



EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT BOARD OF REVIEW

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BOARD OF REVIEW DECISION

JOHN A. KING, ESQ. CHAIRMAN

SANDOR J. ZAPOLIN MEMBER

STEPHEN M. LINSKY, ESQ. MEMBER

In the matter of:

Appeal number:

BR-113575

CLAIMANT APPELLANT:

EMPLOYING UNIT:

S.S. # XXX-XX_t
Hearings Docket #

Introduction and Procedural History of this Appeal

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

The claimant was discharged on October 30, 2009. He filed a claim for unemployment benefits with the DUA but was denied benefits in a determination issued by the agency on December 31, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on March 15, 2010. The Board accepted the claimant's application for review and provided the parties with an opportunity to submit reasons for agreeing or disagreeing with the board's decision. Only the employer responded. Our decision is based on our review of the entire record including the recorded testimony and evidence from the DUA hearing, the review examiner's decision, the claimant's appeal and the employer's response.

Benefits were denied after the DUA review examiner determined that the claimant was disqualified, under G.L. c. 151A, § 25(e)(2), for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

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.

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Findings of Fact

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

- 1. The claimant worked as a special needs van driver for the employer from July 14, 2003, until October 30, 2009, when he was discharged.
- 2. The claimant worked a varied part time schedule of hours.
- 3. The claimant was discharged for testing positive for marijuana on a drug test administered on October 27, 2009.
- 4. The employer maintains a policy entitled "Drug Free Workplace Policy" which states, "The following activities are prohibited having possession of, der the influence of or having in one's system illegal drugs..."
 - 5. The policy provides the employer with measures to ensure employees' drug and/or alcohol use does not jeopardize the workplace or otherwise negatively affect the general public or the clients served.
 - 6. The claimant was aware of the policy as it was presented to him at his time of hire and he signed for receipt of it on July 10, 2003.
 - 7. The employer has terminated all employees who have had a positive drug test result.
 - 8. On October 26, 2009, the claimant's supervisor received a complaint that the claimant offered illegal substances to a client in exchange for sexual favors. While the supervisor was not convinced this actually took place, it required him to call the claimant into his office and direct him to take a "for cause" drug test. The claimant denied the allegation but agreed to take a drug test the following day.
 - 9. On October 27, 2009, the claimant went to Quest Diagnostics and had a drug test via a urine sample.
 - 10. After 28 hours, the employer gave the claimant a number to call and when the claimant called, it was the lab, which told the claimant that his test came back positive for marijuana.
 - 11. The results came back to the employer on October 28, 2009 after being reviewed by a certified Medical Review Officer stating that the claimant tested positive for marijuana.

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12. The employer decided to terminate the claimant upon learning this information. The claimant was sent a termination letter dated and effective on October 30, 2009.

- 13. The claimant did not deny using marijuana while off duty and off company property at a party on a Saturday night. The reason the claimant used marijuana is now (sic) known.
- 14. The claimant filed for unemployment benefits on November 5, 2009, effective November 1, 2009.

Ruling of the Board

The Board adopts the 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 he tested positive for marijuana use in on October 28, 2009. 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 clients 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 his off-duty use during a prior weekend had any impact on the employer's operations. See Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training, 422 Mass. 1007 (1996) (rescript).

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

The review examiner's decision is reversed. The claimant is allowed benefits for the week ending April 11, 2009 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS DATE OF MAILING - December 23, 2010 John A. King, Esq.

Chairman

Stephen M. Linksy, Esq. Member

Member Sandor J. Zapolin 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 - January 24, 2011

LH/rh

COMMONWEALTH OF MASSACHUSETTS

GENERAL LAWS CHAPTER 151A, SECTION 42

APPEALS TO THE COURTS

"The commissioner or any interested person aggrieved by any decision in any proceeding before the board of review may obtain judicial review of such decision by commencing within thirty days of the date of mailing of such decision, a civil action in the district court within the judicial district in which he lives, or is or was last employed, or has his usual place of business, and in such proceeding, every other party to the proceeding before the board shall be made a defendant. If an appeal to the board of review is deemed denied pursuant to subsection (a) of section forty-one because the board failed to act upon such appeal, judicial review may be obtained by commencing a civil action as prescribed in the preceeding sentence, except that the time for commencing such action shall run from the date such appeal is deemed denied. The commissioner shall be deemed to have been a party to any such proceeding before the board. The complaint shall state the grounds upon which such review is sought. The plaintiff shall serve a copy of the complaint upon each defendant by registered or certified mail, return receipt requested, within seven days after commencing the action for judicial review.

The commissioner shall make every reasonable effort to file with the court a certified copy of the decision of the board of review, including all documents and a transcript of all testimony taken at the hearing before said board or the commissioner as the case may be, within twenty-eight days after service of the complaint upon the commissioner or within twenty-eight days after the commencement of the action for judicial review by the commissioner. Each defendant shall file an answer within twenty-eight days after receipt of the complaint, except that the commissioner may, by way of answer, file in court within such time period a certified copy of the record of the proceeding under review.

Except as otherwise provided in this section, or if inconsistent with the provisions of this section, such proceeding shall be governed by the Rules of Civil Procedure for the district courts and the municipal court of the city of Boston. The findings and decisions of the board shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. Any proceeding under this section shall be given precedence over all other civil cases.

An appeal may be taken from the decision of the justice of the district court directly to the appeals court. Notice of appeal shall be filed in the office of the clerk of the district court within thirty days after entry of the judgment by the clerk. The completion of such appeal shall be made in accordance with the Massachusetts Rules of Appellate Procedure. Benefits shall be paid or denied in accordance with the decision of the trial court justice during the pendency of such appeal."

IMPORTANT

This notice contains information about your rights or obligations, and should be translated immediately. If you need a translator, ask for a listing of translation services at your DUA office.

ВАЖНОВ СООБШЕНИЕ

В этом сообщении совержится информация о Ваших правах и обязанностях, и оно должно быть срочно переведено Вам. Если Вам нужен переводчик, попросите список переводческих компаний и своем DUA офисе.

IMPORTANTE

Este aviso incluye información sobre sus derechos y obligaciones, y debe traducirse de inmediato. Si necesita un traductor, solicite el listado de servicios de traducción en la oficina de la DUA correspondiente.

IMPORTANTE

Ouesto avviso contiene informazioni sui Suoi diritti ed obblighi e deve essere tradotto immediatamente. Se ha bisogno di un traduttore, chieda l'elenco dei servizi di traduzione presso la DUA.

IMPORTANTE

Este comunicado contém informações sobre os seus direitos ou obrigações. Ele deve ser traduzido pro amente. Se precisar de um tradutor, solicite no escu..... no DUA mais próximo uma lista dos serviços de traduc'

สำคับ ๆสะบังยลายละอธกก่รงกักตับฝ้าม, เรียกามฉบไถยตั ຕຳແຈ້ບນີ້ ປະກອບດ້າງ ໆ ກ່ບສືແລະພາລະຣັດຂອບຕາງ ໆ ຂອງທຳຄວນໄດ້ຮັນທີ່ໂລດ. ຖ້າ ຫ່ອງການໃຄ້ພູ້ແປພາສາ, ໃຫ້ຢໍ ລາບການບໍລການແປພາສາທີ່ ມີໄວ້ໃຫ້ໃຊ້ໃນ້ຳນ. ານຕ້ອງການ DUA 2970

សេចក្ដីជូនដំណីជនេះ ខានពតិ៍ខានស្ទើរតែសិទ្ធិ ឬ កាតព្យកិច្ចរបស់អត ។ សមអោយផេបកដែលកាស។ នេះ ជាបន្តថា ។ ប្រសិនបើអ្នកត្រូវការអ្នកបកប្រែ សូមាតទើលបញ្ជីឈ្មោះតន្លែចផ្តល់សៅភាទ្ធបកប្រែ ដែលមាននៅកវិយាល័យ DUA របស់ក្រ ។

ENPOTAN

Not sa a genyen enformasyon sou dwa w oubyen obligasyon ke ou genyen, epi ou têt pou ou fê tradwil kounyê a. Si ou bezwen on moun ki pou tradwi pou ou, mande on lis ki genyen sèvis ke yo ofri pou tradiksyon nan biwo DUA ke ou konn ale a.

Thông báo này bao gồm thông tin về quyển hạn hoặc trách nhiệm của quý vị và phải được thông dịch ngay. Nếu cần một thông dịch viên, hãy yêu cầu một danh sách dịch vụ thông dịch tại văn phòng DUA của quý vị.

本通知包含有關關下權利或義務的資訊,應即與觀測。如果關 下需要翻譯人員,請到閣下的DUA辦字或要求一份翻譯社的

