



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

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**BOARD OF REVIEW
 DECISION**

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STEPHEN M. LINSKY, ESQ.
 MEMBER

In the matter of:

Appeal number: **BR-109816**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. Peter Sliker, a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits because the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on December 22, 2008, filed a claim for unemployment benefits with the DUA, and was initially approved for benefits in a determination issued by the agency on March 13, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties a review examiner overturned the agency's initial determination and allowed denied the claimant benefits in a decision rendered on April 22, 2009.

The review examiner determined that the claimant was disqualified, under G.L. c. 151A, § 25(e)(2), because of a drug test that were positive for cocaine and marijuana. The claimant appealed to the board, arguing that he had not used drugs at work and that he took the drug test after being told that, if the result was positive, he could participate in drug treatment and keep his job. After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision and the claimant's appeal, we remanded the case back to the DUA review examiner to hold another hearing for evidence and findings relating to the employer's policy and

the claimant's state of mind. Both parties attended the remand hearing. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based on our review of the entire record, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant's positive test for metabolites of cocaine and marijuana proved that he violated the employer's drug-free workplace policy.

Findings of Fact

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

1. The claimant worked as a shipper for the employer, a retailer, from 03/14/05 until 12/22/08 when he became separated.
2. The claimant was discharged for violating the employer's substance abuse policy.
3. The employer maintains an employee handbook which includes general expectations regarding employee conduct. The handbook states: "You may not perform any job related activity while under the influence of alcohol or any illegal drug, whether on or off Company premises. An illegal drug means any controlled substance that has not been obtained legally by prescription. Associates who are taking prescription drugs that may affect their judgment, job performance or ability to operate machinery are strongly encouraged to inform their Supervisors."
4. The employer maintains a substance abuse policy which states: "1. The use, sale, possession or purchase of illegal drugs or alcohol on (Employer) property or while conducting (Employer) business is prohibited. Violation of any of these will be cause for termination of employment. 2. Associates are prohibited from being under the influence of drugs or alcohol during working hours. Violation of this may be cause for termination of employment. Under the influence is defined as a confirmed positive result on a drugscreen or a blood alcohol or Breathalyzer level of .05 or higher."
5. The purpose of the employer's substance abuse policy is to maintain a drug-free workplace.
6. The claimant was aware of the employer's substance abuse policy.
7. The claimant was a union employee.

8. The union and the employer have not reached an agreement regarding a more specific drug abuse policy including when a drug test will be given, how the test will be administered and a definition of reasonable suspicion.
9. The claimant was not aware that he could be tested for substance abuse based on the reasonable suspicion of the employer.
10. The employer will allow employees who have previously identified themselves as having a substance abuse problem to continue to work if they test positive for illegal substances.
11. The employer will always discharge employees who have not self identified as having a substance abuse problem for one instance of using drugs or being intoxicated while at work.
12. On 12/15/08 the claimant was observed in the bathroom making unnatural sniffing noises and crinkling paper noises by the employer's loss prevention staff.
13. The claimant was asked to take a preliminary "take-home" type drug test in accordance with the employer's procedures.
14. The claimant took the test and the result of the test was positive.
15. After the test the claimant spoke with a human resources representative who had participated in his hiring. The claimant asked him if he would be given a second chance. The HR representative told him that he would be.
16. In accordance with the employer's procedures for a positive preliminary test the employer's drug testing vendor was contacted and they subsequently arrived at the employer.
17. The employer's drug testing vendor is federally certified.
18. The claimant was asked to submit a urine sample which was sealed in his presence. The claimant signed a chain of custody document.
19. The claimant was asked by the employer to empty his pockets. The claimant refused to empty his pockets.
20. The claimant was placed on paid suspension pending the outcome of the drug test.

21. The testing vendor considers a result of 300 ng/ml to be a positive test result for cocaine. The vendor considers a result of 50 ng/ml to be a positive test result for marijuana.
22. The claimant's urine sample tested positive for cocaine and marijuana use. The level of cocaine was 13,820 ng/ml. The level of marijuana was 178 ng/ml.
23. The medical review officer for the employer's testing vendor considers a level of 13,820 ng/ml of cocaine to be evidence of cocaine use within the previous 24 hours.
24. The test used by the employer can not determine with certainty whether the claimant ingested or possessed drugs at work.
25. The claimant was informed by the vendor that he had tested positive for cocaine and marijuana.
26. The vendor informed the employer that the claimant had tested positive for cocaine and marijuana.
27. On 12/15/08 the claimant did not use cocaine in the employer's bathroom during working hours. (The claimant denied at the hearing that he used cocaine while at work. There was no first hand testimony provided at the hearing to the contrary. Therefore the claimant's direct testimony must be found more credible.)
28. On 12/15/08 the claimant was intoxicated at work. (The claimant denied that he was intoxicated at work. The claimant testified that he did use drugs during a party the previous night. However the record contains an MRO report stating that the claimant tested positive for cocaine with a result of 13,820 ng/ml for cocaine and 178 ng/ml for marijuana. The employer's MRO report is credible. Under these circumstances the employer has provided substantial and credible evidence that the claimant was intoxicated.)
29. On 12/22/08 the claimant met with his union representative, his supervisor and the employer's associate relations manager. The supervisor informed the claimant that he was being discharged for violating the employer's substance abuse policy.
30. The claimant asked if he could participate in a rehabilitation program. The employer informed him that he could not.
31. There has been no appeal by the union to the claimant's discharge.

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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 . . .

The review examiner did not find that the employer's drug-free workplace policy prohibited use of drugs while off the job. The policy forbids being under the influence of drugs during working hours and specifies that a confirmed positive drug test is proof that the test subject is under the influence. This is not consistent with the evidence from the employer's own drug testing lab. The test results do not establish that the claimant was intoxicated or even under the influence. See Finding of Fact #23.

The facts of this case closely parallel those of Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training, 422 Mass. 1007 (1996). In O'Connor & Co., the Supreme Judicial Court held that a claimant who was terminated after he tested positive for marijuana was entitled to benefits because the employer's policy only prohibited drug use or impairment at work, and the mere presence of a positive drug test result did not compel the conclusion that the employee was using or impaired by drugs while he was at work. Since no part of the employer's policy addresses whether an employee must refrain from drug use while not at work, the claimant, despite his positive drug test result, cannot be held to have violated the policy.

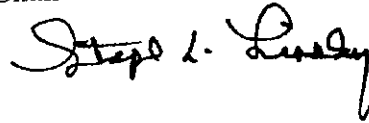
We, therefore, must conclude as a matter of law that the claimant is entitled to benefits because the employer has not shown that his discharge was for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The review examiner's initial decision is reversed. The claimant is allowed benefits for the week ending December 27, 2008 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 11, 2010



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 - March 15, 2010