LAW OFFICES
WESTERN MASSACHUSETTS LEGAL SERVICES, INC.
Franklin/Hampshire Division
A United Way Agency of Franklin County
20 HAMPTON AVENUE, SUITE 100
NORTHAMPTON, MA 01060

TEL: (413) 584-4034; 1-800-639-1309
(413) 774-3747 Franklin County

FAX (413) 585-0418

October 16, 1997

Allan Rodgers
MLRI
99 Chauncy Street, Suite 500
Boston, MA 02111

Re: Recent Board of Review Decision on Deliberate Misconduct

Dear Allan:

Here is a 2-1 Board decision that just restates what the law is re: required findings on the claimant's state of mind in a deliberate misconduct case. In this case, the claimant was fired for eating two strawberries! The hearing officer had ruled against her on the basis that "the claimant failed to establish why she would think it was O.D. to stel the employer's property just because she saw other employees stealing."

The Board reversed, finding that her error in judgment does not rise to the level of deliberate misconduct. Haldane issued a strongly worded dissent.

Sincerely,

Patti A. Prunhuber
Attorney

enc.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: BR-73847

EMPLOYEE APPELLANT:
[redacted]
Office #02

EMPLOYING UNIT:
C & S Wholesale Grocers Inc.
Attn: Sindie Tedford
Ferry Road/P.O. Box 821
Brattleboro, VT 05301

On October 1, 1997, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at hearings held by the Deputy Director's representative on May 15, 1997 and June 10, 1997.

On August 15, 1997, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of Section 41 of M.G.L.c. 151A, the Massachusetts Employment and Training Law. Both parties were invited to present written argument stating their reasons for agreeing or disagreeing with the Deputy Director's decision. Only the claimant responded within the time period allowed.

The claimant's appeal is from the Deputy Director's decision which concluded that:

> The claimant did not leave work voluntarily. Therefore, Section 25(e)(1) is not applicable in this matter.
>
> In accordance with Section 25(e)(2) of the Law, the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant's discharge was 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.
>
> Given the facts as stated above, there is substantial and credible evidence to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The employer discharged the claimant for eating produce, i.e. strawberries, that belonged to the employer.
>
> The claimant was aware of the employer's expectations with regard to not eating produce on the dock, because she was told at the time of hire. The employer's expectations were reasonable because they protect the assets of the company. The claimant ate the strawberries because she observed others, including the supervisor, eating produce, and assumed it is okay. The claimant failed to establish why she would think it was okay to steal the employer's property just because she saw other employees stealing. In

light of the claimant's testimony, that she could not tell for sure if the supervisor was performing his taste testing duties or snacking, she should not have assumed that he was snacking and that it was, therefore, okay for her to help herself to produce that did not belong to her. It follows that the claimant did not establish mitigating circumstances for her actions.

In view of the facts, the claimant is subject to disqualification and is denied benefits.

Benefits are denied beginning with the week ending March 29, 1997 and indefinitely [sic], until the claimant has had eight weeks of work and in each week has earned an amount that is equal to or in excess of her weekly benefit amount.

M.G.L. c. 151A, s. 25(e)(2) is pertinent and provides as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for -

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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, . . .

The Deputy Director's representative held hearings on May 5, 1997 and June 10, 1997. Both parties appeared. Whereupon, the Deputy Director's representative established the following facts:

The claimant worked as a freight hauler for the employer, a grocery wholesale business, from October 7, 1996 to March 23, 1997, at a rate of $7.50 per hour.

On or about March 23, 1997, the employer discharged the claimant for eating produce, i.e. strawberries, that belonged to the employer.

The claimant had been told by the employer at the beginning of her employment that employees were not allowed to eat produce on the dock.

The employer allows employees to purchase products. A list is prepared of items available for purchase. The claimant had purchased products during her employment.

The claimant's supervisor did taste tests of produce generally with inspectors, but not always with an inspector in the immediate area.

Once a case is opened and tested, the supervisor disposes of it as he sees fit. He generally puts the produce in the cafeteria or some other area for employees to share. The claimant was personally aware of only one time when fruit was put in the cafeteria by the supervisor for employees to share after the case was opened for inspection.

The claimant had seen other employees eat produce. She assumed it was okay because other employees were doing it. She did not report them to the supervisor or question the supervisor about what she observed.

The claimant had seen the supervisor eat produce. She could not tell for sure if he was eating the produce as part of his taste testing duties or snacking. She assumed he was snacking and concluded it was okay for her to do the same.

On March 23, 1997, the claimant took two strawberries from a pallet that was off to the side, and ate them. A co-worker reported the incident.

The employer called the claimant in and questioned her about the strawberries. The claimant acknowledged that she had taken the strawberries and ate them. She was then terminated.

The claimant filed a grievance and had a hearing before a group of peers. They voted to uphold the discharge.

After reviewing the record, the Board adopts the findings of fact made by the Deputy Director as being supported by substantial evidence. The Board concludes, however, that the Deputy Director's decision is based on an error of law and modifies that decision for the following reasons:

In accordance with Section 25(e)(2) of the Law, the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant's discharge was 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. The employer has failed to meet the requisite burden of proof.

Inasmuch as the employer has not established that it had a specific rule or policy applicable to the conduct that resulted in the claimant's discharge, the facts must be analyzed under the deliberate misconduct test in Section 25(e)(2).

When a discharged worker seeks compensation, the issue before the Board is not whether the employer was justified in discharging the claimant but whether the Legislature intended that benefits should be denied in the circumstance. See Goodridge v. Director of the Division of Employment Security, 375 Mass. 434, 436 (1978). The words "deliberate" and "wilful" in G.L.c. 151A, s. 25(e)(2) suggest purposeful action or inaction. The aim of Section 25(e)(2) then is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect. When a worker is ill-equipped for his job or has a good faith lapse in judgment or attention, any resulting conduct contrary to the employer's interest is unintentional; any related discharge is not the worker's intentional fault, and there is no basis under Section 25(e)(2) for denying benefits. The critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge. The Board must take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors. Garfield v. Director of the Division of Employment Security, 377 Mass. 94, 97 (1979).

Although the claimant was informed at the time of hire in October of 1996 that employees were not allowed to eat produce on the dock, the claimant observed other employees eating produce during her employment. The claimant also observed her supervisor eating produce during the course of her employment.

At the time the claimant took two strawberries from a pallet and ate them, the claimant believed her actions were acceptable based on a practice she observed occurring in the workplace by other employees, including her supervisor. Given that the claimant's actions were reported to the employer by a co-worker, there is no appearance of the claimant attempting to hide her actions. Likewise, when questioned by the employer, the claimant made no attempt to deny that she had consumed two strawberries she had removed from a pallet.

Although the claimant may have used poor judgement in relying on workplace observations, the Board concludes that the claimant's actions do not rise to the level of deliberate misconduct in wilful disregard of the employing unit's interest withing the meaning of Section 25 (e) (2) of the Law, quoted above.

The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending March 29, 1997, and subsequent weeks, if otherwise eligible.

Thomas E. Gorman
Member

Kevin P. Foley
Member

DISSENT

I respectfully dissent from the reasoning which has concluded that the claimant's discharge was for neither deliberate misconduct in wilful disregard of the employer's interest nor a knowing violation of a reasonable and uniformly enforced rule or policy not shown to be as a result of the employee's incompetence.

The claimant was told that employees were not allowed to eat produce on the dock. She was aware of the process by which she could purchase produce. The claimant observed her supervisor consuming produce, but was aware that taste testing was one of his duties.

She observed other employees eating produce, but did not report her observations to her supervisor. The facts are silent on the issue of whether or not the employer was aware that other employees were violating its policy. The facts are unclear as to whether the pallet from which the claimant took the strawberries was on the dock, where employees were prohibited from consuming produce.

There is evidence in the record which supports the majority's decision to award benefits to the claimant, however the Deputy Director's representative has failed to make the necessary subsidiary findings to support the conclusion.

I, therefore, respectfully dissent from the majority's decision.

Mark T. Haldane

BOSTON, MASSACHUSETTS
DATE OF MAILING - OCT 10 1997

Mark T. Haldane
Chairman

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

LAST DAY - NOV 10 1997

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