The claimant made disparaging comments to two toddlers in her care. Because the claimant had received three prior warnings for disruptive behavior including name-calling, was placed on a three-step plan to help her to control her behavior, and nothing caused her to have little to no control over what she said to them, this was not a mere lapse in judgment. Given the absence of mitigating circumstances, held claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 334-FHJJ-JNDL

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 7, 2024. She filed a claim for unemployment benefits with the DUA, effective June 2, 2024, which was denied in a determination issued on August 8, 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 October 14, 2025. 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). 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 made disparaging comments to two children in her care, 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 as a full-time teacher for the employer, a childcare center, between 6/22/2023 and 6/7/2024, when she separated.

2. The claimant's immediate supervisor was the hiring coordinator and mentor (supervisor).

3. The employer has a child guidance and reporting abuse and neglect policy (policy) requiring employees to "provide positive guidance to the goal of maximizing the growth and development of the children and for protecting the group and individuals within it."

4. The policy stated, in part, "No child shall be subject to cruel or severe punishment, humiliation, verbal abuse, or excessive time-out."

5. The purpose of the policy was to "protect children from abuse and neglect while in the program's care and custody."

6. The discipline for violating the policy depends on the violation.

7. On 6/22/2023, the claimant acknowledged receiving the employer's personnel policy, which included the policy.

8. The employer expected employees to support the children socially, guide their learning, and to speak to them in a supporting manner.

9. The purpose of this expectation is to ensure the children in their care are protected from abuse and neglect, including verbal abuse.

10. The employer communicated the expectation to the claimant upon hire through the policy.

11. On 12/18/2023, the employer issued the claimant a warning related to her behavior during a meeting.

12. On 3/[18]/2024, the employer issued the claimant a second warning that stated, in part, "On Thursday, March 14, 2024, your unprofessional, and disrespectful communication with staff in the [classroom] caused a disruption in your ability of your co-teachers, to focus on caring for the children."

13. The claimant and supervisor agreed to a "three-step plan" for the claimant to follow. The plan included steps the claimant should take if she becomes upset or overwhelmed while at the employer.

14. The second warning stated, in part, "You are advised that three warnings could lead to dismissal."

15. On an unknown date before 5/31/2024, the claimant was working with a teacher (Teacher [A]), who was the claimant's mentor and worked with the employer

for 10 years. Teacher [A] told the claimant that it was okay to use the word "brat" at the employer when speaking about the children.

16. On 5/31/2024, the claimant was working with another teacher (Teacher [B]) while they were outside with the children.

17. One of the children (child A) took a toy for [sic] another child (child B). The claimant told child A that the toy belonged to child B. The claimant saw that child A was going to bite child B. The claimant put her hand in the way so that child A would bite her and not child B.

18. The claimant said "you're a devil child and I don't like you" to child A (the comment).

19. Child A was within five (5) feet of where the claimant was.

20. Teacher [B] felt uncomfortable after the claimant made the comment, and she "was shocked [the claimant] said that to one of the kids."

21. At the time of the claimant's comment about child A, the claimant did not think she was crossing the "line" with what was okay to say at the employer because she thought the word "devil" was like "brat."

22. At the time of the claimant's comment about the child, the claimant did not think she violated the policy and was not expecting any discipline.

23. On 6/3/2024, Teacher [B] reported the comment that the claimant made about child A to the supervisor.

24. Teacher [B] provided a written statement to the employer regarding the comment the claimant made about child A on 5/31/2024.

25. The employer did not have a conversation with the claimant about the report Teacher [B] made related to the comment the claimant made about child A.

26. The claimant called out sick for work on 6/6/2024.

27. On 6/7/2024, the claimant did not report to work and did not inform the employer that she was going to be absent.

28. The supervisor called the claimant and left her a voicemail informing her that she was being discharged.

29. The supervisor followed up with an email message and sent the claimant a letter.

30. The letter stated, "It has come to my attention that on Monday, June 3, 2024, you became irritated with the children and spoke disparagingly to two of the children in your care. This behavior is unacceptable. It is disruptive to the children, your co-teachers, and to the program. We are terminating your employment at [the employer] effective immediately. Your final check, which pays you through the end of today, is enclosed."

31. The claimant made the comment on 5/31/2024. Teacher [B] reported it to the supervisor on 6/3/2024.

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 accept Findings of Fact ## 18 and 19 insofar as it relates to child A. We reject Findings of Fact ## 21 and 22, as these are unsupported by substantial and credible evidence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant was terminated from her employment, 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 fired the claimant on June 7, 2024, because she made disparaging comments to two children in her care. *See* Findings of Fact ## 27, 28, 29, and 30. Specifically, she told child A, "you're a devil, and I don't like you" and she told child B, "that you are the devil too".[1]

[1] The claimant's testimony regarding the comments she made to the two children in her care and the eyewitness' statement are included in Exhibit # 17, the eyewitness' affidavit. While not explicitly incorporated into the review examiner's findings, this testimony and the eyewitness statement, as well as the Director's testimony regarding the children's age 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,

It is undisputed that the employer had a policy requiring employees to provide positive guidance to children and not subject them to humiliation or verbal abuse. *See* Findings of Fact ## 3 and 4. Because the employer maintains discretion as to the form of discipline for anyone who violates the policy, we agree that it has not met its burden to show that the claimant knowingly violated a reasonable and *uniformly enforced* policy. *See* Finding of Fact # 6.

Alternatively, the employer may demonstrate that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. As the claimant conceded that she made the comments at issue to child A and child B on or about May 31, 2024, there is no question that she engaged in misconduct for which she was discharged. *See* Findings of Fact ## 16, 17, and 18. Further, because we see nothing in the record to suggest that she made those comments by mistake, we can infer that her actions were deliberate.

However, deliberate misconduct, by itself, does not disqualify the claimant from receiving benefits. "Such misconduct must also be in 'wilful disregard' of the employer's interest. Deliberate misconduct in wilful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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). 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).

In this case, the claimant was aware of the employer's expectation to provide positive guidance to the children and to speak with them in a supporting manner. *See* Findings of Fact ## 3–5, and 8. Indeed, the employer had given the claimant three prior written warnings for disrespectful and disruptive behaviors including name-calling, which instructed her to act professionally and to communicate in a respectful manner. The most recent one was issued three days prior to the final incident. The claimant also agreed to be placed on a three-step plan, which included steps to follow if she became upset while working. *See* Findings of Fact ## 11, 12, and 13.[2]

We believe that the employer's expectation is self-evidently reasonable, as it ensures the safety and well-being of children and protects them from verbal abuse. *See* Finding of Fact # 9.

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40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2] The record reflects the claimant received three written warnings on December 18, 2023, March 18, 2024, and May 28, 2024, from the employer for her unprofessional and disrespectful behavior. Although a portion of Exhibit # 5, the May 28, 2024, written warning, is not included in the Findings of Fact, it is also part of the unchallenged evidence introduced at the hearing and placed in the record.

The review examiner declined to disqualify the claimant, concluding that the claimant reasonably believed that her comment "devil child" was allowable because it was similar to the word "brat", which her mentor said was acceptable to use to describe children. *See* Findings of Fact ## 15 and 18. The Supreme Judicial Court has stated that "[w]hen a worker . . . has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield, 377 Mass. at 97.

We do not agree that this was a good-faith lapse of judgment. The mentor went only so far as to say it was okay to use the word "brat" in a discussion *about* a child and not *to* a child. *See* Finding of Fact # 15. The claimant had been placed on a three-step plan to guide her in controlling her emotions and avoid disrespectful communications, and nothing in the record shows that, on May 31, 2024, anything caused the claimant to have little or no control over what she said to these children.[3] Therefore, the claimant has failed to show that there were mitigating circumstance for her behavior.

We, therefore, conclude as a matter of law that the employer has met its burden to prove 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 ending June 8, 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 - December 8, 2025

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

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.

[3] The employer's Director provided undisputed testimony that child A and child B were two years old. Nothing about their behavior, described in Finding of Fact # 17, strikes us as extraordinary for their age.

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.

DY/rh