

The claimant, a daycare teacher, was discharged for not washing children's hands after changing diapers. The employer did not condone the claimant's misconduct because it was not aware that employees were not following handwashing procedures. Further held that the claimant did not have mitigating circumstances based on the number of children she was watching or the behavior of one of the children. Held the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0083 0719 71

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 June 24, 2024. She reopened an existing claim for unemployment benefits with the DUA, which was effective August 6, 2023. In a determination issued on August 13, 2024, the DUA denied benefits beginning June 23, 2024. 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 November 2, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated 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 further evidence regarding the circumstances of the claimant's termination. 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 mitigating circumstances prevented the claimant from forming the requisite state of mind to engage in deliberate misconduct in wilful disregard of the employer's interest, 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 are set forth below in their entirety:

1. On January 22, 2024, the claimant started working for the employer, a daycare facility for children, as a teacher. The claimant was initially working 40 hours per week for the employer. The claimant most recently was working 35 hours per week for the employer. The claimant was scheduled to work Monday [sic] through Friday varying hours.
2. The claimant was paid \$23.00 per hour.
3. The claimant's supervisor was the Executive Director of Operations.
4. The employer maintains a Toilet Training Standard Operating Procedure Policy and a Diaper Changing SOP Policy requiring employees to wash the hands of the children after toileting. The employer maintains these policies to ensure sanitation and to comply with government regulations. The claimant received and signed off on these policies.
5. Whether an employee is discharged for violating these policies is left to the discretion of the employer.
6. In the past, the claimant was not issued any disciplinary warnings by the employer for specifically neglecting to wash the hands of children after toileting.
7. On April 17, 2024, the claimant [sic] issued a Written Warning for work performance issues.
8. On May 16, 2024, the claimant [sic] issued a Final Written Warning for not supervising children appropriately. In this Final Written Warning, the employer lists that the claimant's probationary period was extended until July 22, 2024.
9. On June 21, 2024, the claimant failed to wash a group of children's hands that she had been assisting with toileting. The claimant did not wash the children's hands as the claimant had observed others at work not washing children's hands after toileting, including the worker that had trained the claimant, the claimant assumed that the rule was not enforced, and the claimant was watching 4 children at the time. A co-worker observing the claimant on this day in the classroom reported the event to the employer. On this date, the claimant failed to follow the handwashing procedures after she changed a group of children's diapers.
10. The claimant's last date of work was on June 24, 2024, for the employer.
11. The employer discharged the claimant from work because on June 21, 2024, the claimant did not wash a group of children's hands after assisting the children with toileting.

12. The claimant subsequently re-opened her 2023-01 initial unemployment claim.
13. The employer was not aware that during the period of January 22, 2024, to June 21, 2024, (while the claimant was working for the employer) that employees were not washing children's hands after changing diapers or assisting them with toileting.
14. On August 23, 2023, the employer was cited for handwashing violation [sic]. The employer was cited in connection with an employee not following toileting handwashing procedures. The employer issued this employee a verbal warning as at that time, the employer did not have a policy in place. The employer was cited prior to the claimant starting work for the employer.
15. After the employer was cited, in an effort to monitor whether employees were following the handwashing policies, the employer created the Toilet Training Standard Operating Procedure Policy Diaper Changing SOP Policy, assigned education coaches to observe classrooms, and sent out electronic Staff News weekly to staff member's personal e-mail accounts notifying employees that they must wash the children's hand after diapering or toileting.

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 # 9 insofar as it states a co-worker observing the claimant on June 21, 2024, reported the event to the employer. This is inconsistent with the record, which shows that an education coach was observing the claimant on that day and reported the event to the employer. We also note that Consolidated Findings ## 4, 6, 9, and 11 refer to washing children's hands after toileting without also referring to diaper changing. In this context, we understand toileting to include diaper changing. Finally, there appears to be a typographical error in Consolidated Finding # 14, which states, in relevant part, that the employer was cited for a handwashing violation on August 23, 2023. Consistent with the record, we believe that the review examiner intended to find that the employer was cited on August 24, 2023. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the employer discharged the claimant, her qualification 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. . . .

“[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 policies requiring employees to wash children's hands after assisting children with toileting or changing children's diapers. *See* Consolidated Finding # 4. However, the employer maintains discretion over whether an employee is discharged for violating this policy. *See* Consolidated Finding # 5. Since the employer maintains this discretion, it has not met its burden to prove the claimant was discharged for 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.

In this case, the claimant was discharged because, on June 21, 2024, she did not wash a group of children's hands after changing the children's diapers. *See* Consolidated Findings ## 9 and 11. Since the claimant confirmed that she did not wash children's hands after changing diapers on that day, there is no question that she engaged in the misconduct for which she was discharged.

The claimant testified that she did not wash the children's hands on this occasion because she had observed others not washing children's hands after toileting and assumed the policy was not enforced. *See Id.* This indicates that the claimant was aware of the employer's handwashing requirements and had not forgotten about them on June 21, 2024. Thus, we can reasonably infer that her misconduct was deliberate.

However, showing deliberate misconduct is not enough. The employer must also prove that the claimant acted in wilful disregard of the employer's interest. 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). 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).

The record shows that the claimant was aware of the employer's expectations. She received and signed off on the diaper changing policy that requires washing children's hands after diaper changes. *See* Consolidated Finding # 4. In addition, the claimant testified that she received staff

newsletters that were sent to her personal email.¹ She further acknowledged that the sample staff newsletter that the employer submitted as an exhibit for the remand hearing stated that staff must wash children's hands after diapering or using the potty. *See* Remand Exhibit # 8.²

The employer expects employees to wash children's hands after toileting or diapering to ensure proper sanitation and compliance with government regulations. *See* Consolidated Finding # 4. Indeed, the policies were created after the employer was cited for a regulatory violation because an employee did not wash children's hands after toileting. *See* Consolidated Findings ## 14–15. The employer's expectation is reasonable.

However, the claimant observed others, including the teacher who trained her, not following the handwashing requirements. She therefore assumed the rule was not enforced. *See* Consolidated Finding # 9. In effect, she is arguing that she was led to believe that the employer condoned not complying with the handwashing requirements.

It is well established that an employer's inconsistent application of discipline can cloud its expectations. *See Gold Medal Bakery, Inc. v. Comm'r of Division of Unemployment Assistance*, 74 Mass. App. Ct. 1105 (2009), *summary decision pursuant to rule 1:28* (holding that the employer's excusing of past misconduct had led the claimant to "reasonably [believe] that [further misconduct] . . . would be excused as it had been before, and that [he] did not possess the requisite state of mind" to be disqualified for deliberate misconduct in wilful disregard of the employer's interest). *See also New England Wooden Ware Corp. v. Comm'r of Department of Employment and Training*, 61 Mass. App. Ct. 532, 533–535 (2004) (holding that where the employer had overlooked the claimant's prior absences, and then discharged the claimant for excessive absences, the employer led the claimant "to believe that he would not lose his job for failing to adhere to the attendance policy's . . . requirements").

In this case, however, the employer did not enforce its policies inconsistently. The employer created the relevant policies before the claimant began working for it, as part of its response to being cited for violating regulations by not washing children's hands. *See* Consolidated Findings ## 1 and 14–15. During the period that the claimant worked for the employer, the employer was not aware that employees were not washing children's hands after changing diapers or toileting. *See* Consolidated Finding # 13.

An employer cannot condone behavior of which it is not aware. Thus, we conclude that the employer in this case did not condone employees' failure to wash children's hands after diaper changes or toileting.

¹ While not explicitly incorporated into the review examiner's findings, the claimant's testimony in this regard as well as her testimony referenced below, 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).

² Remand Exhibit 8, an email with the subject "Staff News June 13, 2024", is also part of the unchallenged evidence introduced at the hearing and placed in the record. Among other items, it includes a reminder to wash children's hands after diapering or toileting.

Finally, we consider whether the claimant has presented mitigating circumstances for her behavior. 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).

At the time of the incident that led to her discharge, the claimant was caring for four children. Consolidated Finding # 9. In her testimony during the initial hearing, the claimant acknowledged that the Department of Early Education and Care allows certified teachers to be left alone with up to four toddlers.

Although not noted in the consolidated findings or the review examiner's original decision, the claimant testified that one of the children she was watching on June 21, 2024, was known to be "violent" and he was "attacking" other children while she was trying to do diapers. She submitted copies of notes from a black book regarding this child's behavior from days prior to June 21, 2024. *See* Exhibits 28 and 29.³ However, she did not provide any further details regarding his behavior at the time of the incident that led to her discharge.

Being left in charge of the maximum number of children permitted and having to respond to a child's difficult behavior may be circumstances beyond the claimant's control. They may have created a challenging situation for the claimant. However, the claimant has not demonstrated that these circumstances rendered her unable to wash the children's hands after she changed their diapers. Thus, the claimant has not shown mitigating circumstances for her misconduct.

We, therefore, conclude as a matter of law that the employer has met its burden to show that 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 review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 23, 2024, 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 - April 25, 2025



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

³ Exhibit 28, which includes a handwritten note reading "Black Book For [Child's] Behavior with management signatures", and Exhibit 29, a series of handwritten notes dated from February 1, 2024, to May 14, 2024, are also part of the unchallenged evidence introduced at the hearing and placed in the record.

**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.

REB/rh