

**The employer, an assisted living facility, has a policy stating that residents may refuse medication. It discharged the claimant for pinching a resident's nose in the course of trying to get the resident to swallow medication she was refusing to take. Held that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest, and not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 334-FHHT-HNKL**

### 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 March 11, 2025. She filed a claim for unemployment benefits with the DUA, effective March 30, 2025, which was denied in a determination issued on April 11, 2025. 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 May 15, 2025. 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, was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

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 when she pinched a resident's nose while trying to get her to swallow medication, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant worked full-time as a personal care assistant for the employer, a nursing home. The claimant began working with the employer in August 2018 until March 11, 2025.

2. The claimant worked thirty-two hours per week, earning \$24.00 per hour.
3. The claimant's immediate supervisor was the nursing supervisor.
4. The employer has a policy which allows patients to refuse medication. The claimant was aware of this policy.
5. The employer expects employees to refrain from negligent and inappropriate resident care.
6. The claimant was aware, as a matter of common sense, of this expectation.
7. On March 8, 2025, the claimant was scheduled for and worked her scheduled shift.
8. On March 8, 2025, the claimant spent about 20 minutes trying to administer medication to a resident (resident A), but resident A refused to take it.
9. Resident A has dementia.
10. During her employment, the claimant had seen other employees pinch resident A's nose or other dementia patients in order for them to take the medication.
11. On March 8, 2025, the claimant decided to pinch resident A's nose in order for her to swallow the medication.
12. On March 8, 2025, the claimant pinched resident A's nose for about one second, but resident A did not swallow the medication.
13. On March 8, 2025, when the claimant pinched resident A's nose, she did not believe that she would have been disciplined.
14. On or about March 8, 2025, another employee who observed the claimant pinching resident A's nose, reported the claimant to the employer.
15. On March 11, 2025, the employer discharged the claimant for pinching resident A's nose.

### 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 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 findings of fact except as follows. We reject Finding of Fact # 1 insofar as it states the employer is a nursing home. The record shows that the employer is an assisted living facility. Finding of Fact # 15 is incomplete as the record shows that the claimant was not discharged solely for pinching a resident's nose. 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 claimant was discharged from her 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. . . .

“[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).

On March 8, 2025, the claimant spent twenty minutes trying to get a resident to take medication that the resident was refusing to take. *See* Finding of Fact # 8. As part of her efforts to get the resident to swallow the medication, the claimant pinched the resident's nose. *See* Finding of Fact 12. Under the employer's policy, the resident was allowed to refuse her medication. *See* Finding of Fact # 4. The employer also expected the claimant to refrain from inappropriate resident care. *See* Finding of Fact # 5.

The employer did not participate in the hearing or submit copies of its policies. Nor is there anything in the record to show that the employer discharges all employees who violate any policies that allow residents to refuse medication. Therefore, the employer has not met its burden to show that the claimant was discharged for a knowing violation of a reasonable and *uniformly enforced* policy.

Alternatively, the employer may demonstrate that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. To meet its burden, the employer must first show that the claimant engaged in the misconduct for which she was discharged.

The record shows that the employer discharged the claimant because she was observed pinching a resident's nose in order to force the resident to take medication. *See* Findings of Fact ## 11 and 15. There is no question that the claimant engaged in the misconduct for which she was discharged. She acknowledged that, on March 8, 2025, Resident A was refusing her medication, which she was allowed to do. *See* Findings of Fact ## 4 and 8. Nevertheless, the claimant spent twenty minutes trying to get Resident A to swallow her medication, and she pinched Resident A's nose as part of her efforts. *See* Findings of Fact ## 8 and 11.

Inasmuch as there is no evidence to suggest that the claimant's actions were inadvertent or accidental, we can infer that her misconduct was deliberate.

However, deliberate misconduct is not enough. The employer must also show 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).

In this case, the claimant was aware that residents were allowed to refuse their medication. *See* Finding of Fact # 4. She was also aware that the employer expected her to refrain from inappropriate resident care. *See* Findings of Fact ## 5 and 6. Indeed, she testified that she only pinched Resident A's nose for a second and then stopped because she didn't feel right doing it. Further, the claimant stated that she realized that even though she had seen others engage in this behavior, it was the wrong thing to do, and she got the nurse to help Resident A take her medication.<sup>1</sup> Thus, regardless of whether the claimant believed she would be disciplined, this record demonstrates that the claimant was aware that she had engaged in inappropriate resident care with Resident A, who clearly did not want to take her medication. *See* Finding of Fact # 13.

As an assisted living facility, the employer is in the business of providing care and assistance to residents. Its expectation that residents be allowed to refuse medication is a reasonable means of ensuring that residents' autonomy is respected. Also, its expectation that employees refrain from inappropriate resident care is a reasonable means of keeping residents safe.

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).

The claimant testified that the staff knew that getting Resident A to take her medication was "time consuming." She further testified that, at the time of the incident that led to her discharge, the employer was understaffed, and that there was only one nurse in the building.

These may have been circumstances beyond the claimant's control. However, given that the residents have the right to refuse medication, we fail to see how these circumstances required the claimant to spend twenty minutes trying to get Resident A to take her medication or pinch her nose in order to force her to take it. Thus, the claimant has not shown that there were mitigating circumstances for her misconduct.

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<sup>1</sup> This testimony from the claimant and the testimony referenced below are part of the unchallenged evidence introduced at the hearing and placed in the record. They are thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); and Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

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 March 9, 2025, 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 - June 30, 2025**



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.

REB/rh