

Claimant had mitigating circumstances when she failed to report to work after final warning because she had arranged through the employer's EAP to enter a rehab program for her substance abuse, and she had notified her supervisor and the area HR manager prior to her shift that she was entering a substance abuse program.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Meghan Orio-Dunne, 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 affirm.

The claimant was discharged from her position with the employer on August 30, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 8, 2016. The claimant appealed the determination to the DUA hearings department. Following a continued 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 December 20, 2016. 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 expectation and, thus, was not 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 employer's appeal, we remanded the case to the review examiner, because, while attempting to review the recordings of the two continued hearings, we discovered the first recording to be unintelligible due to a malfunction of the recording device. The case was remanded to repeat the first hearing, in the interest of practicality and economy, as there was no problem with the recording of the second hearing. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. 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's conduct did not constitute deliberate misconduct is supported by substantial and credible evidence and is free from error of law, where the claimant established the existence of a mitigating circumstance which prevented her from meeting the employer's expectation that she report to work as scheduled on August 28, 2016.

Findings of Fact

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

1. The claimant worked for the employer, a manufacturer of auto parts, as a full-time inspector from January 2015 until August 30, 2016.
2. The claimant was a union member and worked a third shift schedule.
3. The employer maintains a written attendance policy to ensure that staffing is sufficient to meet production requirements.
4. An excused absence, per the employer, is one which is approved in [advance] or excused by Law.
5. Attendance is tracked on a rolling 12-month calendar and an unexcused absence (up to and including 2 consecutive work days) results in 1 point being allotted to the employee.
6. Disciplinary action for accumulation of points through unexcused absences is taken as follows:
 - 4 points = Verbal Notification
 - 5 points = Written Warning
 - 6 points = Final Written Warning
 - 7 points = Termination
7. Tardies, early leaving, and missed punches, are considered partial absences and are tracked separately from unexcused absences. Points for partial absences are tracked on a rolling 12-month period and are combined when determining disciplinary action.
8. Every 4 partial absences in a rolling 12-month period results in the issuance of 1 point.
9. Disciplinary action for accumulation of points through partial absences is taken as follows:
 - 1 point: Verbal Notification
 - 2 points: Written Warning
 - 3 points: Final Written Warning
 - 4 points: Termination
10. The claimant was aware of the employer's attendance policy, having received it along with her Collective Bargaining Agreement on January 5, 2015.

11. Per the CBA, if disciplinary action is not issued within 5 working days of an occurrence, the most recent absence / partial absence must be forgiven.
12. Per the CBA, an employee has the ability to grieve any disciplinary action. Following a successful grievance, an occurrence or absence / partial absence may be removed from the employee's record.
13. On April 28, 2015, the claimant was issued a verbal warning / notification for "absences" when the employer believed that she had accrued 4 points during the prior 12 months (unexcused absences on 1/20/15, 1/27/15, 4/6/15, 4/21 – 4/22/15).
14. On June 12, 2015, the claimant was issued a written warning for "absences". The written warning was revoked shortly thereafter upon the employer's realization that it had failed to account for an allowed snow day in January 2015.
15. On June 15, 2015, the June 12, 2015 warning was reissued as a verbal warning after the employer removed January 27, 2015, an allowed snow day, from the claimant's unexcused absences. During the 12 months prior to June 15, 2015, the claimant incurred unexcused absences on 1/20/15, 4/6/15, 4/21-4/22/15 and 6/9/15, resulting in 4 points.
16. On August 26, 2015, the claimant was issued a verbal warning / notification for "partial absences" after accruing 1.5 points via partial absences (6/8/15 early out, 7/7/15 tardy, 7/31/15 tardy, 8/1/15 tardy, 8/14/15 early out, 8/25/15 missed punch) during the prior 12 months. The warning was not issued within 5 working days of 8/1/15, when the claimant accrued 1 point due to partial absences.
17. On September 16, 2015, the claimant was issued a written warning for "partial absences" after accruing 2.25 points via partial absences during the prior 12-month period (6/8/15 early out, 7/7/15 tardy, 7/31/15 tardy, 8/1/15 tardy, 8/14/15 early out, 8/25/15 missed punch, 8/31/15 early out, 9/4/15 tardy, 9/15/15 early out). The warning was not issued within 5 working days of 9/4/15, when the claimant accrued her 2nd point due to partial absences.
18. On September 25, 2015, the claimant received a written warning for "absences" after accruing 5 points during the prior 12-month period (unexcused absences on 1/20/15, 4/6/15, 4/21 – 4/22/15, 6/9/15, 9/23/15).
19. On February 2, 2016, the claimant received a written warning for "absences" after accruing 5 points during the prior 12 months (unexcused absences on 4/6/15, 4/21 – 4/22/15, 6/9/15, 9/23/15, 2/1/16).
20. On February 17, 2016, the claimant was issued a final warning for "absences" after accruing 6 points due to unexcused absences over the prior 12-month period (4/6/15, 4/21 – 4/22/15, 6/9/15, 9/23/15, 2/1/16, 2/15 – 2/16/16).

21. On May 4, 2016, the claimant received a final warning for “absences” after accruing 6 points due to unexcused absences over the prior 12 months (6/9/15, 9/23/15, 2/1/16, 2/15 – 2/16/15, 4/18/16, 5/2 – 5/3/16).
22. On July 15, 2016, the claimant was issued a final warning for “absences” after accruing 6 points due to unexcused absences over the prior 12-month period (9/23/15, 2/1/16, 2/15 – 2/16/16, 4/18/16, 5/2 – 5/3/16, 7/14/16).
23. Each Notification or Warning stated that additional occurrences would result in further progressive disciplinary action.
24. The claimant understood that her job was in jeopardy due to her continued absences.
25. All of the above disciplinary actions were signed off on by a union steward and the claimant had the right to grieve any of the disciplinary actions. She did not pursue any grievances.
26. The claimant had a long-term history of heroin addiction and had been on a methadone maintenance program for some time. On an unknown date prior to September 2015, the claimant resumed using heroin along with methadone. In December 2015, she also began using cocaine.
27. The claimant’s absences between September 2015 and August 2016 were primarily related to her multi-substance abuse.
28. The Collective Bargaining Agreement to which the claimant and employer were subject contains a provision which reads, in part:

“An employee who tests positive for the first time or who voluntarily comes forward seeking treatment, will not be **disciplined based on the failed test or for having come forward to seek treatment under this policy** if he or she accepts a rehabilitative evaluation and successfully completes a rehabilitation program. **However, neither coming forward for treatment or failing a drug test will mitigate against discipline otherwise justified under the terms of the Collective Bargaining Agreement.**”

“**The Company will direct the employee to contact a specified outside service for rehabilitative evaluation** (emphasis added).” ... “A rehabilitation program will be selected that is mutually agreeable to both the Company and the employee.” ... “If it is necessary for an employee to be off work to receive this treatment, the Company will grant an unpaid leave for the duration of the hospital stay...” ... “Discipline will be avoided only upon successful completion of rehabilitation, which will include full cooperation with the treatment center and the Company.”

29. After an employee comes forward to seek treatment, the employer requests that the EAP contact the employee to arrange services and that the employee authorize the EAP to remain in communication with the employer. This ongoing communication allows the employer to ensure that the employee is continuing treatment, and is not authorized if the employee seeks rehabilitation services independently.
30. The claimant was aware from her time of hire that she had access to the services of an Employee Assistance Program.
31. On August 28, 2016, the claimant contacted the EAP to seek treatment for her drug abuse because she believed that she had “hit rock bottom” and felt suicidal. On that date, prior to the start of her scheduled shift, the EAP had arranged for the claimant to leave Massachusetts on August 30, 2016 to enter a treatment program in Las Vegas, NV.
32. The claimant did not appear for work on August 28, 2016.
33. The claimant believed she had acted in accordance with the CBA by contacting the employer’s EAP vendor to seek treatment and did not expect that she would be subject to disciplinary action for failing to appear for her shift on August 28, 2016.
34. Prior to the start of her scheduled August 28 – August 29, 2016 overnight shift, the claimant left a message for her immediate supervisor indicating that she had an emergency and would be contacting the Area Human Resources Manager.
35. Prior to the start of her shift, the claimant left a voicemail for the Area Human Resources Manager stating that she had a drug problem and was going away to get help.
36. The claimant contacted the EAP and arranged to attend rehabilitation independently rather than requesting a referral to the EAP as specified by the CBA.
37. On August 30, 2016, the Area HR Manager informed the claimant that the provisions of the CBA did not protect the claimant from disciplinary action as the result of her August 28, 2016 absence.
38. On August 30, 2016, the claimant was discharged for “absences” after accruing 7 points due to unexcused absences over the prior 12-month period (9/23/15, 2/1/16, 2/15 – 2/16/16, 4/18/16, 5/2 – 5/3/16, 7/14/16, 8/28/16), with the final unexcused absence occurring following a final warning.
39. The union steward informed the HR supervisor that she did not intend to grieve her discharge, and no grievance was received.

40. From August 31, 2016 through September 23, 2016 the claimant attended a residential treatment program and received a certificate of successful completion

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated 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 consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, based on the consolidated findings, we agree with the review examiner's initial conclusion that the claimant is entitled to receive benefits, in accordance with G.L. c. 151A, § 25(e)(2).

The claimant was terminated from her employment, and, accordingly, 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

Following remand, the consolidated findings establish that the claimant had a long history of heroin addiction and had been on a methadone maintenance program for some time. The claimant had resumed using heroin along with methadone prior to September, 2015, and, in December, 2015, she began also using cocaine. They further establish that the claimant's absences between September, 2015, and August, 2016, were primarily related to her substance abuse problem. The review examiner found that the claimant had retained her employment despite multiple absences following her initial final warning.

The claimant was aware that, as part of the collective bargaining agreement, the employer had an Employee Assistance Program (EAP) designed to aid employees who wish to seek treatment and rehabilitation. On August 28, 2016, the claimant was feeling suicidal and believed that she had hit rock bottom. She contacted the EAP to seek treatment for her drug abuse problem. Prior to her scheduled shift that day, the EAP arranged for the claimant to enter a treatment program in Las Vegas on August 30, 2016. The claimant believed that she had complied with the collective bargaining agreement by contacting the EAP vendor and did not expect that she would be disciplined for her failure to report to work on August 28, 2016. The claimant had also left a voicemail message for her supervisor and the human resources manager before the beginning of her shift, stating that she had a drug problem and was going away to obtain help.

The claimant believed that she had taken appropriate steps to preserve her employment, and that she was following the expectations of the collective bargaining agreement by contacting the employer's EAP to arrange for her admission to a rehabilitation facility and by leaving messages for both her supervisor and the area human resources manager prior to the start of her scheduled shift on August 28, 2016. The review examiner found that it was reasonable for the claimant to

believe that the employer's EAP vendor served as a proxy for the employer, as that vendor was contracted by the employer in accordance with the collective bargaining agreement.

In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause [her] discharge." Id. 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." Id. Due to the critical nature of an employee's state of mind and surrounding mitigating circumstances, mere violation of an employer's rule or expectation does not automatically disqualify her from unemployment benefits. Torres v. Dir. of Division of Employment Security, 387 Mass. 94 (1979).

The record before us indicates that the claimant suffered from drug addiction, and that it was her need to address this substance abuse that caused her final unexcused absences from a scheduled work shift. Mitigating circumstances over which a claimant may have no control include the situation here, where the claimant had hit rock bottom, was feeling suicidal, and required immediate help. Consequently, we conclude that the claimant's circumstances, over which she had no control, mitigated her failure to meet the employer's attendance expectations. .

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending September 9, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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