



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

In the matter of:

Appeal number:

BR-109099

CLAIMANT APPELLANT:

EMPLOYING UNIT:

Hospice Association of Cape Cod
765 Attucks Lane
Hyannis, MA 02601

S.S.
Hearings Docket #503608

EMP. #72-019130

Introduction and Procedural History of this Appeal

The claimant appeals a decision by John Karagounis, a review examiner of the Division of Unemployment Assistance (DUA) to deny the claimant benefits following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on July 24, 2008. She filed a claim for unemployment benefits with the DUA and was granted benefits in a determination issued by the agency on October 3, 2008. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the DUA review examiner overturned the agency's initial determination and denied the claimant benefits in a decision rendered on January 20, 2009.

Benefits were denied after the review examiner determined that the claimant was disqualified, under G.L. c. 151A, § 25(e)(2), because her discharge was for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and then allowed the parties to submit their reasons for agreeing or disagreeing with the review examiner's decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the decision below and the claimant's response.

The issue on appeal is whether the claimant's positive drug test result constituted a knowing violation knowing of a reasonable and uniformly enforced policy of the employer.

Findings of Fact

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

1. The claimant worked full-time as a cook for a hospice facility, from June 3, 1996, until July 24, 2008, when the employer discharged the claimant.
2. The employer discharged the claimant for failing a urinalysis drug screening for controlled substances.
3. On July 21, 2008, the claimant participated in a urinalysis drug screening for controlled substances; required by the employer for all employees who worked at the employer's facility immediately following the employer's discovery of missing Vicodin® tablets (i.e., narcotic pain medication) tablets on July 9, 2008.
4. Just before participating in the urinalysis drug screening, the claimant informed her supervisor that the claimant had smoked marijuana while in the company of friends during a previous weekend. Consequently, the claimant wanted to notify the employer of a possible positive result for marijuana that could be expected.
5. On July 22, 2008, the employer learned that the claimant's urinalysis drug screening disclosed a positive result for marijuana. Consequently, the employer discharged the claimant.
6. Marijuana is commonly known to be an illegal controlled substance.
7. The claimant admittedly was aware that smoking marijuana was illegal.
8. The employer had a policy that prohibited its employees from reporting to work with an "illegal drug in the employee's system, in any amount."
9. The purpose of the policy was to protect the safety of the employer's residents and employees by prohibiting employee conduct that was likely to cause an increased risk of impaired ability to perform one's duties safely and competently.
10. The policy was contained in an employee handbook.
11. On March 21, 2007, the claimant provided a signed acknowledgment to the employer indicating that the claimant received a copy of the employee handbook.

12. The policy was applicable to all employees without exception. The claimant was the only known violator in recent memory and she was discharged accordingly.

Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), 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 ... 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....

In a discharge case, the employer bears the burden of proof to show that the claimant should be disqualified from receiving benefits.

The employer discharged the claimant after learning that she tested positive for marijuana use in a urinalysis drug screening on July 21, 2008. The employer's policy prohibited employees from reporting to work with alcohol or an illegal drug in the employee's system in any amount.

We recognize that the employer had a reasonable interest and an inherent responsibility to protect its residents from employees whose ability to perform their duties is impaired due to alcohol or illegal drug usage. However, in this case, the employer has failed to establish that the application of a policy prohibiting "any amount" of such substances is reasonable, for the purposes of G.L. c.151A. The hearing record contains no evidence to show that the claimant was under the influence or impaired by marijuana use when at work, or that her off-duty use during a prior weekend had any impact on the employer's operations. Furthermore, the claimant's discharge, which was after 12 years of employment, was the only instance of a discharge for this reason, and the evidence is not sufficient to establish uniform enforcement of the policy.

We, therefore, conclude as a matter of law that the employer failed to meet its burden to establish that prove that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The DUA review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 26, 2008 and subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 26, 2010



Sandor J. Zapolin
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – April 26, 2010