

The claimant was medically disabled by severe foot pain which was a mitigating factor in her inability to stand during her entire shift as a school crossing guard.

**Board of Review
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Issue ID: 0019 2190 26

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by D. Lusakhpuryan, 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 22, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 21, 2016. 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 November 29, 2016. 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, was disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest is supported by substantial and credible evidence and is free from error of law, where the claimant, a school crossing guard, contrary to the employer's directive, waited in her car until there were children to assist crossing the street because she suffered from disabling foot pain.

Findings of Fact

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

1. In November 2005, the claimant started working for the employer, a municipality, as a crossing guard.

2. The claimant was paid \$14.00 per hour.
3. The claimant was scheduled to work a split shift. The 1st shift ran from 7:30AM until 8:30AM. The 2nd shift ran from 2:30 p.m. until 3:30 p.m.
4. The claimant's supervisor was the Sergeant.
5. The employer expects crossing guards to remain outside of their motor vehicles for the duration of their scheduled shifts at assigned schools. The employer has this expectation to ensure the safety of the students crossing at the schools.
6. Whether a crossing guard is discharged for violating this expectation is left to the discretion of the Sergeant.
7. The employer does not have a written rule or policy to address this expectation.
8. On August 13, 2015, the Sergeant held an orientation for the crossing guards. The claimant attended the orientation (Exhibit # 10). During the orientation, the Sergeant explained that crossing guards were expected to remain outside of their motor vehicles for the duration of their scheduled shifts at the assigned schools.
9. During the orientation, the Sergeant informed the workers that authorization would be given for small stools or chairs to be used.
10. On February 9, 2016, the Sergeant issued the claimant a verbal warning informing the claimant that the claimant was expected to be outside of her vehicle for her shift. This warning occurred near the school the claimant was assigned as a crossing guard.
11. The claimant's last day of work was on February 22, 2016.
12. On February 22, 2016, the Sergeant went to the claimant's assigned school. The claimant was inside her motor vehicle when the Sergeant approached the claimant. The claimant and the Sergeant had a conversation.
13. During this conversation, the Sergeant informed the claimant that the claimant was expected to remain outside of her motor vehicle for her assigned shift. The claimant refused to remain outside of her motor vehicle for her assigned shift. The claimant told the Sergeant that she had issues with her feet. The claimant also commented to the Sergeant that's "a bunch of bullshit."
14. On February 22, 2016, the Sergeant discharged the claimant.

15. The employer discharged the claimant for refusing to remain outside of her motor vehicle for her assigned shift as a crossing guard on February 22, 2016.
16. The last doctor's note the employer had from the claimant was dated September 16, 2014 listing the following: "[Claimant's name omitted] is in good health and can work without restrictions as a crossing guard (Exhibit # 3b)."
17. The claimant has been diagnosed with arthritis, hammer toes and *pes [cavus]*.
18. The claimant did not ask the employer for any accommodations for the pain she was experiencing in her feet.
19. The employer could have provided accommodations for the claimant if the claimant could not have stood.
20. On February 29, 2016, the claimant's doctor wrote: "[Claimant's name omitted] has been a patient in my office for more than 10 years. She has severe foot pain from arthritis, hammer toes and *pes cavus*. This causes her disability due to the inability to stand or walk for long periods due to the pain (Exhibit # 7b)."
21. On July 21, 2016, the Department issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(2) of the Law commencing the week beginning February 21, 2016 and until she met the requalifying provisions of the Law (Exhibit # 6).

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 conclude, contrary to the review examiner, that the claimant's misconduct was mitigated by her medical condition.

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 relevant 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

In deciding whether the claimant's conduct is disqualifying under the foregoing provision, it is the employer's burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation, and that the conduct was done deliberately in wilful disregard of the employing unit's interest. A "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

In this case, the findings establish that the employer maintained an expectation that its crossing guards remain outside their vehicles during their entire shifts, whether or not children or pedestrians were visibly attempting to cross the street. This rule was reasonable, since it ensured that the crossing guards would be immediately available in the event a child or pedestrian wanted to cross the street. The findings further establish that the claimant was aware of this expectation, having been specifically warned about it by her supervisor two weeks prior to her discharge. Nonetheless, on February 22, 2016, the claimant was again seated in her car when she was approached by her supervisor during her shift. The employer has therefore satisfied its burden to establish that the claimant was engaged in deliberate misconduct by disobeying the supervisor's directive to remain outside her vehicle at all times.

However, a deliberate violation of an employer's rule or expectation does not automatically disqualify a claimant from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass. 776 (1982). The question is not whether the employer was justified in discharging the claimant, but whether the Legislature intended that the now-unemployed claimant should be denied benefits under the circumstances. Garfield, 377 Mass. at 95. In this case, the claimant had served for eleven years without discipline, until the instant issue arose about waiting in her car in icy weather until children or pedestrians needed assistance.¹ There is no allegation that the claimant remained in her vehicle while pedestrians required her assistance or that her conduct in any way actually resulted in a hazardous situation. Instead, the record reflects that she suffered from painful foot conditions that were exacerbated by cold weather, and that her reason for waiting in the vehicle was solely intended to ameliorate this condition. The record contains a copy of the claimant's Disabled Persons Parking Identification Placard, valid through August 17, 2021 (Exhibit # 11). To be sure, it may have been wiser for the claimant to have formally requested accommodations, rather than disobey a directive, but she did inform her supervisor when he approached her on February 22 that it was the severe cold and her painful medical condition that had caused her to wait in the vehicle when pedestrians did not appear to need her assistance. Under these circumstances, the claimant was acting out of a need to avoid excessive physical discomfort, rather than a wilful disregard of the employer's interests, as required in order to disqualify her from benefits. The claimant's medical inability to stand for the entire duration of her shift was a substantial mitigating factor in her remaining in her car to wait until there were children there to assist in crossing the street.

¹ The claimant offered un rebutted testimony that, during her eleven years of service, she had routinely waited in her car until a need arose to assist a pedestrian across the street, and that she was never questioned for doing so until the events giving rise to this case.

We, therefore, conclude as a matter of law that the claimant was not discharged for 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 entitled to receive benefits for the week beginning February 21, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 16, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**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.

SPE/rh