



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-124153**

CLAIMANT APPELLANT:

[REDACTED]

EMPLOYING UNIT:
Shaw's Supermarkets, Inc.
c/o TALX UCeXpress
P.O. Box 6001
Peabody, MA 01961

S.S. [REDACTED]
Hearings Docket [REDACTED]

EMP. #00-097130

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, 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 separated from her position with the employer on May 21, 2012. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 29, 2012. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 10, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer, or urgent, compelling, and necessitous reasons, and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional testimony regarding the claimant's reasons for tearing a suspension notice and immediately leaving the manager's office. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

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The issues on appeal are whether the claimant resigned or was discharged from her job; and, if she was discharged, whether she engaged in deliberate misconduct in willful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced policy or rule of the employer when she ripped up a notice of suspension she had been issued by the employer.

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 20-35 hours per week at a rate of \$11.00 per hour as a non-union Cashier at this employer's supermarket from 03/21/03 until she was issued a five days suspension on 05/15/12 and then discharged when she attempted to return to work on 05/21/12.
2. On 05/15/12 a customer complained to management that the claimant had been rude in her dealings with this customer and her young daughter.
3. The Assistant Store Manager on 05/15/12 in response to the customer's complaint watched the store security video of the interaction between the claimant and the customer that day and he determined that discipline in the form of a five days suspension was warranted.
4. On 05/15/12 the Assistant Store Manager met with the claimant and handed her a five days suspension letter. The claimant was upset because she believed that the customer's complaint was not warranted, as she had done nothing wrong. The claimant was also upset that she was not given any opportunity to give her side of the story before being suspended for five days. The claimant during the 05/15/12 meeting began to have a panic attack. The claimant's heart was pounding fast, she had shortness of breath, cold sweats, dizziness and she was shaking and crying.
5. The claimant has been treated for her panic attacks with prescription medication since 1995 and her employer was aware of this health problem. The claimant had taken her medication on 05/15/12 but with the stress of the moment and her frustration, from being disciplined without an opportunity to defend herself, the claimant experienced a severe panic attack during the meeting on 05/15/12.
6. The claimant had been trained by her healthcare provider to walk away from the situation causing the attack and to take deep breaths to begin the recovery process.
7. On 05/15/12 the claimant after reading that she was being suspended for five days, tore the suspension letter in half, placed it in the barrel and exited the room to recover from her panic attack. The claimant went to the lunch room next to where the disciplinary meeting was held and she sat there for ten minutes taking deep breaths and crying attempting to get control of her panic attack before leaving to begin her five days suspension.

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8. The suspension letter indicated that it was to end on 05/20/12. Since 05/20/12 is a Sunday and the claimant does not work on Sunday the claimant understood that she was to return to work her usual schedule on Monday, 05/21/12.
9. The claimant had no contact with employer management from the date of her departure on 05/15/12 until she came to the store on 05/21/12 seeking to return from her suspension.
10. On 05/21/12 the claimant arrived early in uniform ready to work. When the claimant saw that her name was not on the schedule she went to speak with the Assistant Store Manager about why she was not on the posted schedule. The Assistant Manager met with the claimant on 05/21/12 and told her that management had decided to terminate her employment. The claimant understood that she had been discharged due to the customer complaint on 05/15/12. The claimant was discharged without being given an opportunity to defend herself against the customer stated version of events.
11. On 05/21/12 after returning home the claimant called the Store Manager seeking to learn if she really had been discharged as the Assistant Manager had said, and if so, why. When the claimant spoke with the store Manager he confirmed that a decision to discharge her had been made and it was final. The claimant asked if the employer would protest her claim for unemployment benefits and she was told to file and "she should have no problem."
12. On 05/21/12, after speaking with the Store Manager, the claimant filed a claim for unemployment benefits (effective 05/13/12).
13. On 06/29/12 the claimant was mailed a "Notice to Claimant of Disqualification." This Notice indicated that the claimant had allegedly voluntarily left work rather than accept a disciplinary warning regarding a customer complaint. The claimant never submitted a resignation letter. The claimant never verbally said that she wanted to quit. The claimant requested a hearing on the separation issues.

Credibility Assessment

The claimant attended the remand hearing and the employer did not. The claimant's testimony and medical evidence was accepted as credible.

Ruling of the Board

The Board adopts the review examiner's consolidated 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.

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The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

After the initial hearing, the review examiner concluded that the claimant left work voluntarily, without good cause attributable to the employer or urgent, compelling and necessitous reasons. After remand, however, the findings show that the claimant was terminated.

The claimant's discharge occurred when the employer ended her assignment when she reported to work at the end of a five-day suspension imposed by the employer following a customer complaint, to which the claimant was never given any opportunity to respond. As such, it is controlled by 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, or 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 . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to show it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy, or for deliberate misconduct in willful disregard of the employer's interest. We conclude that the employer has not met its burden.

Initially, the review examiner denied benefits because he found that the claimant abruptly quit without notice while attending a disciplinary meeting on May 15, 2012. However, following remand, the review examiner's consolidated findings demonstrate that the claimant was discharged without being given an opportunity to defend herself against the customer's version of events.

Moreover, the review examiner found on remand that, after her suspension ended on May 20, 2012, the claimant arrived early for work on May 21, 2012, ready to work. When she discovered that she was not listed on the schedule, she went to speak with the employer about why she wasn't on the schedule. The employer told her that management had decided to terminate her employment. The claimant understood that she was being discharged because of the customer complaint on May 15, 2012. She had been given no opportunity by the employer to defend herself against the customer stated version of events. The claimant did not say that she was quitting and did not submit a resignation letter.

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The review examiner provided a credibility assessment accepting the claimant's testimony and medical evidence as credible. Such assessments are within the scope of the fact finder's role and unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. See School Committee of Brockton v. MCAD, 423 Mass. 7, 15 (1996).

The facts support our conclusion that the employer initiated the claimant's separation and that the claimant's conduct in tearing up the suspension letter and leaving the employer's office, which occurred during an extreme panic attack, cannot be construed as a resignation. Because the employer characterized the claimant's separation as a resignation, it established no relevant policy or expectation that was violated by the claimant; not has it provided any evidence of intentional wrong doing by the claimant.

We, therefore, conclude as a matter of law that the claimant was discharged, and that she did not engage in a knowing violation or deliberate conduct, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week ending May 19, 2012 and for subsequent weeks if otherwise eligible.

John A. King, Esq.
Chairman

Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 28, 2013

Member Sandor J. Zapolin declines to sign the majority opinion.

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 1, 2013

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.

SPE/JV

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 preceding 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.

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."

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.

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.

ВАЖНОЕ СООБЩЕНИЕ

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

IMPORTANTI

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

IMPORTANTE

Este comunicado contém informações sobre os seus direitos ou obrigações. Ele deve ser traduzido prontamente. Se precisar de um tradutor, solicite ao escritório DUA mais próximo uma lista dos serviços de tradução.

ສຳຄັນ
ງູ່ຈະບົວບູລາບອະຄຸກດຳລັງກັບພົນ, ຄື ທາງການແປໂດຍທຳ
ຄຳລະບົບ ປະກອບທາງ ໆ ກຸ່ມສັດສະພາອະຣັກອຸສມາງ ໆ
ຂອງທຽງອຸບໂຄຣ໌ເນຕີໂລດ. ຖ້າ ທ່ານຕ້ອງການໃຊ້ບໍ່ແປພາສາ, ໃຫ້
ລາບການປະກອບແປພາສາທີ່ ຈັບໄວ້ໃຫ້ໃນນ້ຳມັນ. ກຸ່ມທ່ານ
DUA ຂອງທ່ານ

အရေး

ကျွန်ုပ်တို့၏အချက်အလက်များကို နှစ်ဖက်ဖက်သား အတော်အတန်အထိ
အတိုင်း ဖတ်ရှုနိုင်ရန်အတွက် အချက်အလက်အရင်းအမြစ်များကို
အောက်ဖော်ပြပါ DUA အဖွဲ့တွင်

ENPOTAN

Nót ma a getyca endónasyon sou dwa w oubyen obligasyon ke ou genyen, epi ou fèt pou ou fè tradwi li kòmnye e. Si ou bezwen ou moun ki pou tradwi pou ou, mande ou lis ki getyca sèvis ke yo ofri pou tradiksyon nan biwo DUA ke ou konn ale a.

QUAN TRONG

Thông báo này bao gồm thông tin về quyền 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.

重要

本通知包含有關閣下權利或義務的資訊，應即為翻譯。如果閣下需要翻譯人員，請到閣下的DUA辦事處要求一份翻譯社的名單。