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

SEP 7 REC'D

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: BR-78368

CLAIMANT APPELLANT:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Office # 02

EMPLOYING UNIT:

[REDACTED]
[REDACTED]
[REDACTED] ad
[REDACTED]
EMP. # 78303930

On June 9, 2000, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearings held by the Deputy Director's representative on January 12, and February 4, 2000.

On March 22, 2000, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The Board remanded the case to the Deputy Director for further review and to make subsidiary findings of fact from the record. The Deputy Director returned the case to the Board on April 11, 2000.

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:

The claimant was not discharged from his job. Therefore, Section 25(e)(2) of the law does not apply to this matter.

The claimant caused his own separation from work within the meaning of Section 25(c)(1) of the law.

There was no dispute about the incident which caused the claimant's separation from work. On 11/4/99, he was stopped by a police officer for crossing a centerline. He then failed a field sobriety test, refused a Breathalyzer test and was thereby given a 120-day automatic license suspension. The case has not gone to court for a disposition yet. However, the claimant clearly was at fault. The license suspension was caused by his refusal to take the Breathalyzer test. A class 2 license is a job requirement. Thus, the claimant caused his own separation through his conduct and is not entitled to benefits within the meaning of Section 25(c)(1) of the law.

The claimant's representative made two contentions. First, she contended that this case falls under the "alcohol --related leavings" section of the customer service handbook. The claimant is an alcoholic and did admit to this. However,

PAGE 2

BR-78368

the claimant was clearly operating under the influence of alcohol and did not stay within marked lanes. Thus, he violated motor vehicle laws. He thereby caused his own separation. In the alcohol-related leavings section of the CSR handbook, the issues covered pertain to employer-initiated separations resulting from the claimant's conduct, i.e. - discharging the claimant. This case involves a claimant-initiated separation. Therefore, the contention is dismissed. Second, the claimant's representative contended that the employer should have and could have found enough work for the claimant even without his license. It is this examiner's opinion that the employer has no such obligation. Thus, that contention is dismissed.

In view of the facts, the claimant is not entitled to benefits.

The claimant is not entitled to benefits for the week ending 11/27/99 and subsequent weeks until he has worked for eight weeks and in each of said weeks has earned an amount equal to or in excess of his weekly benefit amount.

Section 25(c) of Chapter 151A of the General Laws is pertinent and provides, in part, 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 (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. . .

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The Deputy Director's representative held hearings on January 12, 2000, and February 4, 2000. Both parties appeared. The Board remanded the case to the Deputy Director for further review and to make additional findings of fact. The Deputy Director's representative then made the following consolidated findings of fact:

1. The claimant was employed as an equipment operator/truck driver for the employer, a town, from 10/21/93 until 11/19/99, when he became separated from his job. His last actual day of work was on 11/4/99. Subsequently, he filed a claim for benefits on 11/24/99.
2. The claimant's job required a valid class 2 driver's license and a hydraulic license.
3. On 11/4/99 at about 4:30 PM, the claimant had to drive into Amherst on some errands. He was driving the employer's truck. He then traveled to Pelham and returned to Shutesbury, where he worked.
4. The claimant then took out some whiskey and drank it straight out of the bottle. He drank the equivalent of "three or four shots". He then entered one of the buildings at work. A town police officer observed him swaying and being unsteady as he stood. He also noted a strong smell of alcohol. He told the claimant it was not a good idea to drive.
5. The police officer also told the claimant to call him for a ride home when he finished work.

PAGE 3

BR-78368

6. Relative to finding of fact #5, the claimant's reason for not calling the police officer for a ride was as follows.[sic] He did not want the police officer to tell others he had taken a highway department employee (the claimant) home, because he had been drinking. The claimant thought the police officer would do this, because it's a small town (Shutesbury) and he knows the police officer talks to others.
7. The claimant then moved a dump truck. He then entered his own vehicle. He drove down the road and crossed the centerline as he did so. The police officer, who was following the claimant, stopped his vehicle.
8. The police officer then administered field sobriety tests. The claimant failed every test which he took. One test was not administered, as the claimant has a bad back and could not comply with its requirements.
9. The police officer placed the claimant under arrest for operating under the influence of alcohol and failure to stay in marked lanes.
10. he [sic] claimant was "booked" on the charges at a local police station.
11. The police officer then explained the Breathalyzer test. He explained that failure to take the test would result in an automatic loss of license for 120 days. The claimant refused to take the test.
12. The claimant was then given a temporary license for 15 days. This was followed by the 120-day license suspension.
13. On 11/5/99, the employer placed the claimant on a paid leave status.
14. On or about 11/19/99, the employer informed the claimant that he could not return to work due to the loss of license which was required as part of his job.
15. The claimant is an alcoholic.
16. The claimant has been treated and has made efforts to overcome this condition.
17. The claimant voluntarily entered alcoholism treatment programs on two occasions. During June 1999, he entered an alcoholism rehabilitation program. From 11/5 to 11/10/99, the claimant entered another program. This was a detoxification unit. He was then in an acute residential program from 11/10 to 11/20/99.
18. As part of his treatment, the claimant has also attended Alcoholics Anonymous (AA) meetings.
19. The claimant's job duties do not regularly involve driving a truck.
20. All of the work in the department and the claimant's job duties did not require a driver's license.
21. The employer considered it necessary for the claimant to have a license and not just have other employees do all the driving due to the following reason. [sic] Without a license, the claimant could not perform necessary duties such as driving a truck to plow snow.
22. The employer hired the claimant for this job, even though he did not have the required driver's license at hire. They did so, because there was enough non-driving work for him to do.
23. The claimant was hired with plans for him to obtain that license.

PAGE 5

BR-78368

After reviewing the record, the Board adopts the consolidated findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The majority of the Board concludes as follows:

There was no evidence presented to establish that the claimant's separation from employment resulted from a discharge, therefore, § 25(e)(2) of the Law does not apply in this matter. Under Massachusetts General Laws, Chapter 151A, § 25(e)(1), the burden of proof is on the claimant to establish by substantial and credible evidence that he left his job with good cause attributable to the employing unit or its agent, or for urgent, compelling, or necessitous reasons. In this case, no evidence was offered to demonstrate that the claimant left with good cause attributable to the employer, therefore, the proper analysis is whether the claimant left for an urgent, compelling, and necessitous reason, rendering his separation as involuntary. The claimant has not met his burden of proof.

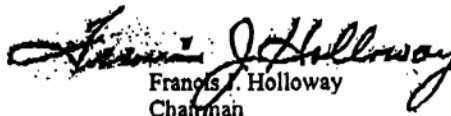
The facts reveal that the claimant worked for the employer as a truck driver and heavy equipment operator and that his job required him to possess a valid class two driver's license. On November 4, 1999, the claimant lost his license to operate a motor vehicle for 120 days when he refused to submit to a Breathalyzer test after being arrested for operating under the influence of alcohol. Although the claimant was provided a temporary license for 15 days, the employer placed him on paid leave status beginning on November 5, 1999. The employer considered it necessary for the claimant to have a license. Without a driver's license, the claimant could not perform necessary job duties and the employer subsequently informed him that he could not return to work because of his loss of license.


Although the claimant argues that his alcoholism impaired his judgment when he refused to take the Breathalyzer test, he has failed to establish that his refusal to submit to the test was the result of the disease of alcoholism. The claimant offered no testimony at the hearing before the Deputy Director's representative to suggest that he was experiencing an alcoholic episode, at the time he refused to take the Breathalyzer test. Further, the findings made by the review examiner below do not reflect that the claimant's judgment was impaired by his alcoholism or that his refusal to take the Breathalyzer test was anything but volitional. Indeed, the facts show that the claimant was aware that his failure to take the test would result in an automatic loss of his driver's license for 120 days and he understood the consequences of his actions that day. Earlier the claimant decided not to call the police officer for a ride home because he did not want the police officer to tell others that he had given a highway worker (the claimant) a ride home because he had been drinking. The claimant thought the police officer would tell others because Shutesbury is a small town and the claimant knew that the police officer talked to others.

The majority of the Board concludes that the claimant caused the statutory impediment which prevented him from continuing to perform his required job duties. The employer was under no obligation to modify the claimant's job duties or to continue to maintain his employment after he became legally restricted from performing driving duties.

Therefore, the majority of the Board concludes that the claimant's leaving work was voluntary without good cause attributable to the employing unit and not for an urgent, compelling, or necessitous reason within the meaning of § 25(e)(1) of the Law.

The majority of the Board affirms the Deputy Director's decision. Benefits are denied.


Francis J. Holloway
Chairman


Kevin P. Foley
Member

PAGE 6

BR-78368

DISSENT

Upon review of the consolidated findings submitted by the review examiner and the conclusions proffered by the majority in this case, I respectfully dissent from the decision. In my view the record does not support the conclusion that the claimant voluntarily left his job under Section 25(e) (1) of the law.

First, the employer, the Town of Shutesbury Highway Department, notified the claimant on November 19, 1999, by certified letter (Exhibit # 14) that he was "terminated" from employment "due to circumstances that resulted in your loss of license." On this basis, I conclude that the employer is the moving party, which caused the claimant's separation. Here, the employer has shown that the claimant's position required a Class 2 driver's license, however, the employer has not established that the loss of such license for a period of 120 days warrants discharge. Nor are the facts clear whether the claimant could return to his job after a period of 120 days with a license.

Second, it is undisputed that the claimant is an alcoholic and that he consumed alcohol at the end of his workday on November 4, 1999. Also, the facts show that a police officer determined that at that time the claimant was "under the influence of alcohol" because he failed several field sobriety tests. Whether the police officer explained to the claimant that his refusal to take a Breathalyzer test would result in an automatic loss of license for 120 days is not the issue. Rather, I believe the issue is whether the claimant, while impaired by alcohol, knew that the loss of his license for 120 days would be cause for the employer to terminate him. In my review, I don't believe this question was asked and answered, which would further justify a remand for additional evidence or a full Board hearing. I vehemently disagree with the majority's analysis that states the claimant "has failed to establish that his refusal to submit to the test was the result of the disease of alcoholism." It is quite clear to me that even if the claimant took the Breathalyzer test and failed or whether he took the test and passed, the claimant's separation was caused by the disease of alcoholism. Additionally, the findings show that the claimant had been voluntarily seeking treatment for the disease.

The courts have addressed this issue but it appears the majority has elected to ignore its relevance to this case. The critical issue in determining whether disqualification is warranted is the employee's "state of mind" in performing the acts that caused his discharge. In evaluating the employee's state of mind, the fact finder must take into account, (1) the employee's knowledge and understanding of the employer's expectations, (2) the reasonableness of that expectation, (3) and the presence of any mitigating factors. *Garfield v. Director of the Division of Employment Security*, 377 Mass 94 (1979). The employer has the burden of proving that the employee had control of his alcoholism or that he deliberately and wilfully refused to accept help in controlling it. *Shepard v. Director of the Division of Employment Security*, 399 Mass. 737 (1987). In the instant case, the employer has failed to meet its burden of proof.

BOSTON, MASSACHUSETTS
DATE OF MAILING - SEP 05 2000


Thomas E. Gorman
Member

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

LAST DAY - OCT 05 2000

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