Evidence from both parties confirms the claimant nurse understood he was expected to promptly notify the prescribing physician of medication issues and understood the investigation into his failure to do so was confidential. As he conceded he chose not to contact the on-call physician upon identifying the medication issue and confirmed he discussed information about the employer's investigation with the other nurse, he was discharged for deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

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Issue ID: 334-FHJ2-VM6H

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 affirm.

The claimant separated from his position with the employer on February 14, 2024. He filed a claim for unemployment benefits with the DUA effective February 11, 2024, which was approved in a determination issued on March 28, 2024. The employer 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 denied benefits in a decision rendered on June 14, 2024. The claimant sought review by the Board. Due to an administrative error, the Board failed to review his appeal and pursuant to G.L. c. 151A, § 41, his appeal was deemed to be denied. The claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On October 16, 2024, the District Court ordered the Board to review the review examiner's June 14, 2024, decision on its merits. Our decision is based upon our review of the entire record.

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). 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was discharged because he failed to follow the employer's medication administration policy and subsequently disclosed information about an employer investigation he knew was supposed to be confidential, 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 registered nurse (RN) for the employer, a home health care provider, from May 8, 2006, until February 14, 2024.

2. The employer has a written policy regarding confidentiality that pertains to the protection of client information and access to the employer's information systems and the devices used to access the information systems.

3. The employer has a written policy entitled "Medication Administration" regarding the administration of medicine to patients (the policy). The policy reads at Section V.(F)(4), "The [Employer] and [Alternate Employer Name] nurse is responsible for checking all medications a patient receives to identify possible adverse reactions, significant side effects, drug allergies, interactions, contraindicated medications, and questionable dosage, route, or frequency. Any discrepancies or problems are promptly reported to the patients' physician."

4. The claimant was aware of the policy.

5. The policy states its purpose as "To outline the various procedures by which nursing personnel manage, administer, and document the safe use of medication for patient home use."

6. The policy does not state the discipline imposed if an employee violates the policy. The employer applies a progressive approach to discipline which varies depending on the severity of the violation.

7. The employer usually issues a final written warning to nurses who fail to comply with the policy.

8. The employer has expectations that nurses will promptly notify a patient's physician if a medication dose will not be administered as prescribed by the physician, and that confidentiality will be maintained by an employee while participating in an investigation initiated by the employer.

9. The employer communicated its expectation regarding physician notification to the claimant through the employer's policy, and the expectation of confidentiality during an investigation was verbally communicated to the claimant at the start of an investigation in which he participated.

10. The reason nurses are expected to promptly notify physicians of changes in medication administration is because nurses do not have the authority to alter prescriptions ordered by physicians.

11. The reason employees are expected to keep the details of investigations confidential is to avoid interference with the investigation.

12. The employer is harmed when nurses do not promptly notify physicians of deviations from a prescribed dose of medication through increased liability for the patient's safety.

13. On March 15, 2022, the claimant received a written warning from the employer for failing to prioritize patients' care and needs and low productivity during his shifts and was placed on a Performance Improvement Plan (PIP). The claimant made improvements and was taken off the PIP on June 13, 2022.

14. A majority of the claimant's duties require him to visit homes of patients to administer medication as prescribed by a physician and to educate the patients about their medications and how to administer the medications to themselves according to their doctor's orders.

15. The claimant lives in [City A], MA. Most of the employer's patients live in the [City B], MA area.

16. On January 14, 2024, the claimant was scheduled to work 2:00 p.m. until 10:30 p.m. and was thereafter on-call until 8:00 a.m.

17. On-call nurses are not expected to administer medication to patients.

18. The claimant is not required to view work-related e-mails or text messages prior to the start of his shift.

19. Nursing license regulations state that RNs are prohibited from delaying or changing a doctor's orders regarding the administration of medication. There is, however, a one-hour window for early or late administration allowed for some types of medications and a two-hour window allowed for other types of medications.

20. On January 11, 2024, the claimant punched into work at 2:10 p.m.

21. Upon punching into work, the claimant read e-mails and text messages received from the employer regarding a patient the claimant was scheduled to visit that day. The patient had just been released from the hospital and was recovering from a bone infection. The claimant was alerted by the employer that this patient required intravenous (IV) medication that was prescribed to be administered at 2:00 p.m. and again twelve hours later.

22. At 2:27 p.m., the employer's scheduler sent the claimant a text message that read, "[Patient] requesting call, says IV needs to be by 2 PM."

23. At 2:28 p.m. the claimant responded by e-mail to the employer stating, "Yeah, I wasn't made aware till I started shift at two, looking her up now calling her shortly."

24. At 2:32 p.m. the claimant sent an e-mail asking, "What are we doing about the 2 AM dose, is the doctor aware she will not receive it?"

25. At 2:36 p.m. the clinical manager responded to the claimant's e-mail stating, "She will dose herself at 2 am. Will you please call the patient with your ETA and (text cut off - unreadable)."

26. The drive from the claimant's home to the patient's home takes approximately 35 to 45 minutes depending on traffic.

27. At approximately 3:30 p.m. the claimant arrived at the patient's house. The claimant began the administration of the patient's 2:00 p.m. dose of medication at approximately 3:40 p.m. or 3:45 p.m. The time to complete the administration of the patient's IV medication took approximately 90 minutes.

28. The claimant provided training to the patient on how to administer IV medication to herself, but she was not proficient following the education by the claimant.

29. The claimant spent approximately two hours in total at the patient's home.

30. After the claimant left the patient, the patient and her husband called the employer to complain about the claimant.

31. The claimant did not call the patient's physician to advise the physician that the patient had not responded well to the education provided by the claimant and would not be able to administer the 2:00 a.m. dose of medication to herself.

32. Physicians that are not "on-duty" have other physicians who are "on-call" to cover their practice in case of after-hours calls and emergencies. In order to reach an on-call physician, a caller must call the off-duty physician's office for a message to be relayed to the physician that is on-call.

33. The physician that ordered the patient's medication worked out of an infectious diseases office (ID).

34. A nurse that works in ID gave the claimant a direct line telephone number for him to call when he needed to reach her because they spoke to each other often about patient care. The claimant is unaware if the number was a private number or an office number.

35. At approximately 10:30 p.m., the claimant called the ID nurse's direct line and left a voicemail that the patient's IV medication would not be administered at

2:00 a.m. as prescribed because the patient could not properly administer her own medication following the claimant's education on the subject.

36. On January 12, 2024, the employer conducted an interview of the claimant regarding the patient of the day before. At the start of the interview, the claimant was advised that this was an investigation and was instructed not to speak with anyone about the investigation other than the human resources representative (HR) present and his union representative.

37. During the meeting, the claimant was asked why he called the ID nurse instead of calling the office line. The claimant responded, "I didn't want to wait on hold for 20 minutes just to get yelled at by a doctor. … The doctor would have approved the delay."

38. After the meeting, the claimant called a triage nurse and the ID nurse regarding the investigation.

39. On January 29, 2024, the claimant was suspended for failing to properly notify the patient's physician that the patient's 2:00 a.m. medication dose would not be administered as prescribed and for interfering with the employer's investigation.

40. On February 14, 2024, the claimant was called on the telephone by his manager with HR present. The employer terminated the claimant for failing to comply with the employer's medication administration policy and for failing to protect the confidentiality of the employer's investigation.

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. There appears to be a typographical error in Finding of Fact # 16, which states, in relevant part, that the claimant was scheduled to work on January 14, 2024. As the uncontested evidence showed the events described in Findings of Fact ## 16–35 occurred on January 11, 2024, we believe that the review examiner intended to find that the claimant was working the 2:00 p.m. to 10:30 p.m. shift on that date. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Further, as discussed more fully below we believe that the review examiner's findings of fact support the conclusion that the claimant is not entitled to benefits.

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. . . .

"[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 requiring its employees promptly report to a patient's physician any discrepancies or problems with administrating medications to that patient. Finding of Fact # 3. As the employer retains discretion to what disciplinary action may be imposed for violation of this policy, the policy on its face shows that it is not uniformly enforced. *See* Finding of Fact # 6 and 7. Therefore, the Board cannot conclude that the claimant knowingly violated a *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 interest. To meet its burden the employer must first show that the claimant engaged in the misconduct for which he was discharged.

In this case, the claimant was discharged for failing to promptly notify a patient's physician of a problem with a medication and for disclosing information about a confidential employer investigation. Finding of Fact # 40. While the claimant did call someone at that physician's practice, he did not take appropriate steps to contact the prescribing physician directly. Findings of Fact # 31–34. Further, the claimant confirmed that he understood that the ID nurse that he contacted directly would not receive his voicemail until the following morning.[1] Because the claimant called the nurse approximately eight hours after identifying the medication issue and well after the nurse had gone home for the day, he did not promptly notify the patient's physician of the medication issue that he identified at the start of his shift. The claimant also conceded that, after learning that the employer had opened an investigation into his actions on January 11, 2024, he discussed the substance of that investigation with two other individuals. Finding of Fact # 38. He, therefore, engaged in the misconduct for which he was discharged.

Inasmuch as the claimant conceded that he made the volitional choice to call the ID nurse instead of the physician's office, his actions in so doing were self-evidently deliberate. *See* Findings of Fact ## 34 and 37. Because there is no suggestion that he contacted the ID nurse and triage nurse by mistake shortly after being notified that the employer was investigating his actions, this conduct is also self-evidently deliberate. Findings of Fact ## 36 and 38.

However, the Supreme Judicial Court (SJC) has stated, "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest. In order

[1] While not explicitly incorporated into the review examiner's findings of fact, this portion of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed into the record, and it is 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).

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).

The claimant confirmed he understood, based on word of mouth and general nursing practice, that he was expected to notify the patient's physician of the medication issue but maintained that he had no knowledge of the employer's medication policy. Nonetheless, the review examiner found that the claimant was aware of the employer's medication policy. *See* Finding of Fact # 4. In so finding, the review examiner implicitly rejected the claimant's testimony to the contrary as not credible. 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

Review examiners are not required to believe self-serving, unsupported evidence, even if it is uncontroverted by other evidence. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986). They must still assess the reasonableness of the testimony presented. In this case, however, the claimant's self-serving assertion is controverted by other evidence.

Shortly after starting his shift, the claimant emailed the employer's clinical manager asking if the patient's doctor was aware that the patient would not receive the 2:00 a.m. dose of medication, evidencing his understanding that the physician needed to be notified. Finding of Fact # 24. The claimant also testified that he contacted the ID nurse regularly because she would speak with the doctor at practice on the claimant's behalf. He would have no reason to rely on the ID nurse as an intermediary between himself and the prescribing physician if he did not understand that his job duties required him to notify the physician who prescribed the medication. When asked about the timing of his call, the claimant also conceded that his general practice was to report any issues with a patient's medication at the first available opportunity.[2] Because the claimant's testimony confirms that he understood his duties required him to promptly contact a patient's physician to report issues with that patient's medication, we believe that the review examiner implicit credibility assessment is reasonable in relation to the record.

According to his testimony and consistent with the emails admitted into evidence, the claimant became aware that the patient would not get the 2:00 a.m. dose shortly after the start of his shift. *See* Findings of Fact ## 24 and 28. However, he did not make any effort to contact the claimant's physician's office until 10:30 p.m., approximately eight hours after he first identified the problem. Finding of Fact # 24 and 35. Further, instead of contacting the physician's office directly, the

[2] The claimant's uncontested testimony in this regard is also part of the unchallenged evidence of record.

claimant decided to engage in a course of action that he knew would result in an additional nine-plus hour delay before the ID nurse would even become aware of the patient's medication issue. *See* Findings of Fact ## 32 and 35. In so doing, the claimant deliberately acted in a way that he understood was contrary to the employer's expectations.

The review examiner also found that the claimant had been told the employer expected him not to discuss its investigation into his actions on January 11, 2024. Finding of Fact # 36. However, in her decision, she stated that she accepted the claimant's testimony that he had not been told the investigation was confidential. As discussed above, the review examiner is not required to believe self-serving, unsupported evidence. McDonald, 396 Mass. at 470. And, as with the claimant's assertions about his knowledge of the employer's medication policy, there is specific evidence directly detracting from this claim that he was unaware the investigation was to remain confidential.

Two of the employer's witnesses, its HR representative and clinical manager, were both present at the first investigatory meeting on January 12, 2024, and provided consistent testimony that the employer's HR representative advised the claimant not to speak to anyone else about the investigation during that meeting. *See* Finding of Fact # 36. Further, the employer's decision to keep the investigation confidential is consistent with generally accepted business practices. We, therefore, decline to accept the portion of the review examiner's implicit credibility assessment accepting the claimant's self-serving testimony that he was unaware the investigation was confidential. It is unreasonable in relation to the evidence presented. Finding of Fact # 36 is supported by substantial and credible evidence.

The claimant did not dispute that he discussed the employer's investigation with the ID nurse and triage nurse shortly after the January 12, 2024, meeting had concluded. Findings of Fact ## 36–38. As he had just been cautioned that the employer's investigation was to remain confidential, we can reasonably infer that he understood that he acted contrary to the employer's expectations when he discussed the substance of the investigation with the two other nurses. Finding of Fact # 36.

Finally, we consider whether the claimant presented mitigating circumstances for his misconduct. Mitigating circumstances include factors that caused 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).

Neither the claimant's preference to contact the ID nurse instead of the on-call line nor his assumption that the physician would be fine with delaying the dose for several hours is evidence that circumstances beyond the claimant's control precluded him from promptly notifying the patient's physician of the medication issue. *See* Findings of Fact ## 31–35 and 37. He also did not show any mitigating circumstances for his breach of the employer's expectation of confidentiality.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week of February 11, 2024, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 28, 2025

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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