

Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. Ferullo, 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 his position with the employer on November 2, 2012. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 8, 2013. The employer 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 denied benefits in a decision rendered on April 8, 2013. 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. Neither party responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether, under G.L. c. 151A, § 25(e)(2), the review examiner's conclusion that the claimant engaged in deliberate misconduct by urinating in public on school property, in light of medical documentation confirming his diagnosis with a prostate condition, is supported by substantial and credible evidence and is free of error of law.

Findings of Fact

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

1. The claimant worked part-time as a school bus monitor for the employer, a municipality, from September 6, 2007 until becoming separated from employment on November 2, 2012.
2. The employer expected that employees would not urinate in public on school property.

3. The claimant had a common sense awareness that urinating in public on school property was prohibited.
4. The claimant was diagnosed with an enlarged prostate [sic] in 2011. The claimant was placed on medication for that condition in or around mid 2011. The claimant had been informed by his doctor that the medication would cause his throat and mouth to become dry and that he would have to be constantly consuming liquid.
5. At no time did the claimant notify the employer of his medical condition or request any type of accommodation.
6. There were no bathrooms available on the school buses to which the claimant was assigned.
7. The claimant had not had any issues at work related to his inability to hold his urine while on the medication from mid 2011 until January 27, 2012.
8. As a bus monitor, the claimant was responsible for the safety of the students in his care.
9. On January 27, 2012, the claimant was working for the employer. The claimant was on the bus coming from dropping off children in Jamaica Plain traveling to another high school. It would normally take approximately forty-five minutes to an hour to get from the Jamaica Plain location to the high school.
10. On January 27th there was some additional traffic. The commute from [Jamaica] Plain to the high school took over one hour.
11. Upon arriving at the high school the claimant left the bus to go into the school to sign in and to use the bathroom.
12. While walking to the school entrance the claimant felt that he could not hold his urine. The claimant felt urine running down his leg into his shoes. The claimant then urinated in public, so as to not wet his clothing.
13. The claimant was seen by the assistant headmaster at the corner of the school. She inquired as to what he was doing and directed the claimant into the school. The claimant met with the assistant headmaster to discuss what had taken place. The claimant admitted to urinating in public. The claimant was sent home at that time and replaced on the bus.
14. On February 3, 2012 the claimant met with the headmaster of the school to discuss the incident. The claimant provided the employer with a letter [from] his doctor regarding his medical condition and his need to urinate frequently.

15. The claimant remained on a paid leave of absence with the employer from January 27th until November 2, 2012.
16. On October 18, 2012 the claimant attended a disciplinary hearing with the employer, a union representative, the employer's counsel and a bus monitor. The claimant admitted to having urinated in public on the grounds of the high school. The claimant further provided information regarding his medical condition.
17. The claimant was presented with a letter of discharge from the employer dated October 24, 2012. The letter indicated that the claimant was being discharged effective November 2, 2012 due to his urinating in public on the school grounds.
18. The claimant was a member of the union. The claimant filed a grievance, but never heard anything on it. At no time did the claimant follow up on his grievance.
19. The claimant filed his claim for unemployment benefits on November 7, 2012. The effective date of the claim is November 4, 2012.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence.

The review examiner denied benefits after analyzing the claimant's separation under 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 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, ... provided that such violation is not shown to be as a result of the employee's incompetence....

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. The review examiner concluded that the employer had met its burden. We disagree.

The review examiner found that the employer had an expectation that employees would not urinate in public on school property. This expectation is reasonable, and the claimant had a common sense awareness of this expectation.

The review examiner also found that the claimant was diagnosed with an enlarged prostate in 2011, for which he was put on medication in approximately mid-2011. The medications caused the claimant's throat and mouth to become dry, and required him to constantly consume liquids. The claimant's testimony was corroborated by a letter from his physician, explaining the claimant's history with this diagnosis, noting its severity, and indicating it required the claimant to urinate frequently. *See Hearings Exhibit #9.*

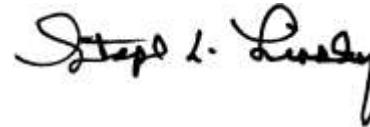
Regarding the incident that precipitated the claimant's termination, the review examiner found that the claimant was on a route as a bus monitor which normally took 45 minutes to an hour to complete, but which took over an hour on the date in question, due to traffic. There were no bathrooms on the buses to which the claimant was assigned. Upon arriving at the destination high school, the claimant left the bus to go sign into the school and use the bathroom. As he was walking to the school entrance, the claimant felt urine running down his leg into his shoes. Rather than completing his trip into the school to sign in, he admittedly urinated on the side of the building to avoid further soiling his clothing. He was observed by a school official, questioned, sent home, suspended, and eventually discharged after a disciplinary hearing almost nine months after the incident itself.

The review examiner concluded that the claimant did not establish mitigating circumstances to excuse the conduct that prompted his termination. We disagree. The review examiner's summary of the claimant's predicament – "It was unrefuted that the claimant was presented with the choice on January 27th of either wetting his clothing or exposing himself or urinating in public, on school property while school was in session" – makes it clear that the claimant's actions resulted from exigent circumstances, prompted by a medical condition which he corroborated with documentary evidence from his physician.

Further, the facts as found by the review examiner show that the claimant intended to comply with the employer's expectation by going towards the building to sign in and use the bathroom. However, his body was unable to refrain from urinating before he was able to sign in. The claimant's efforts to comply with the employer's expectation support the conclusion that he lacked the requisite state of mind to support disqualification for deliberate misconduct in wilful disregard of the employer's interest, since the claimant did what he could to comply with the employer's expectation.

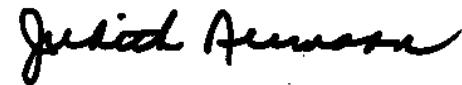
We, therefore, conclude as a matter of law that the claimant was discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest because he presented substantial and credible evidence of circumstances that mitigated compliance with the employer's expectation.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 10, 2012, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – November 4, 2013

Stephen M. Linsky, Esq.
Member



Judith M. Neumann, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

JPC/rh