

**The employer discharged the claimant, a teacher, for violating its policy that prohibited giving food, candy, and medicine to students, after she gave hungry elementary school students some gum and cough drops during a stressful lockdown situation. Because the claimant was not aware of the policy, the claimant is not disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).**

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**Issue ID: 0080 2684 31**

### 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 and filed a claim for unemployment benefits with the DUA, effective April 2, 2023, which was approved in a determination issued on July 20, 2023. 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 August 22, 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 afford the claimant 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, a teacher, engaged in deliberate misconduct in wilful disregard of the employer's interest by giving her students gum and cough drops during a lockdown, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings of fact now show that the claimant was unaware that her conduct violated any policy of the employer.

### 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 music teacher for the employer, a public-school department from 12/22/22 until 5/3/23.
2. The claimant taught at an elementary school.
3. The claimant did not go through a formal orientation when hired during the school year. She was given a class list and names of teachers that could help her.
4. The claimant had worked in other school districts for many years.
5. The employer maintained a policy prohibiting teachers from giving food, candy, and medicine to students.
6. The employer maintained the policy to protect their students as the products can cause issues with allergies, choking hazards, etc.
7. The claimant did not receive a copy of the policy.
8. The policy was located online but the claimant never viewed it.
9. The employer enforces the policy differently depending on the circumstances.
10. On 3/28/23, the school had a lockdown from 11:10 a.m. through 1:11 p.m.
11. It was believed there was a shooting at the high school located next to the elementary school.
12. The claimant had third graders in her classroom at the time. She had to keep the children in the room and block the windows.
13. The children were scheduled to head to lunch after her class. They could not go anywhere during the entire duration of the lockdown. No one could leave the room. They could not use the restrooms, either.
14. The principal of the school announced the lockdown over the intercom. The announcement scared the children in the claimant's classroom. The claimant was also terrified.
15. The principal had just been placed in that role that month. She was not the principal when the claimant was hired in December 2022.
16. The students were shaking and holding each other's hands because they were so afraid.
17. The claimant tried to distract them by giving them activities to do, singing with them, and handing out headphones.

18. One student in the class screamed during most of the lockdown. The constant screaming scared the other children more.
19. Some of the children had lunches with them so the claimant allowed them to eat. Other students were hungry because they had not brought lunches from home.
20. Several students asked the claimant if they could eat anything because they were hungry. The claimant only had bubble gum that she had confiscated from another student and her own cough drops.
21. The claimant gave the gum and cough drops to the students to help keep them calm and comfort them during the stressful lockdown.
22. The claimant had only been employed with the instant employer for a few months and was not aware of their policies on giving gum or cough drops to students.
23. In previous school districts, the claimant was allowed to give cough drops and gum to students.
24. The claimant typically did not allow students to eat gum or cough drops in class because they usually made a mess.
25. The claimant normally would not have given students gum or cough drops, but because they were all terrified during the lockdown, she wanted to give them anything she could think of to help them take their mind off of [sic] the traumatizing event.
26. The claimant was aware that there were two students in her class with severe allergies. Those students had aides with them. The claimant did not give those students cough drops or gum.
27. The claimant was not notified that anyone else in the class had allergies.
28. At the end of the day, the principal spoke to teachers about the lockdown. When the claimant tried to talk, the principal yelled that the teachers had to stay in their rooms during the lockdown. The claimant felt the principal failed to show empathy during the meeting. She felt sick and was shaking from the traumatizing day. She was also ill from a cold, which is why she had the cough drops with her that day.
29. The superintendent of schools announced counselors would be available to staff and students due to the traumatizing event that day.

30. It was later learned that the lockdown occurred because of a prank call about a shooting that day.
31. The claimant was out sick the following day, 3/29/23. She was taking steroid medication for her illness.
32. Another teacher became aware that the claimant gave some students cough drops and gum and reported it to the principal by email.
33. The following day, 3/30/23, the claimant taught all her classes.
34. At the end of the day, the claimant was placed on paid administrative leave while the employer investigated the matter. The claimant was presented with a letter indicating she was being investigated for dispensing medication to students.
35. The claimant had no idea what the letter meant and asked what medicine they were talking about.
36. The claimant was told it was about the cough drops and gum.
37. The claimant admitted that she gave students cough drops and gum.
38. The claimant gave them cough drops and gum because they were hungry because [sic] they had no lunch during the lockdown and because she thought it would try to calm them down from the traumatizing event.
39. The claimant was very upset, because she was being punished for helping her students as best as she could during the traumatizing event.
40. While standing in the main office area in earshot of other students, she loudly said to the principal, "Are you kidding me? After everything that happened, how dare you do this," and told her that she was disappointed in her.
41. Afterwards, the claimant asked the teacher in the room next to her about whether the employer had an employee handbook or policy relating to giving students gum or cough drops.
42. The teacher told the claimant that she did not know of any related school policies.
43. On 5/3/23, the employer terminated the claimant for giving students cough drops and gum during the lockdown and for conduct unbecoming of a teacher for her outburst in the main office area on 3/30/23.
44. The claimant would have been fired for giving the students cough drops and gum even if she did not talk loudly to the principal on 3/30/23.

### Credibility Assessment:

The employer did not provide substantial and credible evidence that the claimant received any relevant policies or that she was aware of the employer's expectation that she refrain from giving students gum or cough drops. The principal of the school was only newly hired for that position when the event leading to the claimant's discharge occurred and was not present during the claimant's onboarding process, which only involved her receiving a class list and names of teachers that could possibly assist her with questions. Even if she had known of their expectations, the claimant established there were mitigating circumstances for her actions that led to her termination.

The claimant was very credible. She provided straightforward and sensible answers during the hearing. The claimant testified that she was a newly hired teacher, who was put in her role in the middle of a school year and was not given the employee handbook or other policies to assist her with dealing with the stressful and traumatizing event that occurred on 3/28/23. Her testimony is supported by the fact that after the event, she asked another teacher about the policies. The other teacher was unaware of them as well. Additionally, the claimant testified that the only reason she gave the students gum and cough drops was to try to comfort them and calm them down during a very stressful and traumatizing event. Her testimony is credible because there was no evidence presented that she gave them to the students at any other time. The claimant's decision to provide the gum and cough drops to the students along with her outburst after being notified of her suspension for doing so, was reasonable considering the extremely difficult circumstances that afternoon.

### 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 original 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 its written policy pertaining to the prohibition against teachers giving students food, candy, and medicine for us to review. Moreover, the employer uses discretion when enforcing the policy. *See Consolidated Finding # 9*. 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 § 25(e)(2).

We remanded this case to the review examiner to obtain additional information pertaining to the employer's expectation about teachers providing food, candy, and medicine to students, as well as the claimant's awareness of that expectation. The consolidated findings show that the employer prohibited teachers from giving food, candy, and medicine to students in order to protect its students from issues relating to allergies and choking hazards. Consolidated Findings ## 5 and 6. Although the review examiner did not make any findings as to whether this employer policy was reasonable, we believe that this is self-evident.

The review examiner further found that, on March 28, 2023, the claimant had given some students gum and cough drops to help keep them calm and comfort them during a stressful lockdown situation. *See Consolidated Findings ## 10–11, and 21*. Initially, the review examiner found that the claimant knew that she should not have given gum and cough drops to students during the lockdown. However, after the remand hearing, the review examiner found that the claimant had only been employed with the employer for a few months, did not receive a copy of the employer's policy, and was not aware of the employer's policy regarding the giving of gum or cough drops to students. Consolidated Findings ## 7 and 22.

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 that the claimant did not understand that she would be prohibited from giving hungry third-grade students gum or cough drops during a lockdown. The record establishes that she did not see any information pertaining to this policy before the March 28, 2023, incident occurred. Moreover, after the employer informed her that she was being investigated, the claimant asked another teacher whether the employer had an employee handbook or policy regarding giving students gum and cough drops, and the teacher was also unaware of any such policies. Consolidated Findings ## 34–36, and 41–42. Under Garfield, the claimant may not be disqualified from receiving benefits.

We, therefore, conclude as a matter of law that the employer has failed to show that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest

or to a knowing violation of an employment rule or 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 7, 2023, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 24, 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](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.

JMO/rh