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-257623**

**APPELLANT: (claimant)**

**RESPONDENT: (employer)**
A.L. Griggs Industries Inc.
c/o UTCA Inc.
One Monarch Place, #250
Springfield, MA 01144

On September 24, 1999, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Deputy Director's representative on May 4, 1999, and August 9, 1999.

On June 28, 1999, 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 to take additional evidence and testimony and to make additional findings of fact. The Deputy Director returned the case to the Board on August 17, 1999.

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 applicable to this matter.
>
> In accordance with Section 25(e)(2), 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, 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 evidence to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interests. The claimant was not discharged for violation of a reasonable and uniformly enforced policy or rule.
>
> The employer discharged the claimant for poor work performance after warning. The claimant was fully aware of the employer's expectations relative to servicing the customer's machines, because the claimant was specifically told. The claimant was capable of performing the job in the manner that was expected by the employer. The claimant failed to meet the employer's expectations because he was in a hurry to return to the office for a job interview. Such reason does not

constitute mitigating circumstances. Nor does being tired or getting stuck in the snow.

The claimant could have asked for help so he could go to the interview. He could have gone to the interview and then completed his route. Or he could have called the Controller to say he was going to be late or reschedule. The Controller's testimony, that he scheduled the interview for 4:30 or when the claimant completed his route and that the claimant could have called him, was consistent, direct, and completely believable.

The claimant's suggestion, that he made all the stops and serviced all the machines on 1-29-99, was simply not credible. The mere act of looking at the machines does not constitute servicing them, and the claimant was fully aware of that because he had just been spoken to about adequate servicing eleven days earlier. While the claimant may have made an error in judgement on 1-14-99, he certainly was not convincing that his poor performance on 1-29-99 was under similar circumstances. Rather, the claimant was in a hurry to get to his interview and simply did not do his job. Had he actually serviced them as he contends, they would not have run out of product.

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

The determination is affirmed. Benefits are denied beginning with the week ending 2-6-99 and indefinitely, 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 his weekly benefit amount.

**Section 25(e (2) of Chapter 151A** of the General Laws 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 a hearing on May 4, 1999. Both parties appeared. The Deputy Director representative held a remand hearing on August 9, 1999. Again both parties appeared. Whereupon, the Deputy Director's representative consolidated her final findings of fact as follows:

1. The claimant worked as a driver for the employer, a food service company, from 8-31-98 to 2-2-99, at a rate of $9.25 per hour.

2. On 2-2-99, the employer discharged the claimant for poor job performance after warning.

3. The claimant's job duties included driving to the location of the employer's customers and servicing the vending machines. If food or coffee is low in the machines, the driver is expected to fill the machines. The coffee machines hold a large quantity of coffee, and if they are adequately serviced, they will not run out between service calls.

4. If machines are not serviced, the employer risks losing accounts. Loss of accounts results in loss of money for the company. If a driver does not service an account, he is warned that such action is not acceptable. If it happens again, the employer terminates the driver.

5. Route tickets are printed to tell the drivers where to go daily. Drivers are to go to each stop, check the vending machines at the stop, and service the machines by filling them with product sufficient to carry over until the next scheduled service.

6. On or about 1-14-99, the claimant failed to take enough food to fill a machine for one of the employer's accounts. The employer received a call from the customer over the weekend, and had to make an emergency run to service the machine.

7. On or about 1-18-99, the employer met with the claimant to discuss the matter that had occurred over the weekend. The claimant considered the incident to be a mistake and an error in judgement. The claimant was reminded of the importance of adequately servicing the machines. and the severity of missing stops. The employer did not think the claimant had missed that stop, but rather that he did not adequately service the machine.

8. The claimant thought he was putting in too many hours. The claimant's pay stub for 1-7-99 showed 40 regular hours and 8 holiday hours. His pay stub for 1-14-99 showed 40 regular hours and 10.75 overtime hours.

9. During the week ending 1-29-99, the claimant was paid for 40 regular hours and 19.5 overtime hours. Neither the claimant nor the employer had an exact breakdown of hours per day, but the claimant believed he worked between 10 and 12 hours each week day and about 6 hours on Saturday.

10. The claimant told his health care provider, as well as the co-pastor at Out [sic] Lady of Mercy Church, that his job required long hours and that he was exhausted.

11. The claimant wanted to apply for another job within the company that would not require as many hours as he had been working. He made an appointment for an interview with the Controller/Human Resource representative.

12. The interview was scheduled for 1-29-99 at 4:30 p.m. or when the claimant finished his route. The claimant could call if he was running late and was not going to get back by 4:30. Or he could return for the interview and then go back out to complete his route after the interview. Or he could ask his supervisor for help.

13. The Controller did not tell the claimant that he was leaving at 4:30 and would not wait for the claimant if he were running late.

14. On 1-29-99, there was a snowstorm. The claimant decided to start his route very early so he would be sure to complete it in time for his interview. He got stuck in the snow, had to be towed, and consequently did not get the early start on his route that he had planned.

15. The claimant made the actual stops that were scheduled. He did not, however, adequately service all the machines that were at the stops, as he was in a hurry to get back for his interview. The claimant realized the coffee was on the low side, but did not take the time to go out to his truck, get some coffee, return to the

machine, and put the coffee in the machine. As a result, the employer received calls from two customers, stating that their machines had not been serviced. BBA Nonmoldens called on 1-29-99 and American Tissue called after the weekend.

16. The claimant arrived for the interview on 1-29-99 at about 4:35 and had the interview with the controller.

17. The inadequate service of the vending machine involved the account at BBA Nonmoldens. On 1-29-99, the employer's answering service received a call at about 8:00 p.m., which was passed on to the Route Operations Supervisor. The nature of the complaint was that the coffee vending machine was out of coffee and was vending hot water. The Route Operations Supervisor went out the following morning, 1-30-99, and put coffee in the machine.

18. On 2-1-99, the District Manager apprised the claimant of the complaint received on 1-29-99 from BBA Nonmoldens. At that time, the claimant indicated he had serviced the machine and thought there was enough coffee to make it through the weekend.

19. The employer accepted the customers' depiction of events because the machine ran out of coffee, and was reported by the customer, on the very day the claimant said he serviced the machine. The employer believed the claimant would have gone out to the truck, gotten the coffee, returned to the machine, and put coffee into the machine, if he had not been rushing to get back for the interview. His job was to "make sure" there was enough coffee, and he did not do that.

20. The claimant was then terminated.

21. The claimant's explanation to the employer at the time of termination was basically the same explanation the claimant gave for the purpose of the instant hearing.

CREDIBILITY: The Controller's testimony, that he scheduled the interview for 4:30 or when the claimant completed his route and that the claimant could have called him, was consistent, direct, and completely believable.

The claimant's suggestion, that he serviced all the machines on 1-29-99, was simply not credible. The mere act of looking at the machines does not constitute servicing them, and the claimant was fully aware of that because he had just been spoken to about adequate servicing eleven days earlier. While the claimant may have made an error in judgement on 1-14-99, he certainly was not convincing that his poor performance on 1-29-99 was under similar circumstances. Rather, the claimant was in a hurry to get to his interview and simply did not do his job. Had he actually serviced them as he contends, they would not have run out of product.

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 Board concludes as follows:

Under Massachusetts General Laws, Chapter 151A, § 25(e)(2), 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, provided that such violation is not shown to be as a result of the employee's incompetence.

There is no evidence to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. Therefore, the Board must analyze the discharge under the deliberate misconduct test of section 25(e)(2).

In order to disqualify an individual from unemployment benefits for deliberate misconduct in wilful disregard of the employing unit's interest, the claimant's state of mind at the time of the infraction which caused the discharge, is critical. The factors to be considered are whether the employer made its expectation known, was the claimant aware of these expectations were they reasonable, and were any circumstances present which precluded the claimant from meeting these expectations.

Here, the claimant was aware that he had to adequately service the machines because it was part of his duties and he had been spoken to approximately two weeks previously about his failure to do so. In addition, the expectations were reasonable as the employer's business depended on such.

On the final day however, the claimant, who had been experiencing exhaustion because of the long hours he was working as a driver, had made a 4:30 p.m. job interview appointment with the employer's Controller for another position within the company which would not require such long hours. In order to be on time for the job interview, the claimant attempted to start his work-day early. However, a snow storm had occurred, which caused the claimant's car to get stuck and be towed, resulting in his inability to get an early start. In order his rush to complete his stops and get to the interview on time, he decided that certain machines, although low in supply, were adequately filled to meet the customers needs for the weekend.

The claimant, who arrived in time for the job interview, was spoken to on February 1, 1999, by the District Manager who informed him that they had received complaints from some customers that their machines ran out of product over the weekend.

The claimant's explanation that he had made the stops and that he believed the supplies were adequate was not accepted and his employment was terminated.

The Board concludes that the circumstances the claimant encountered on the final day caused him to make an error in judgement and, therefore, sufficiently mitigated his failure to meet the employer's expectations. Consequently, the claimant's discharge is not in wilful disregard of the employing unit's interest and he is not subject to the disqualifying provisions of Section 25(e)(2) of the Law.

The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending February 6, 1999, and subsequent weeks, if otherwise eligible.

Thomas E. Gorman
Member

**BOSTON, MASSACHUSETTS**
**DATE OF MAILING -** OCT 05 1999

Kevin P. Foley
Member

**APPELLANT: I.D.** [redacted]
**RESPONDENT: I.D.** [redacted]

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

**LAST DAY -** NOV 04 1999

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