At most, the employer has shown that the claimant may have exercised poor judgment in giving an inappropriate assignment to her second graders at a time when she was feeling ill from a prescribed medication. Any omissions during an investigative interview were not deliberate, but due to forgetting one of six people she had spoken to. Employer's no-contact directive was overbroad and unreasonable.

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Issue ID: 0020 9459 20

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Margaret Blakely, 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 reverse.

The claimant was discharged from her position with the employer on February 2, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 20, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 28, 2017. We accepted the claimant's application for review.

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, she 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 conclusion that the claimant's violation of the employer's no-contact directive was deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time grade 2 teacher for the employer, a municipality, between August, 1993, and 02/02/2017, when she separated.

2. The claimant's direct supervisor was the principal of the school where she worked.

3. The employer has a "Student Discipline" policy outlining the parameters within which a teacher can impose disciplinary action upon students. This "Student Discipline" policy does not identify what discipline, if any, will be imposed upon an employee who violates its terms.

4. On 08/10/2016, the superintendent issued the claimant a written Notice of Discipline, in part, for imposing inappropriate discipline upon a student. This was the claimant's "last chance…to immediately correct [her] behavior."

5. The 08/10/2016 Notice of Discipline instructed the claimant to "inquire with [the principal] if [the claimant] feel[s] a need to impose discipline on a student beyond an admonishment." The purpose of this requirement was to ensure a safe and secure learning environment for children.

6. The employer expected the claimant to comply with her lesson plan. The purpose of this expectation was to ensure proper use of learning time and compliance with the curriculum.

7. The employer expected the claimant not to impose discipline in the classroom beyond a mere admonishment, without speaking first with the principal. The purpose of this expectation was to ensure a safe and secure learning environment for children. This expectation was communicated to the claimant through the 08/10/2016 Notice of Discipline.

8. The claimant was not at work on 12/14/2016 and 12/13/2016 because she was sick.

9. On 12/15/2016 at approximately 10:00 a.m., the claimant sent three boys, including boy B, to speak to the principal because they were misbehaving in the bathroom. All three boys met with the principal. During their return to the claimant's classroom, boy B continued to misbehave. The claimant sent boy B to the principal's office for a second time at approximately 10:30 a.m. The secretary notified the claimant that boy B did not arrive at the principal's office as she had instructed.

10. On 12/15/2016, the claimant had a preparation period between 10:30 a.m. and 11:10 a.m. During this time, the claimant went home to change clothes because she soiled herself as the result of being on antibiotics prescribed to her while she was sick. The claimant returned to work at 11:00 a.m. and still did not feel well. Upon the claimant's return to school, the secretary informed

the claimant that the principal wanted to meet with boy B at recess, which began at 11:45 a.m.

11. The claimant's lesson plan between 11:10 a.m. and 11:40 a.m. was to conduct a social studies lesson. An ancestry topic was ending and an economics topic was starting. The claimant's lesson plan contained a Brain Pop Jr. movie "goods and services" related to the social studies curriculum.

12. During this time, the claimant wrote a prompt on the board, "Why is it important not to lie to a grownup?" for her class to respond in their journals. Boy B responded to his prompt in his journal along with the other students in the class.

13. The claimant used this prompt because the students were looking disinterested in their other work, she did not feel well, and she needed a "quick filler" assignment until recess.

14. The claimant did not seek permission from the principal prior to providing this prompt on the board.

15. This prompt was not in the claimant's lesson plan.

16. At approximately 11:25 a.m., the principal and superintendent entered the claimant's classroom as part of a routine visit. All of the claimant's students, including boy B, were seated and responding to the prompt on the board.

17. The principal asked another student about the prompt. The student relayed that boy B "was in trouble" and that they were "writing about that."

18. On 12/15/2016, the employer placed the claimant on administrative leave for imposing inappropriate classroom discipline with this prompt.

19. On 12/15/2016 and 12/19/2016, the claimant was verbally directed not to have contact with any school district personnel about her discipline, employment status, or any other topics. The claimant was informed that contact could not be direct or indirect, and that if anyone who works for the school district contacted her, to tell them she was unable to speak to them at that time. The claimant was directed to contact her union representatives if she had any questions about the no-contact directive and the union representatives could then speak with the superintendent.

20. The purpose of this no-contact directive was to maintain confidentiality and prevent any tainting [of] the employer's investigation while the claimant was on administrative leave.

21. No written policy regarding the no-contact directive was presented.

22. The claimant had contact with three teachers, a custodian, an educational aide and a substitute teacher (six employees). The claimant's mother had contact with the secretary on the claimant's behalf.

23. The claimant was in a continuing education class with two of the teachers.

24. The claimant did not communicate with her union representatives about her contact with any of these employees.

25. No written policy was presented regarding being truthful and complete during an investigation.

26. On 01/23/2017, the claimant participated in an investigatory interview, during which the claimant was instructed to be truthful and complete in her answers.

27. During the interview on 01/23/2017, the claimant only disclosed contact with five (5) employees because she did not know in advance what would be covered during this interview and could only remember and think of those five (5) employees when being questioned.

28. On 01/23/2017, the claimant received a voice message from the substitute teacher asking where she was. The claimant sent a text message to the substitute teacher at 12:25 p.m. stating, "Hi. I was at school being Questioned [sic] and I told them that two peoplr [sic] reached out to me. We didn't discuss the case, but we talked about the horrors of stress. IF YOU are called to the office, take a rep. Or wait til [sic] you have one."

29. On 01/24/2017, the claimant sent a text message to the substitute teacher at 10:57 a.m. stating, "Please remember that we never discussed my case because I had a gag order." At 10:59 a.m., the claimant sent another text message stating, "They realize they don't have enough evidence to fire me so the want to get me on breaking the gag order."

30. On 02/01/2017, the claimant participated in a hearing. During the hearing, the claimant was represented by her attorney, the union president, and the union business representative.

31. On 02/02/2017, the superintendent terminated the claimant's employment for imposing inappropriate discipline on her class on 12/15/2016, not being truthful during the investigation, and violating the no-contact directive.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to

be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible 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 findings show that a series of events, beginning with the claimant assigning a writing prompt to her class on December 15, 2016, led to her discharge. Specifically, the review examiner found that the employer fired the claimant for three reasons: (1) imposing inappropriate discipline on December 15, 2016; (2) lying during an investigation; and (3) violating a no-contact directive. Finding of Fact # 31. We consider whether the employer has satisfied its burden to show that any of these alleged forms of misconduct amounted to a knowing violation of a reasonable and uniformly enforced rule or policy, or deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

Inappropriate discipline

To be a knowing violation at the time of the act, the employee must have been ". . . consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996). Exhibit # 5 is a copy of the employer's student discipline policy. Nothing in this written policy expressly prohibits the writing assignment at issue. Rather, the policy states, "The degree, frequency, and circumstances surrounding each [student disciplinary] incident shall determine the method used in enforcing these policies. . . If a situation should arise in which there is no applicable written policy, the staff member shall be expected to exercise reasonable and professional judgment."[1] The employer has shown that the claimant was aware that inappropriate discipline was not allowed, as she had received a written warning about

[1] The quoted portion of Exhibit # 5, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in 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).

imposing inappropriate discipline before, on August 10, 2016.[2] Findings of Fact ## 4 and 5. While it is not entirely clear that the assignment to write about "why it is important not to lie to a grownup" constituted a form of inappropriate or unauthorized discipline as meant under the policy, we shall accept for purposes of analysis that it was. However, because the record does not show that that the employer uniformly disciplined employees who engaged in the same type of behavior, it has not met its burden to show a knowing violation of a reasonable and *uniformly* enforced policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

In order to determine whether an employee's actions constitute deliberate misconduct, 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). 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).

The review examiner found that the claimant assigned the writing prompt because the students looked disinterested in their other work, she did not feel well, and she needed a "quick filler" assignment until recess. Finding of Fact # 13. In doing so, the review examiner rejected the employer's assertions that the claimant's motives were to further discipline and potentially embarrass student B. *See* Exhibit # 9. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980). 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). Here, the review examiner's finding is supported by the claimant's testimony and is reasonable in relation to evidence presented.

We believe that the claimant's decision, to give a writing prompt to fill instructional time before recess instead of following the original lesson plan because the students showed no interest in other work, was an exercise of professional judgment. The topic may have shown poor judgment under the circumstances, but it did not amount to wilful disregard of the employer's interest. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) ("When 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.").

We are also mindful of the Supreme Judicial Court's instructions to evaluate the claimant's state of mind by taking into account the presence of any mitigating factors. Garfield, 377 Mass. at 97. The fact that the claimant had just had a bad reaction to medication and was not feeling well at the time also constituted mitigating circumstances for giving the class an inappropriate assignment. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a

[2] Exhibit # 8 is an employer letter to the claimant that describes in detail the alleged incident which led to the August 10, 2016, warning. The student, type of student misbehavior, and the claimant's handling of the situation, as described in the letter, are different from the incident that took place on December 15, 2016.

claimant may have little or no control). In other words, it is feasible that the claimant's medical condition and not wilful disregard of the employer's interest drove her decision to assign the writing prompt.

Thus, we agree with the review examiner's conclusion that that the employer has not shown that its discharge for imposing inappropriate discipline on December 15, 2016, amounted to disqualifying misconduct under either the knowing violation or the deliberate misconduct prongs of G.L. c. 151A, § 25(e)(2).

Not being truthful during investigation

In her analysis, the review examiner correctly concluded that because the employer did not present any written policy or rule pertaining to being truthful during an investigation, this allegation did not constitute a knowing violation under G.L. c. 151A, § 25(e)(2). Nonetheless, it is self-evident and reasonable for the employer to expect an employee to be truthful in response to any investigative questions. Here, the claimant does not pretend to have believed otherwise. Rather, the issue is whether she deliberately gave an untruthful response to the employer during the January 23, 2017, investigatory interview about how many employees she had been in contact with since being place on leave.

The review examiner found that, when the claimant told the employer that she had only spoken to five employees, the claimant did so because she did not remember communicating with the sixth. Finding of Fact # 27. This finding is reasonable and supported by the claimant's testimony. Forgetfulness does not constitute deliberate misconduct. *See* Board of Review Decision 0013 9972 02 (June 11, 2015) (lacking evidence that the claimant chose, decided, or refused to close the safe properly, his negligence arose out of forgetfulness, which is inconsistent with a conclusion that the claimant acted with wilful disregard at the time); Board of Review Decision 0011 7585 58 (Sept. 29, 2014) (claimant, who forgot to take a temperature control sample, was not acting deliberately)[3]. The review examiner has not found, and we decline to impute from any findings or other evidence, that the claimant's failure to mention the substitute teacher during that interview was deliberate. Since we conclude that it was not deliberate, there is no basis to conclude that her omission constituted deliberate misconduct under G.L. c. 151A, § 25(e)(2).

Violating the no-contact directive

The employer has shown that by speaking with six school district employees while on administrative leave, the claimant violated the explicit instructions of its no-contact directive. It is not necessary for us to decide whether the directive crossed the line into unlawful protected activity under the National Labor Relations Act or under G.L. c. 150E, and we form no opinion about whether the employer was justified in terminating the claimant's employment. The only question before us is whether the claimant's actions disqualified her from receiving unemployment benefits. They do not, because we conclude that the employer's directive was unreasonable.

[3] Board of Review Decisions 0013 9972 02 and 0011 7585 58 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

As stated in Finding of Fact # 19, upon placing the claimant on administrative leave, the employer instructed her not to have contact with any school district personnel directly or indirectly about her discipline, employment status, or any other topics. We consider first its prohibition about talking to any other school personnel about the discipline.

The employer imposed the directive while it investigated the claimant's alleged inappropriate classroom discipline of December 15, 2016. *See* Findings of Fact ## 18 and 20. In Board of Review Decision 0002 5114 03 (Feb. 25, 2014), we denied benefits to a police officer because he reached out to his best friend, another police officer who worked for the same municipality, to talk about the claimant's pending discipline. In that case, the employer had instructed the claimant not to take any action that would tend to discourage, persuade, or retaliate against a witness. Because the claimant's best friend was a percipient witness in the upcoming disciplinary hearing, we concluded that the claimant acted deliberately and in wilful disregard of the employer's instruction not to take any action that would tend to discourage, persuade, or retaliate against a witness. Unlike in the present appeal, the employer's directive in Board of Review Decision 0002 5114 03 was narrowly drawn and appropriately tied to the circumstances underlying that claimant's disciplinary charges. Here, the only school district personnel who were potential witnesses to the December 15, 2016, incident were the principal and the superintendent. Had the employer's order been limited to avoiding contact with these two individuals, it might withstand scrutiny, because the employer had a vested interest in these witnesses' untainted statements during the investigation or at any upcoming disciplinary hearing, and it would be reasonable for the employer to ask the claimant not to reach out and try to influence their recollection of the facts. Instead, the employer ordered the claimant not to contact *any* school district personnel. We see no reasonable basis for doing so.[4]

Second, we consider that the directive ordered the claimant not to speak with any school district personnel about *any other topics*. This restriction reached beyond the workplace into the claimant's personal interactions in the community. Because nothing in the record suggests a valid business reason for such a broad directive, we conclude that it was unreasonable. The claimant did not, therefore, knowingly violate a *reasonable* policy or disregard a legitimate employer interest, as required for disqualification under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the employer has failed to sustain its burden to prove that the claimant is disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(2).

[4] *See also* Board of Review Decision 0015 7381 34 (Dec. 23, 2015) (claimant eligible for benefits, because employer's directive that claimant, an experienced nurse, not talk to coworkers about her discipline for objecting to a new protocol for a highly contagious resident was unreasonable).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 29, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 27, 2017

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

AB/rh