Held that the review examiner unreasonably rejected hearsay evidence submitted by the employer, a detailed investigative report with multiple statements from corroborating witnesses. It constituted substantial and credible evidence that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The claimant is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 334-FHJK-N6V3

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 October 17, 2024. She filed a claim for unemployment benefits with the DUA, effective October 20, 2024, which was denied in a determination issued on November 15, 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 January 22, 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 employer had not established that the claimant, a special needs teacher, had engaged in the misconduct towards students or her peers for which she was discharged, 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 employer is a town. The claimant worked as a moderate special needs teacher for the employer. The claimant worked for the employer from 10/16/1995 to 3/08/2024.

2. The employer runs a school system. The claimant worked in the employer's high school.

3. The employer's special education coordinator (Coordinator 1) supervised the claimant.

4. The employer created a policy. The policy is titled "Nondiscrimination and Harassment Prevention." The policy reads, in part, "Examples of prohibited conduct include, but are not limited to…Verbal conduct: name calling, teasing, jokes or other derogatory or dehumanizing remarks, whether made by an individual or a group…Physical contact: unwelcome touching of a person or person's clothing or any other act of physical intimidation or bullying…Retaliation: Retaliation includes any form of intimidation, reprisal, or harassment directed against an individual because he or she makes a complaint of discrimination or harassment under this policy, witnesses an incident of discrimination or harassment, or provides information during an investigation into a complaint of discrimination or harassment." The policy reads, in part, "Please note that while this policy sets forth [the employer's] goals of promoting a workplace and school environment that is free of discrimination and harassment, the policy is not designed or intended to limit our authority to discipline or take remedial action for workplace or school conduct which the [the employer] deems unacceptable, regardless of whether that conduct satisfies the definition of unlawful and prohibited conduct set forth in this policy."

5. The employer created a policy titled "Staff Conduct." The policy reads, in part, "In the area of personal conduct, the [School Committee] expects that teachers and others will conduct themselves in a manner that not only reflects credit to the school system but also sets forth a model worthy of emulation by students."

6. The employer created a policy titled "Student Services Programs." The policy reads, in part, "To support the classroom activities and other instructional needs of the [the employer], various educational services shall be provided. The Student Services staff will work in cooperation with building staff and the administration of the [the employer] in the coordination and the supervision of the curriculum implementation of the instructional program, and support services programs."

7. The employer created a policy titled "Special Instructional Programs and Accommodations." The policy reads, in part, "The goals of this school system's special education program are to allow all children to grow and achieve at their own level and to gain independence and self-reliance. The requirements of law and regulation will be followed in the identification of children with special needs, in referrals for their evaluation, in prescribing for them suitable programs and in assessing their educational progress. In keeping with state requirements, all children with special needs between the ages of three and twenty-two who have not attained a high school diploma or its equivalent will be eligible for

special education. The School Committee believes that most children with special needs can be educated in the regular school program if they are given special instruction, accommodations and the support they need. Their success and the success of all children can be further enhanced when universal design for learning principles and strategies are applied in classrooms to support accessibility of the curriculum. These children should also be given the opportunity to participate in the school system's non-academic and extracurricular activities. The Committee recognizes that the needs of certain children are so great that special programs, special classes or special schools may be necessary. When appropriate programs, services, or facilities are not available within the public schools, the Committee will provide these children with access to schools where such instruction and accommodations are available."

8. The employer created a policy titled "Equal Educational Opportunities." The policy reads:

   In recognition of the diversified characteristics and needs of our students and with the keen desire to be responsive to them, the School Committee will make every effort to protect the dignity of the students as individuals. It also will offer careful consideration and sympathetic understanding of their personal feelings, particularly with reference to their race, color, sex, gender identity, religion, national origin, immigration status, sexual orientation, physical and intellectual differences, pregnancy or pregnancy related condition.

   To accomplish this, the Committee and its staff will make every effort to comply with the letter and the spirit of the Massachusetts equal educational opportunities law which prohibits discrimination in public school admissions and programs. The law reads as follows:

   No child shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and course of study of such public school on account of race, color, sex, gender identity, religion, national origin, immigration status, sexual orientation, pregnancy or pregnancy related condition.

   This will mean that every student will be given equal opportunity in school admission, admissions to courses, course content, guidance, and extracurricular and athletic activities.

   All implementing provisions issued by the Board of Elementary and Secondary Education in compliance with this law will be followed.

9. The employer created a policy titled "Bullying Prevention." The policy reads, in part, "The School Committee is committed to providing a safe, positive and productive educational environment where students can achieve the highest

academic standards. No student shall be subjected to harassment, intimidation, bullying, or cyber-bullying."

10. The employer created a policy titled "Searches and Interrogations." That policy features a section titled "Searches by Staff." That section reads, "The right of inspection of students' school lockers is inherent in the authority granted school committees and administrators. This authority may be exercised as needed in the interest of safeguarding children, their own and school property. Nevertheless, exercise of that authority by school officials places unusual demands upon their judgment so as to protect each child's constitutional rights to personal privacy and protection from coercion and to act in the best interest of all students and the schools. Searches by school officials of students' automobiles or the student will be conducted in a way that protects the students' rights consistent with the responsibility of the school system to provide an atmosphere conducive to the educational process."

11. The employer created a policy titled "Corporeal [sic] Punishment." That policy reads, "The power of the School Committee or of any teacher or other employee or agent of the Committee to maintain discipline on school property shall not include the right to inflict corporal punishment upon any student."

12. The employer will choose from a variety of potential disciplinary outcomes when a worker violates its policies.

13. The claimant reviewed the employer's policies prior to the 2023–2024 school year.

14. The claimant worked in a classroom with a general education teacher shortly after February vacation in February 2024. The students sat in desk clusters. The students did not pay attention to the lesson. The general education teacher warned the students that she would put the desks into rows. The general education teacher left and the students continued to not pay attention. The claimant instructed the students to move the desks into rows. The students refused. The claimant then moved the desks into rows by herself. She slid backpacks out of the way so she could arrange the desks. The claimant did not yell at the students.

15. The employer received a complaint from a student (Student X). Student X reported that the claimant grabbed his hand and searched his backpack. The employer received this complaint on or around 3/8/2024.

16. The employer placed the claimant on paid administrative leave after it received the complaint from Student X. This leave started on 3/8/2024.

17. The employer contracted with an outside attorney (Attorney 1) to investigate the claimant's behavior. Attorney 1 was licensed in Massachusetts and

specialized in education law. The employer did not perform its own internal investigation of the claimant's behavior.

18. Attorney 1 created a report about how the claimant behaved in the 2023–2024 school year (Report 1). Attorney 1 submitted Report 1 to the employer. Attorney 1 presented several conclusions in the report.

19. The employer did not issue any discipline to the claimant in the period from the start of the 2023–2024 academic year to 3/8/2024.

20. The claimant did not grab a student's hand. The claimant did not search a student's backpack.

21. The claimant did not endeavor to belittle students. The claimant did not endeavor to make students feel dumb.

22. The claimant did not refuse to support students when they asked for assistance.

23. The claimant did not withhold IEP accommodations from students.

24. The claimant did not engage in a tug of war with a student over a cellular telephone.

25. The claimant did not refuse to support lead teachers.

26. The claimant did not endeavor to withhold religious accommodations from students.

27. The claimant did not target or retaliate against students.

28. The claimant did not fail to adapt her teaching style.

29. The claimant did not endeavor to communicate poorly.

30. The claimant did not force students to disclose disabilities.

31. The employer created a letter. The letter is dated 9/4/2024. The letter indicates that the employer intended to discharge the claimant. The letter indicates that the employer intended to discharge the claimant because it concluded she grabbed a student's hand and searched his backpack; it concluded she became angry in class, yelled at the students, and slid the students' backpacks across the floor; it concluded she made comments to the students that belittled them and made them feel dumb; it concluded she failed to provide IEP accommodations to students on a consistent basis; it concluded she refused to support students when they asked for assistance; it concluded she engaged in a "tug of war" with a student over a cellular telephone; it concluded she failed to support lead teachers; it concluded she failed to provide a religious

accommodation; it concluded she engaged in targeted and retaliatory behavior toward students; it concluded she failed to adapt her teaching style; it concluded she failed to communicate effectively; and it concluded she forced students to disclose their disabilities.

32. The employer created a letter. The letter is dated 10/17/2024. The letter is titled, "Notice of Dismissal." The letter reads, in part, "This letter shall serve as notice that you are being dismissed from employment as a teacher with [the employer] effective October 17, 2024."

33. The employer discharged the claimant because it concluded she grabbed a student's hand and searched his backpack; it concluded she became angry in class, yelled at the students, and slid the students' backpacks across the floor; it concluded she made comments to the students that belittled them and made them feel dumb; it concluded she failed to provide IEP accommodations to students on a consistent basis; it concluded she refused to support students when they asked for assistance; it concluded she engaged in a "tug of war" with a student over a cellular telephone; it concluded she failed to support lead teachers; it concluded she failed to provide a religious accommodation; it concluded she engaged in targeted and retaliatory behavior toward students; it concluded she failed to adapt her teaching style; it concluded she failed to communicate effectively; and it concluded she forced students to disclose their disabilities.

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. For the reasons discussed below, we reject the portions of Findings of Fact ## 14 and 20–30 which conclude that the claimant did not engage in the alleged misconduct, as they are based on a credibility assessment that is unreasonable in relation to the evidence presented. 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 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 several policies regulating staff members' behavior. *See* Findings of Fact ## 4–11. However, it chooses from a variety of potential disciplinary outcomes when a worker violates its policies. Finding of Fact # 12. Since the employer maintains discretion over the discipline it imposes for violating its policies, it has not met its burden to show that 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 that the claimant engaged in 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.

As evidence to prove the alleged misconduct, the employer relied solely on an independent investigator's report, which was entered into the record as Exhibit 13. The review examiner concluded that the investigator's report was, on its own, insufficient to establish that the claimant engaged in the conduct for which she was discharged. For this reason, he accepted the claimant's testimony regarding her behavior as more credible than the employer's assertions.

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). Based upon the record before us, we cannot accept the review examiner's assessment.

The investigator's report is hearsay, and the employer did not present any witnesses who had directly observed any of the claimant's misconduct. However, hearsay evidence is not only admissible in informal administrative proceedings, but it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether the underlying testimony was detailed and consistent, was made by a person with a motive to lie, and whether it was corroborated by other evidence in the record. Covell, 439 Mass. at 785–786.

The investigator's report shows that the investigator interviewed multiple students, parents, and staff members, as well as the claimant, while investigating thirteen allegations against her. It provides specific details about each allegation, often with direct quotations from the individuals interviewed. These individuals were eyewitnesses who spoke about their personal experiences

with the claimant or parents who heard about the events from their child. In almost all instances, multiple people corroborated the details of the others. *See* Exhibit 13.

Among the reasons for discharge is that the claimant grabbed a student's hand and then searched the student's backpack without permission or reasonable suspicion to do so. *See* Findings of Fact ## 15, 31, and 33; Exhibit 13, p. 2. The employer first learned about this incident when it received an email from the student's mother. This email, as reproduced in the investigator's report, says that the student "stated he reached into his backpack to get something and the support teacher walked over grabbed his hand, pulled it away from his bag. She then said let me see what's in there." Exhibit 13, p. 2.

The student told the investigator that he was taking a piece of gum out of the top pocket of his backpack when the claimant "came out of nowhere and grabbed my hand and pulled my hand out of my bag." He showed the investigator how she gripped his hand and stated that the claimant then "put her hands in my bag and pulled the pocket open, saying, 'what's in here?'" Id. at 3.

The student's father told the investigator that the student "is not one to cause a fuss and wouldn't normally say anything to us about his day. However, that day when he came home from school, it was the first thing he told us." Id.

Another reason for discharge was that the claimant engaged in a tug-of-war with a student over the student's cell phone. *See* Findings of Fact ## 31 and 33. The investigative report states that a staff member reported to the investigator that students are asked to put their phones in a phone hotel, but that one day, a student was reluctant to put his phone away. The report further provides that, according to the staff member, the claimant "grabbed it from him and they had a back and forth tugging on the phone." Exhibit 13 at 7.

These statements were made in the context of a formal investigation. Many come from eyewitnesses. They are detailed, consistent, and corroborate each other. Nothing in the record indicates that these individuals had motive to lie. Thus, the evidence contains indicia of reliability.

During the hearing, the claimant rebutted the contents of the report by either denying the alleged misconduct or testifying that she did not recall the events and did not believe that they had occurred. Her failure to remember does not mean that the misconduct did not take place. *See* Board of Review Decision 0078 6460 37 (May 31, 2024).

Given the multiple detailed and corroborated witness statements included in the employer's investigative report, it should have been assigned considerable weight. The review examiner's wholescale rejection of this evidence was unreasonable. This hearsay report constitutes substantial and credible evidence to show that the claimant did, among other things, grab a student's hand and search his backpack without permission or reasonable suspicion to do so, and that she engaged in a tug-of-war with another student over the student's cell phone. *See* Findings of Fact ## 15, 31, and 33.

Because the hearsay nature of the employer's evidence is the only basis upon which the review examiner determined the claimant's testimony to be more credible, we reject that portion of the assessment and the corresponding Findings of Fact ## 14 and 20–30 as unreasonable in relation to

the evidence presented. The employer has met its burden to show that the claimant engaged in misconduct for which she was fired.

Nothing in the record indicates that the claimant's actions were accidental or inadvertent. We can thus 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). In order 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).

As shown by its Nondiscrimination and Harassment Prevention policy, the employer expected the claimant not to engage in unwelcome touching of a person or a person's clothing or any other act of physical intimidation or bullying. *See* Finding of Fact # 4. It also expected the claimant to conduct searches in a way that protected students' personal privacy. *See* Finding of Fact # 10. The claimant reviewed the employer's policies prior to the 2023–24 school year. Finding of Fact # 13. Thus, she was aware of the employer's expectations.

The employer's expectations are a reasonable means of ensuring that the school environment is free of harassment and discrimination and that students' privacy is protected.

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, there is no evidence of such circumstances in the incidents discussed above, as the claimant asserted that she did not recall these events.

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 October 13, 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 - June 5, 2025

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. declines to sign the majority opinion.

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