She had not slept in at least two nights. Consolidated Finding # 32. We can reasonably infer that any failure on her part to treat Patient A with dignity and respect may have been attributable to fatigue from not sleeping. However, the findings further show that the claimant had prescribed medication to help her sleep, but she did not take it the night before. *See Consolidated Findings ## 33 and 34.* There's nothing in the record explaining why. Inasmuch as she chose to forego taking prescribed sleeping medication, the lack of sleep and fatigue on November 10, 2022, was her own doing. Any resultant inability to function was not due to circumstances beyond her control.

We, therefore, conclude as a matter of law that the employer has met its burden to show that it discharged the claimant for 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 reversed. The claimant is denied benefits for the week beginning November 20, 2022, 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 - May 31, 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](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.

AB/rh