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July 31, 1998

Allan Rodgers
Massachusetts Law Reform Institute
99 Chauncy Street
Boston, MA 02111-1722

Re: Decision of Board of Review

Dear Allan:

Enclosed herewith please find a recent decision of Board of Review on a case of mine where I represented the employee appellant. You will note that the board decided that the claimant's action was not a culpable, conscious action performed in defiance of the employer's reasonable expectations. Therefore, the Board concluded that the discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interests or to a knowing violation of a reasonable and uniformly enforced policy within the meaning of §25(e)(2) of the Law.

I hope this will be of interest to you and if you have any questions, please do not hesitate to contact my office.

Very truly yours,

Ilene Titus/rjs

Ilene Titus

IT/rjs
Enclosure



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-76048**

EMPLOYEE APPELLANT:

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

Office #08

EMPLOYING UNIT:

College of Holy Cross
 Attn: Personnel Office
 College Street
 Worcester, MA 01610

On May 8, 1998, 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 February 2, 1998 and February 20, 1998.

On April 16, 1998, the Board allowed the claimant's application for review of the Deputy Director's decision, dated February 26, 1998, in accordance with the provisions of § 41 of M.G.L. c. 151A, the Massachusetts Employment and Training Law.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

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 applied in this matter.

Given the facts as stated above, it is concluded that the employer had a rule or policy applicable to the conduct in question. Therefore, the appropriate initial analysis is whether the claimant's discharge was for a knowing violation of a reasonable and uniformly enforced rule or policy and whether such violation was the result of the claimant's incompetence. In the instant case, the claimant was discharged for insubordination. The evidence presented during the hearing established that the claimant was insubordinate towards her supervisor when she failed to stop arguing with co-workers, as directed. This examiner rejected the claimant's argument that she behaved in such a fashion that day due to her concern regarding her son's health. The evidence established that the claimant was not experiencing any out of the ordinary stress, or concern, that day. And finally, this examiner found the employer representative's testimony credible regarding the December 4, 1997 incidents based on her concise and clear responses to questioning. The claimant, on the other hand, was both vague and evasive with respect to her responses regarding the December 4, 1997 incidents. This examiner is convinced that the claimant persisted in arguing with co-workers, despite being told not to do so.

The claimant knew of the employer's insubordination policy by being in receipt of printed employer policy. The policy was reasonable and fundamentally fair as it is in place to address morale concerns.

The policy was uniformly enforced and fairly applied in the case at hand as the employer has never allowed an employee to remain employed once found to have violated said policy.

The claimant's failure to comply with the employer's policy was not as a result of any incompetence on the part of the claimant, because she had demonstrated in the past that he was capable of adhering to such, had she so desired.

It is therefore concluded that the employer met it's burden of proof in showing that there is substantial and evidence to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy and that such violation was not the result of the claimant's incompetence.

In view of this conclusion, the claimant is subject to disqualification.

The claimant is denied benefits from the week ending December 13, 1997 and until she 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, § 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 February February 2, 1998 and February 20, 1998. Both parties were present. Whereupon, the Deputy Director's representative made his findings of fact as follows:

The claimant worked as a cafeteria worker for the employer, from 1973 until she separated from the employer.

The claimant was discharged on December 4, 1997 for insubordination.

During the course of her employment, the claimant was in receipt of the employee handbook. The claimant read said handbook. Said handbook indicates that insubordination is grounds for immediate discharge.

The claimant's son was injured in a car accident back in 1993. As a result, the claimant's son is semi-paralyzed, and subject to epileptic seizures. In addition, the claimant's son is partially blind. The claimant provides the majority of care for her son.

On November 18, 1997, the claimant was informed by the assistant director that she had to refrain from arguing with other employees in front of the customers.

Prior to reporting to work on December 4, 1998, the claimant was not experiencing any out of the ordinary stress, or concern, regarding the condition of her son.

On December 4, 1997, the claimant, at about 11AM, noticed that a co-worker was not at her assigned work station. When the claimant questioned said co-worker about such, the co-worker responded to the claimant in a rude manner. An argument then ensued between the two parties. The claimant yelled at the co-worker. The claimant's supervisor then approached the claimant and told her to stop arguing with the co-worker in front of the customers.

The claimant then stopped arguing.

Moments later, however, the claimant began yelling at another co-worker regarding a customer's bacon cheeseburger. The customer had yet to receive his bacon cheeseburger, and he was being impatient. The claimant then argued with the co-worker regarding her placing the order. The co-worker then started to cry. The co-worker did not respond to the claimant.

Again, the supervisor approached the claimant and told her to stop arguing in front of the customers. The claimant then stopped.

Later, that day the supervisor reported the claimant's behavior to the assistant director.

Later, at about 3:15PM, the claimant was informed of her discharge.

Prior to the claimant's discharge, the employer had the occasion to discharge one former employee for insubordination. There has never been an occasion in which an employee has been insubordinate and not been discharged.

On December 10, 1997, the claimant filed a new claim for unemployment insurance benefits.

After reviewing the record, the Board adopts the consolidated 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 § 25(e)(2) of the Law, the employer has the burden of proof 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 policy.

The claimant was discharged for arguing with a second co-worker after being directed by her supervisor to stop arguing with another co-worker. The employer discharged the claimant for insubordination. Under the employer's policy, employees are subject to immediate discharge for acts of insubordination. The claimant was aware of this policy and had received a copy of the employer's handbook. Although the employer established that the policy was reasonable and uniformly enforced, it failed to demonstrate that the claimant's conduct amounted to insubordination as defined by the policy.

Further, a discharged employee is not disqualified from receiving unemployment insurance benefits on the basis of a knowing violation of a rule or policy, unless it can be shown that the employee, at the time of the act, was consciously aware that the consequence of the act being committed was a violation of the employer's reasonable rule or policy.

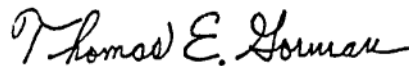
Arguing with a co-worker is not an act of insubordination by itself. The claimant confronted a co-worker for failing to appear at her assigned work area and an argument between them ensued. When the supervisor directed the claimant to stop arguing with the co-worker, the claimant stopped. Moments later, in response to a customer's impatience, the claimant addressed a second co-worker about the problem with the customer's order. The supervisor once again directed the claimant to stop arguing and the claimant immediately complied. In both instances the claimant's compliance with her supervisor's directives demonstrated her acceptance of her supervisor's authority.

When the claimant confronted the second co-worker, her behavior was a spontaneous reaction to the needs of a customer. The claimant did not refuse, nor did she intentionally fail to disobey her supervisor's orders. The claimant's reaction was an attempt to further the employer's interest of good customer service, rather than a culpable, conscious action performed in defiance of the employer's reasonable expectations.

The Board concludes that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interests or to a knowing violation of a reasonable and uniformly enforced policy within the meaning of §25(e)(2) of the Law, quoted above.

The Board modifies the decision of the Deputy Director. The claimant is entitled to benefits for the week ending December 13, 1997, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - JUN 16 1998



Thomas E. Gorman
Member



Kevin P. Foley
Member

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

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LAST DAY - JUL 16 1998