



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-269040**

APPELLANT: (claimant)



Office #02

RESPONDENT: (employer)

Flexcon Co. Inc.
Flexcon Industrial Park
Spencer, MA 01562

On February 28, 2000, 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 October 19, 1999, January 5, 2000, and February 3, 2000.

On November 24, 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 testimony and to make additional findings of fact. The Deputy Director returned the case to the Board on February 14, 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 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, the employer met it's [sic] burden of proof. The claimant was discharged for violation of the employer's attendance policy. The claimant was aware of the attendance policy because he received copies of it. The policy is reasonable because it affords the employer consistency in the handling of attendance. The employer treats all violations in a like manner, with the accrual of points and progressive discipline. There was no testimony or evidence presented in this hearing to establish that the claimant's violation was as a result of incompetence on the part of the claimant.

In view of the facts, the claimant is subject to disqualification and denied benefits. Benefits are denied beginning with the week ending 9-4-99 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 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 October 19, 1999. Both parties appeared. The Deputy Director's representative held remand hearings on January 5, 2000, and February 3, 2000. Both parties appeared. The Deputy Director's representative then consolidated her final findings of fact as follows:

1. The claimant worked as a slitter operator for the employer, a pressure sensitive business, from 6-11-93 to 8-26-99, at an ending rate of \$12.16 per hour.
2. On 8-26-99, the employer discharged the claimant for excessive absenteeism in violation of the attendance policy.
3. The employer has an occurrence system attendance policy that calls for progressive discipline for occurrences of absence. The policy uses a rolling six-month time frame, and drops occurrences after six months.
4. The policy is set up for three-day, four-day, and five-day work weeks. For a three-day work week, the maximum allowable absences before discipline starts is one absence in a month or two in six months. If an employee working a three-day work week is absent more than one time in a month, the discipline process would start. If an employee working a three-day work week is absent more than two times in six months, the discipline process would start.
5. The policy includes excused absences and unexcused absences. Excused absences include funeral, jury duty, military training, disciplinary time off-attendance suspensions only, approved vacations and holidays, confinement in hospital for injury or illness, and confinement in home immediately following such hospitalization when it is a continuous and uninterrupted period. Excused absences also include snowstorms, layoff, FMLA leave, and maternity leave for birth or adoption.
6. Unexcused absences include sick days for confinement in home not covered by the FMLA, with continuous, uninterrupted days counted as one occurrence, personal absent days, and incomplete scheduled shift unless the individual leaves for a short period of time and returns to complete the shift. Unexcused absences also include disciplinary time off-suspension that is not for attendance, and any other absence not covered under excused absences.

7. The progressive disciplinary steps include a verbal warning, a written warning, suspension, and then termination. The employer handles all absences in a like manner, with the accrual of occurrences and progressive discipline. The employer does not make exceptions.
8. The attendance policy is written in the employee handbook, which the claimant received and signed for. The purpose of the policy is to assure consistency in handling attendance issues.
9. The claimant was a three-day per week employee. He worked Friday, Saturday, and Sunday, from 6:00 a.m. to 6:00 p.m.
10. The claimant had some personal losses, a son on 8-11-98 and a pet on 3-13-99, which resulted in some absences from work. The claimant had a difficult time coping with his losses. As a result of that difficulty, he started drinking.
11. The claimant sought medical attention and was put on Paxil, an anti-depressant medication. He contacted the employer's Employee Assistance Program (EAP), and between 12-10-98 and 8-23-99, the EAP provided periodic services. On the recommendation of the EAP, the claimant attended a bereavement support group.
12. At the recommendation of the EAP, the claimant took a leave of absence under the Family Medical Leave Act (FMLA). Said leave ran from December, 1998 to March, 1999.
13. In March, 1999, the claimant had one absence immediately following his return from the leave of absence under the FMLA, which the employer did not count against him because it was so close to the leave of absence. The claimant was aware that he had gotten a break and knew of no other instances where the policy was not followed exactly as written.
14. On 6-13-99, the claimant received a verbal warning relating to attendance. Said warning was due to absences on 4-16-99, 5-28-99, and 6-6-99, 6-11-99 and 6-12-99. The June absences were counted as one occurrence as they were consecutive since the claimant is a three-day a week employee.
15. The employer does not know the circumstances relating to the reasons for any of the claimant's absences.
16. The claimant does not recall the circumstances surrounding the 4-16-99 absence, but believes it might have been because of poison ivy. The claimant does not recall the exact circumstances surrounding the 5-28-99 and 6-6-99 absences. He thinks that because the absences were close to the anniversary of his son's death, that the absences were "probably" related to drinking and/or being inebriated. The 6-11-99 and 6-12-99 absences were due to a being arrested for an alcohol-related incident at the Athol Hospital.
17. On 7-11-99, the claimant received a written warning relating to attendance. Said warning was due to the aforementioned absences, plus absences on 7-9-99 and 7-10-99.
18. The claimant does not recall the exact circumstances surrounding his 7-9-99 absence, but thinks it was "probably" alcohol related. Because the claimant knew that the 7-10-99 absence would not be counted against him as it was consecutive with the 7-9-99 absence, getting up to go to work was the "least of his priorities."

19. On 7-23-99, the claimant received a three-day suspension for attendance. Said disciplinary action was for the aforementioned absences plus an absence on 7-18-99.
20. The claimant does not recall the exact circumstances surrounding the 7-18-99 absence, but believes it was either alcohol related or related to a court appearance for the earlier arrest.
21. The claimant was aware that the next step in the progressive discipline would be discharge.
22. On 8-20-99, the claimant reported to work. He worked his full shift without any significant incident or problem.
23. On Saturday, 8-21-99, the claimant reported to work. Because it was close to the anniversary of the death of his son, he was having some difficulty concentrating. When he started having problems setting the blades on his machine and with ripping material, he became very frustrated.
24. The claimant's supervisor was aware that the claimant was frustrated and helped him with the machine. After the supervisor left the area, the problems persisted, and the claimant's frustration mounted.
25. The claimant's frustration was so great that the claimant feared that he might lose control, as he had on another incident where he shook and broke a bar at work. The claimant felt it was necessary to be dismissed early to seek counseling on 8-21-99 because he was neither mentally nor physically capable of working the entire day on 8-21-99. He concluded he needed to leave because of his frustration and lack of ability to concentrate.
26. The claimant called the EAP from the pay phone at work at 10:59 a.m. He was told either by an individual or by a message machine that a counselor would not be available to speak to until Monday, 8-23-99. He has no specific recollection of whether he left a message or spoke to someone directly, but has a vague recollection of someone asking if he was suicidal, which he was not.
27. Around 11:00 a.m. the claimant told his supervisor that he was having difficulty concentrating and asked to be dismissed early to seek counseling. His intent was to get counseling through the Employee Assistance Program. The claimant was told that if he left, it would result in his termination.
28. The claimant does not know if he spoke to his supervisor before he called the EAP or after he made that call.
29. The claimant left work to seek counseling shortly after 11:00 a.m. knowing that it would result in his termination. He also knew prior to leaving that counseling through the EAP was not available to him that day because he had already made his call from the pay phone.
30. After leaving work on 8-21-99, the claimant took no further steps on that day to get counseling through any other avenues.
31. The claimant did not call work the next day because he had been told if he left on the 8-21-99, he would be terminated.
32. On 8-23-99, the employer called the claimant and suspended him pending review of the claimant's absences in relation to the policy. The claimant was subsequently terminated.

33. On 8-23-99, the claimant did call the EAP. He received no services through the EAP on that day or any day thereafter.
34. The claimant has continued his association with the bereavement support group. He also began treatment at the Beacon Clinic for alcohol abuse in October, 1999, and has attended group sessions with that clinic since October.

CREDIBILITY: With the exception of whether the claimant called the EAP on 8-21-99, there was little disagreement on the facts of this case. While there was no concrete evidence that the claimant made the call from the pay phone at 10:59, the fact that the claimant knew the call was on the phone bill would give his testimony, that he made that call, substantial weight.

After full review and consideration, the Board adopts the consolidated findings of fact made by the Deputy Director 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 the result of the employee's incompetence.

The claimant was discharged because he violated the employer's attendance policy, when he left work during the middle of his shift on August 21, 1999.

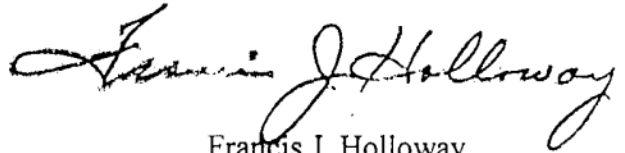
The employer has an attendance policy that assesses a point system to track an employee's attendance. The employer's policy provides specific guidelines for what the employer determines to be excused absences and unexcused absences. The employer's policy does not excuse sick days unless they are in accordance with a family medical leave or for hospitalization or a confinement period at home following a hospital stay.

The employer's policy calls for progressive disciplinary action based on the number of occurrences within a six-month rolling period. The claimant was fully aware of this attendance policy and the employer uniformly enforced it. The claimant received progressive discipline as a result of his failure to adhere to the employer's attendance guidelines. On July 23, 1999, the claimant received a 3-day suspension as a result of his attendance and he was made aware that his job was in jeopardy for continued absenteeism.

The claimant's final absence occurred on August 21, 1999, when the claimant left work approximately five hours into his 12-hour shift. On that final day the claimant was experiencing emotional distress because it was around the one-year anniversary of the death of his son. The claimant was having difficulty concentrating on his work and he felt that he was neither mentally nor physically capable of continuing work that day. As a result of his distress, the claimant apprised his supervisor that he needed to leave work to seek counseling. The claimant was warned at that time that if he left, he would be terminated. The claimant, however, left work that day and was subsequently terminated for his attendance.

The Board concludes that there were extraordinary circumstances in this case that caused the claimant to leave work early on his last day and to be in violation of the employer's attendance policy. The Board also concludes that the employer's application of its attendance policy in this instance was unreasonable because it failed to recognize the extenuating circumstances that the claimant was experiencing at the time of this final incident. The Board further concludes that the employer failed to meet its burden of proof to show that the claimant's discharge rose to the level of a knowing violation of a reasonable and uniformly enforced policy or rule or an act of deliberate misconduct in wilful disregard of the employer's interest. Therefore, the claimant is not subject to disqualification under the provisions of Section 25(e)(2) of the Law.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending September 4, 1999, and subsequent weeks, if otherwise eligible.



Francis J. Holloway
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - **MAR 06 2000**



Kevin P. Foley
Member


RESPONDENT I.D. #08191201

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

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LAST DAY - **APR 05 2000**