The claimant nurse was discharged because failed to properly store and secure medications in the medication cart and lockbox at the end of her shift. However, the review examiner reasonably accepted as credible the claimant's testimony that she inadvertently left the medications unsecured because she did not feel well and was dealing with a serious medical issue. Thus, she did not have the requisite state of mind to engage in deliberate misconduct within the meaning of G.L. c. 151A, § 25(e)(2), and she is eligible for benefits.

Board of Review
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Member

Issue ID: 0079 2467 81

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 separated from her position with the employer on February 6, 2023. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 8, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 8, 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 obtain additional evidence about the circumstances surrounding the claimant's separation. 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 engage in deliberate misconduct in wilful disregard of the employer's expectations because she was preoccupied with personal medical issues and inadvertently failed to secure medications in accordance with the employer's policies, 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 full time as a registered nurse for the employer, a human services program, from January 15, 2021, until January 28, 2023.

2. The claimant's immediate supervisor was the nurse manager.

3. The employer maintained an expectation that employees would secure medications at all times when not in use and properly store medications only in the medication cart lockbox. The purpose of the expectation was to prevent improper use of medications in the facility. The claimant was made aware of the expectation during on-site training and by being placed on a performance improvement plan. The claimant was also aware of the expectation through general knowledge and practice as a nurse.

4. In the claimant's previous employment as a registered nurse, the claimant's previous employers expected her to properly secure and store medications.

5. On an unknown date, the claimant stored a tube of lip balm in her desk rather than in the medication cart. The claimant intended to put the lip balm in the cart later.

6. On December 23, 2022, the claimant visited her physician for an evaluation of skin lesions. The claimant's physician was concerned that the lesions could be caused by cancer.

7. On January 6, 2023, the claimant had a follow-up appointment for a biopsy of a neoplasm on her forearm.

8. On January 17, 2023, the claimant was placed on a performance improvement plan (PIP) for storing medication outside the medication cart by not properly storing the lip balm. The PIP directed the claimant to complete required nursing documentation in a timely manner, properly administer and store medication, and properly document medication. The PIP specified that "all medication is to be store in a locked medication cart, not in the nursing desk or left out in the open."

9. The PIP specified that "All medications must be signed off in the Medication Administration Record (MAR). The MAR must be signed off immediately upon removal of the medication. You mist Initial the MAR immediately when you give the student medication." The PIP specifies that controlled medication must be signed off in the Controlled Medications Count Book. The PIP requires a "nursing note" if a student refuses a medication.

10. The PIP does not state a requirement of signing off for non-controlled medications or a requirement to sign medications back in.

11. On January 26, 2023, the claimant was left in charge of the medication cart. The claimant did not store all medications in the cart and left the lockbox unlocked when she left at the end of her shift.

12. The claimant did not intentionally leave medications unsecured.

13. The claimant did not secure the medications because she was distracted due to her medical conditions. The claimant was feeling tired and left the facility late in the day.

14. The claimant had not received a diagnosis of her skin condition at the time and was not taking medications for her skin condition. The claimant's skin condition did not directly impact her ability to perform her job duties.

15. The claimant was not expecting to be disciplined because she did not know she had not properly stored the medications.

16. On January 27, 2023, another nurse entered the nurses' office and found the medication cart unlocked, the keys to cart unsecured, and medications that had been packed for a trip on the office desk.

17. The assistant vice president (AVP) contacted employees who had access to the office and viewed security camera footage. The AVP concluded that the claimant was the last individual in the office on January 26, 2023. The AVP did not conclude that the claimant's actions were deliberate.

18. On January 27, 2023, the claimant had a follow-up appointment for her biopsy.

19. On an unknown date after January 26, 2023, the claimant tested positive for COVID-19. It is not known when the claimant's COVID-19 condition began.

20. On February 6, 2023, the claimant was discharged for improper storing of medications.

21. On February 14, 2023, the claimant was diagnosed with Compound Melanocytic Nevus with Moderate Atypia on the left distal forearm. The claimant's physician recommended excision.

22. In the claimant's fact-finding questionnaire dated March 6, 2023, the claimant stated that she "made an error" due to being tired and not feeling well on January 6, 2023. The error the claimant was referring to was that she did not properly secure the cart lockbox and medications. The claimant was feeling tired, distracted, and unwell due to the process of diagnosing her medical condition and the uncertainty of her diagnosis at the time. The claimant's tiredness and distraction was not directly caused by her skin condition.

Credibility Assessment:

The remand hearing was held virtually. A follow-up hearing was held virtually for the parties to submit additional documents. The claimant attended the remand hearings. The AVP and an agent attended the remand hearings on behalf of the employer. The claimant admitted that she was aware of the employer's expectation that she properly store medications and that she had received the PIP. The PIP was entered as an exhibit in the initial hearing. The PIP requires proper storage of medications but notably does not contain a documentation procedure for re-storing medications.

The claimant initially testified that she had received her cancer diagnosis shortly before January 26, 2023. However, the claimant provided medical documentation which shows that her diagnosis was not until February 14, 2023. Throughout the claimant's testimony, she gave confused answers regarding the chronology of events. The claimant did not have documentary evidence to rely on other than her medical appointment records. Based solely on the medical appointment records, it cannot be concluded whether the claimant discussed the possibility of her diagnosis with her physician. However, based on the claimant's credible testimony regarding this topic, it is clear that the claimant was distracted by her medical condition around January 26, 2023. The claimant was not distracted by the actual diagnosis of her condition on January 26 because she had not yet received the diagnosis. She was preoccupied with the possibility of a diagnosis or what the condition could have been.

The claimant credibly testified that she tested positive for COVID-19 shortly after January 26, 2023. The claimant did not know the exact date of the test or whether she was affected by COVID-19 on January 26, 2023. The claimant testified that looking back, she may have been feeling more tired on January 26 due to COVID-19, however the claimant cannot be certain when or how she was affected by COVID-19. It cannot be ascertained whether COVID-19 caused the claimant to be tired, distracted, or unwell.

The AVP testified that she determined that the claimant was the last person in the office and was the person who had left the cart unlocked and medication unsecured. The claimant admitted that she was probably the person who had left the cart unlocked and medication unsecured. The AVP admitted that she was not sure if the claimant had acted deliberately.

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. 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. As discussed

more fully below, we believe the review examiner's decision to award benefits is supported by substantial and credible evidence and free from error of law.

Because the claimant was discharged from his employment, his 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).

While the employer maintains policies regarding the storage of medications, it did not provide any evidence showing it discharged all other employees who failed to secure medications in accordance with these policies. Absent such evidence, the employer has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy.

We next consider whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show the claimant engaged in the misconduct for which she was discharged. As the claimant was in charge of the medication cart on January 26, 2023, and the next nurse on shift found the lockbox had been left unlocked and medication had been left out, we believe the employer has shown the claimant engaged in the misconduct for which she was discharged. Consolidated Findings ## 11–13 and 16. However, the claimant maintained that she did not intentionally fail to secure medications in the cart and lockbox at the end of her shift.

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.

After reviewing the evidence presented at both the initial and remand hearings, the review examiner accepted as credible the claimant's contention that she did not intentionally fail to properly store and secure the medications on January 26, 2023. Consolidated Finding # 12. Specifically, the claimant testified that she forgot to properly secure the medications before leaving that day because she was feeling unwell and was preoccupied with the process of being evaluated for a potentially serious medical condition. Consolidated Findings ## 6, 7, and 18. 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). Upon review, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

We form no opinion about whether the employer made the appropriate decision to end the claimant's employment. *See* Garfield, 377 Mass. at 95 (the issue is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances). However, as the review examiner reasonably found the claimant had not deliberately failed to secure the medications at the end of her shift, we agree with the review examiner's conclusion that the claimant was discharged under non-disqualifying circumstances.

We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to 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 of February 5, 2023, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2024

Paul T. Fitzgerald, Esq.
Chairman



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

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