

Appendices

Appendix L: Sample Memorandum to the Board of Review

[Editor's note: This memo from a successful appeal demonstrates the importance of highlighting how the facts in the case do not support the Review Examiner's conclusions.]

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW**

In Re: Jane Claimant
Claimant ID No.: 123456
Claim ID No.: 109876

**MEMORANDUM IN SUPPORT OF APPLICATION FOR
FURTHER REVIEW BY THE BOARD OF REVIEW**

The Claimant, Ms. Jane Claimant, ("Claimant") respectfully requests that the Board of Review accept her application for further review of a Department of Unemployment Assistance ("DUA") hearing decision denying her unemployment insurance benefits (UI). Claimant requests that the Board reverse the decision and award UI because the employer failed to meet its burden showing that Claimant engaged in "deliberate misconduct". Alternatively, Claimant requests that the Board remand the case for a *de novo* hearing because the Review Examiner's factual findings, including credibility findings are not supported by substantial evidence.

Claimant was employed as a childcare teacher's assistant on August 14, 2014, was promoted to child care teacher in the summer of 2015 and was discharged on September 21, 2015. Claimant was fired for allegedly sleeping on the job. However, the sole support of this allegation is a photograph taken of Claimant and testimony of the employer. The Review Examiner concludes that the photograph proves that Claimant was sleeping, even though the photograph is consistent with Claimant's testimony that she was rocking the baby with her eyes closed while singing. Because the photograph only captures a moment and it is consistent with

both the employer's story and Claimant's it cannot be deemed substantial evidence to deny UI. To support the denial of UI the Review Examiner credits the employer's testimony that Claimant was observed sleeping and that she had been previously warned about sleeping on the job. The Review Examiner fails to address the countless contradictions and inconsistencies in the employer's testimony. These contradictions include the following:

1. The employer's testimony regarding prior warnings was inconsistent and contradictory.

In support of his denial of UI, the Review Examiner explicitly credits the employer's testimony that she was counseled about sleeping on the job prior to the incident that led to her termination. However, even a cursory review of the record shows that this conclusion is unfounded. The employer presented as its primary witness, Mr. Smith, the owner and director of the daycare center. At the first day of the hearing, Mr. Smith testified that there were no concerns about Ms. Claimant's performance prior to September, 2015. Most importantly when asked whether Claimant ever fell asleep on the job prior to the September 2015 allegation, Mr. Smith clearly answered no. The Review Examiner's finding that there were no prior warning is not only consistent with Claimant's testimony but it was the testimony of the employer's primary witness.

The allegation that Claimant received warnings only came on the second day of the hearing and it was the testimony of the owner's wife. When she was asked whether Claimant was ever warned about sleeping on the job she answered that Claimant was warned numerous times in June 2015 about sleeping on the job. Her testimony regarding these incidents was vague and she was unable to provide any dates. Also left unexplained is why the employer did not terminate, or at least discipline, a childcare teacher who is caught several times in one month

Appendices

sleeping while caring for infants¹. Ms. Smith's explanation that she counseled Claimant about these incidents—with no written documentation of warnings—is also inconsistent with the fact that Claimant was promoted from teacher assistant to a teacher position starting September 2015. The Review Examiner himself implicitly appears not to credit Ms. Smith's testimony as he only references that the employer warned Claimant about one prior incident, not several as she had testified. There is no explanation as to why the Review Examiner accepts as credible that Claimant was warned once about sleeping on the job when the employer testified she was warned repeatedly for the alleged behavior. The Review Examiner also makes no attempt to reconcile the testimony of the primary witness who on the first day of the hearing explicitly stated there were no prior warnings with the vague and contradictory testimony of the witness on the second day of the hearing. It is an error of law to deem such blatantly contradictory evidence as substantial evidence.

2. The employer's testimony regarding Claimant's termination was inconsistent and contradictory.

In the DUA questionnaire and in his testimony, Mr. Smith identified an employee, Ms. Snitch, as the person who "woke up" Claimant on September 15. However, Ms. Smith contradicted this testimony and instead insisted it was Ms. Other-snitch, a different employee, who saw Claimant sleeping.

More importantly, the testimony regarding the observation of Claimant was also contradictory. The affidavit provided by Ms. Snitch, the employee identified by Mr. Smith as

¹ Claimant adamantly denies she was ever warned about sleeping on the job. However, the Review Examiner's conclusion, even if true, is legally flawed. If, as the employer claimed, Claimant was spoken to about sleeping on the job multiple times but she was never disciplined or terminated, her alleged sleeping on the job in September, 2015 is not disqualifying activity. If the employer's testimony is true, Claimant had no reasonable expectation that sleeping on the job would lead to her termination. *New England Wooden Ware Corp. v. Commissioner of the Dep't of Employment & Training*, 61 Mass. App. Ct. 532 (2004).

the direct witness of the incident, is of questionable credibility. In her affidavit, Ms. Snitch claims that when she witnessed Claimant sleeping, she feared for the safety of the child so she went and took a picture. The Review Examiner never examines the plausibility of testimony that Claimant was observed sleeping while holding an infant and that the first action taken was to take a picture instead of securing the safety of the child.² There was also contradictory testimony how long Claimant was allegedly asleep and whether she was snoring or not.

Mr. and Ms. Smith also offered contradictory testimony regarding what actions were taken after the incident in question. Mr. Smith testified that there were no further conversations with Claimant until she was terminated on September 21. Ms. Smith claims the incident was discussed with Claimant the same day, September 18, and not on September 21, the day she was terminated.

For the above reasons, Claimant respectfully requests the Board accept her appeal and overturn the hearing decision and award UI or remand the case for a *de novo* hearing.

Respectfully Submitted,

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By her Attorney,

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² Claimant contends that the employer terminated her after she made her concerns known regarding conditions at the employer's workplace. For purposes of UI eligibility, Claimant does not need to prove her termination was pre-textual but the fact that an employee took a picture of Claimant instead of securing a child allegedly in danger does suggest there are other motivations behind the employer's actions.