

The employer terminated the claimant, an early education teacher, for leaving her classroom out of ratio and clocking out late on the same date. However, the employer had failed to prove that the claimant acted deliberately with respect to either incident. Held she did not engage in deliberate misconduct in wilful disregard of the employer's interest and, therefore, she may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0078 7592 41

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 affirm.

The claimant was discharged from her position with the employer on December 8, 2022. She filed a claim for unemployment benefits with the DUA, effective November 27, 2022, which was denied in a determination issued on March 23, 2023. 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 26, 2023. 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 afford the employer an opportunity to testify. 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 claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer by leaving a classroom out of ratio and clocking out after her shift ended, 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 over 30 hours per week as a certified teacher for the employer, an early childhood school, from approximately February 28, 2022, to December 8, 2022. The claimant earned \$19.00 per hour working for the employer.
2. The claimant was initially hired to work for the employer from 8:00 a.m. to approximately 5:00 p.m. Monday through Friday.
3. The claimant's work schedule with the employer changed [sic] the end of March or the beginning of April 2022, because she and her mother became the guardians for her cousin's three children.
4. The claimant started working for the employer from 8:00 a.m. to 3:00 p.m. Monday through Friday as of the end of March or beginning of April 2022, because she was required to pick up the three children from school.
5. The three children were being monitored by the Department of Family and Children [sic] (DCF) and the claimant and her mother could not leave the children at the school, or they could be taken away from them and placed with strangers.
6. The claimant informed the employer about her responsibility to pick up the three children from school each day.
7. The employer had a policy regarding the number of certified teachers that must be assigned to work with the toddlers in the classroom to ensure compliance with a state regulation regarding early childhood education.
8. The state regulation requires that a certified teacher be present for four toddlers with an additional educator present if there are five to nine toddlers in the classroom. The additional educator does not have to be a certified teacher.
9. The purpose of the employer's policy and the regulation is for the safety of the children.
10. The claimant knew the policy regarding the ratio of teachers to toddlers.
11. The employer had a policy that required employees to clock out of work at the end of their shift, either on an application on the employee's phone or on the employer's computer at the worksite.
12. The purpose of the policy is to ensure payroll is accurate and that employees are paid for the work they perform.
13. The employer could give a warning or terminate an employee who violated the policy regarding clocking in and out accurately, depending on the severity of the violation.

14. On December 7, 2022, the claimant called the Assistant Director (AD) during the day to see who would be relieving her at 3:00 p.m. that afternoon. At that time, the AD did not know who would be relieving the claimant.
15. At 3:00 p.m. on December 7, 2022, no one came to relieve the claimant from her classroom. There were 8 toddlers in the classroom at that time with her, and an assistant teacher.
16. The claimant called the AD and the Executive Director (ED) at approximately 3:00 p.m. on December 7, 2022, regarding getting coverage for her classroom. Neither of them answered her call.
17. The claimant found another teacher to step into her classroom at approximately 3:05 p.m. or 3:10 p.m. on December 7, 2022. The claimant did not know the qualifications of this teacher.
18. The teacher who came into the classroom to relieve the claimant on December 7, 2022, had relieved the claimant and covered for the claimant in the past when there was only another assistant teacher present.
19. When the claimant left the classroom on December 7, 2022, there were two assistant teachers in the classroom with 8 children.
20. The claimant was rushing to leave on December 7, 2022, and forgot to clock out when she left the worksite at approximately 3:05 p.m. or 3:10 p.m.
21. The claimant rushed out of work on December 7, 2022, because she did not want to be late picking up the three children from school.
22. The claimant clocked out from home at approximately 3:25 p.m. on October 7, 2022 [sic].
23. The claimant was discharged from her job with the employer on December 8, 2022, for leaving a classroom out of ratio because one of the teachers was not certified, and because she clocked out of work after she left the workplace.

Credibility Assessment:

The claimant credibly testified in the hearing that she called the AD on December 7, 2022, to find out who would be relieving her at 3:00 p.m. At the time the claimant spoke to the AD, the AD did not know who would be relieving the claimant. The claimant credibly testified that she also called the AD and the ED at approximately 3:00 p.m. to see who would be relieving her but neither of them answered her call. The Director of Operations and the Human Resources Generalist testified in the hearing that the claimant did not call either the AD or the ED before she left. However, neither of them were present at that time. They both were testifying based

upon their conversations with the ED. The claimant's testimony in this regard is found more credible because it is firsthand testimony.

The claimant credibly testified that she did not know the qualifications of the teacher she got to relieve her on December 7, 2022. The claimant credibly testified that she believed that this teacher was qualified because she had relieved the claimant in the past when there was only another assistant teacher in the classroom. The Director of Operations testified in the hearing that the claimant may be correct regarding this teacher covering for her in the past during breaks.

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 the portion of Consolidating Finding # 22 that erroneously references the date of October 7, 2022. Given the nature of the record, we believe this to be a mere typographical error, and that the review examiner intended the date to be December 7, 2022. 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.

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 relevant 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).

The employer maintains a policy regarding the number of certified teachers that must be assigned to work with toddlers in a classroom. Consolidated Finding # 7. State regulations require the presence of a certified teacher for four toddlers per classroom, with an additional educator present if there are five to nine toddlers in the classroom. The additional educator does not have to be a certified teacher. Consolidated Finding # 8. As the purpose of the employer's policy was to ensure the safety of children, we believe that it is reasonable. *See* Consolidated Finding # 9.

The employer also maintains a policy that requires employees to clock out of work at the end of their shift, either on an application on the employee's phone or on the employer's computer at the worksite. Consolidated Finding # 11. Given the purpose of this policy, to ensure payroll is accurate and that employees are paid for the work they perform, we believe that it is also reasonable. *See* Consolidated Finding # 12.

Because the employer did not present any evidence demonstrating that discipline for violating its policies is imposed uniformly for the same type of infractions, the Board cannot conclude that the claimant knowingly violated a reasonable and *uniformly enforced* policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged. In this case, the claimant was discharged for leaving a classroom out of ratio because one of the teachers was not certified, and for clocking out of work after she left the workplace. Consolidated Finding # 23.

We address the classroom ratio issue first. Consolidated Findings ## 8 and 19 provide that the employer required at least one certified teacher to be in a classroom and when the claimant left the classroom on December 7, 2022, there were two assistant teachers. Thus, she engaged in misconduct. We do not question the employer's decision to discharge the claimant. The only issue before us is whether she is eligible for unemployment benefits.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id. Thus, our inquiry is focused on the events which triggered her discharge. In this case, the first incident which led to separation is the claimant's act of leaving a classroom out of ratio because one of the teachers was not certified.

The review examiner found that, prior to leaving the workplace on December 7, 2022, the claimant had called both the AD and ED to inquire about the coverage of her classroom when her shift ended at 3:00 p.m. Consolidated Findings ## 4, and 14–16. When the AD and ED failed to respond to the claimant, she found another teacher to cover her classroom approximately five to ten minutes after her shift ended. Consolidated Findings ## 16–17. When the claimant left the classroom, there were two assistant teachers and eight children. Consolidated Finding # 19. However, the review examiner found that, although the claimant did not know the teacher's qualifications, she believed that the teacher was qualified because the same teacher had relieved the claimant in the past, when there was only another assistant teacher in the classroom. *See* Consolidated Finding # 18. In her credibility assessment, the review examiner also noted that the employer's Director of Operations testified that the claimant may have been correct that this teacher had covered for her in the past.

Accordingly, the record establishes that the claimant did not take deliberate action to cause her classroom to be out of ratio.

The employer also discharged the claimant for clocking out of work after she had already left the workplace in violation of its policy to clock out at the end of the shift. *See* Consolidated Findings ## 11 and 23. Initially, the review examiner found that the claimant forgot to clock out when she left her shift on December 7, 2022, and clocked in late on her phone when she realized that she had forgotten to clock out. Remand Exhibit 1.¹ Similarly, after remand, the review examiner found that the claimant forgot to clock out when she left the workplace and clocked out from home approximately twenty-five minutes after her shift ended. Consolidated Findings ## 20 and 22.

Consolidated Finding # 20 states that the claimant merely forgot to clock out immediately after her shift ended. Since the claimant forgot to clock out as soon as she completed her shift, we cannot conclude that she deliberately failed to comply with the policy. *See* Board of Review Decision 0031 1109 42 (Nov. 15, 2019) (where the claimant's failure to comply with the employer's attendance expectations arose from forgetfulness, the Board held that the claimant lacked the necessary state of mind to engage in deliberate misconduct); *see also* Board of Review Decision 0025 3567 20 (Jan. 14, 2019) (although the employer discharged the claimant because she did not attend or notify employer that she was not going to attend a scheduled training, the Board held the claimant not subject to disqualification because the review examiner found that the claimant forgot to attend and did not act deliberately).

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant knowingly violated a reasonably and uniformly enforced policy or 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 entitled to receive benefits for the week beginning December 4, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 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)**

¹ Remand Exhibit 1 is the hearing decision, dated April 26, 2023.

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