APR - 4 REC'D

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

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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR- 26003700**

CLAIMANT APPELLANT:
[redacted]

EMPLOYING UNIT:
Amherst Woodworking and Supply
P.O. Box 718
Northampton, MA 01060

[redacted]
Office #01

EMP. I.D.# 09-793921

On January 6, 2000, the Northhampton Division of the District Court remanded this case, Civil Action No. 9945-CV-306 to the Board of Review. On March 27, 2000, in Boston, Massachusetts, the Board reviewed the written record, the transcript and recordings of the testimony presented at the hearing held by the Deputy Director's representative on May 18, 1999.

The Board's decision of July 13, 1999, issued in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law), affirmed the Deputy Director's decision, issued on May 24, 1999, which denied benefits to the claimant. The claimant exercised her right of appeal to the courts under M.G.L. c. 151A, § 42.

In accordance with the court order, the Board remanded the case to the Deputy Director on February 2, 2000, for additional findings of fact to be made from the record. On February 22, 2000, the Deputy Director's representative submitted his consolidated findings of fact to the Board.

The Deputy Director's decision, of May 24, 1999, concluded that:

> The claimant did not resign from her job. Therefore, Section 25(e)(1) of the law does not apply to this matter.
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> 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 was discharged for deliberate misconduct in wilful disregard of the employing unit's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule, unless the violation was the result of the employee's incompetence. In this case, there was a policy or rule applicable to the conduct in question.
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> The claimant was discharged for excessive absenteeism without notification to the employer. Clearly, she was absent 27 times. Many of these incidents involved failure to call in properly. She was warned on 11/11/98 and on 3/8/99. When the latter warning was issued, it was clear that continued absenteeism would result in discharge. On 3/24 and 3/25/99, the claimant was absent and failed to call in. Thus, policy was violated.

The claimant was aware of the employer's policy. That is because it was conveyed to her in writing at the time of hire. Such policy was reasonable. The employer maintains it to assure that employees are at work and that production is not effected [sic].

The policy was uniformly enforced. Prior to the claimant's discharge, there were no other violators of the policy. The claimant was the first violator and was discharged. Thus, the policy was uniformly enforced.

The policy was fairly applied. The final incident occurred after the claimant had attended a battered women's support group. It is recognized that the claimant was undergoing serious emotional/family problems due to an abusive relationship. She is to be commended for the manner in which she has handled this situation that includes serious emotional problems involving her son. Nevertheless, the decision in this case must be made based upon the facts. While it is recognized that the claimant was emotionally distraught on 3/24/99, she still should have called the employer. By failing to call and not providing the reason for her absence, she gave the employer no reason not to discharge her. The company had no idea why she was absent. The claimant further testified that she did not call, because she assumed she had been discharged. It may be concluded from this testimony, that the claimant knew her behavior was wrong. It is concluded that there was no extraordinary or unusual circumstance concerning the final incident. Thus, the policy was fairly applied.

The violation of policy was not the result of the claimant's incompetence. That is because she had the ability to comply with the policy.

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

The determination is affirmed. The claimant is not entitled to benefits for the week ending 3/27/99 and subsequent weeks until she has worked for eight weeks and in each of said weeks has earned an amount equal to or in excess of her weekly benefit amount.

Section 25 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, (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 .

> 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 a hearing on May 18, 1999. Both parties were present. On February 2, 2000, 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 office assistant for the employer, a custom architectural woodworking company, from 8/5/98 until 3/26/99, when she was discharged from her job. Her last actual day of work was on 3/23/99. Subsequently, she filed a claim for benefits on 3/25/99.

2. The claimant was fired from her job due to violating the employer's final warning regarding excessive absenteeism.

3. The employer has a written policy concerning absenteeism. It is in the form of a policy book. It states that employees must call by 9 am, if absent.

4. The employer conveyed the policy to the claimant through the issuance of the policy book, at the time of hire.

5. The employer maintains this policy to insure that employees report to work and call in timely if absent. Failure to do so can affect production.

6. The claimant has two children; an 8-year old son and a younger daughter.

7. The claimant has been in an abusive relationship with the father of the children. She has been a victim of physical abuse on several occasions. As a result, she has sought and been granted a restraining order against the father. There has also been a criminal investigation complaint filed against him.

8. The son witnessed the claimant being battered by the father. As a result, he has suffered from a variety of emotional problems. These have affected his day-to-day behavior including school behavior.

9. The claimant has been absent from work, tardy, or left work early on numerous occasions dating back to the beginning of her employment. These incidents have occurred due to a variety of reasons as follows: children's illnesses, court appearances, and violence perpetrated by the father.

10. On 11/11/98, the employer issued a written warning to the claimant. It occurred due to the claimant's failure to properly notify the employer regarding an absence. The warning states that the claimant must call in to work to notify the company if she is going to be absent.

11. On 12/4/98, the employer issued an evaluation to the claimant. It stated, in part, that the claimant must be more dependable. It states that the employer will have to replace her if the absenteeism continues. It further states that oversleeping and emotional crises are not an acceptable excuse to miss work.

12. From 11/11/98 until 3/8/98, the claimant was absent fifteen times.

13. On 3/8/99, the employer issued another written warning to the claimant. It states that she has been absent twenty-seven times. It further states that she can not be absent anymore during March 1999 and less than two days in April 1999. If this is exceeded, she will be discharged.

14. Based on the final written warning issued to the claimant on March 8, 1999, she reasonably believed that she would be dismissed from her job if she missed another day of work for any reason other than serious illness or hospitalization.

15. During the week of 3/15/99, the claimant's boy friend slashed the tires on her car. As a result, she had to get a restraining order against him.

16. On Friday, 3/19/99, the school principal called the claimant and told her to pick up her son from school. This situation was caused by behavioral problems. The claimant was unable to do so. That is because she takes a van to work and does not have a car to use during the workday.

17. After making calls to the boy's father, her therapist and her brother, the latter finally agreed to pick up the son from school.

18. As a result of this incident, the claimant suffered a "panic attack" at work.

19. On 3/22/99, the claimant's daughter had an ear infection. This required a doctor's appointment. The claimant called the employer early in the morning and left a message that she would be late to work.

20. On 3/22/99, the claimant arrived at work late. She became engaged in a conversation with the supervisor about what happened on 3/19/99. The supervisor told her that she would not have to leave work so much, if her son wasn't such a "brat". This caused the claimant to become upset.

21. During the evening of 3/23/99, the claimant attended a battered women's support group meeting. She talked about events which had occurred during the prior week.

22. The claimant returned home from the meeting emotionally upset. As a result, she could not sleep.

23. The claimant suffers from post traumatic stress syndrome (PTSD).

24. On 3/24/99, she was scheduled to begin work at 9 am. She did not get out of bed until 9:30 am. She did not call the employer, because she assumed that she had already been discharged for absenteeism and failure to call in before 9 am.

25. The claimant was "consciously aware" that her conduct on March 24,1999 was in violation of the employer's rule. The presence of mitigating factors does not negate a finding that the plaintiff intentionally violated the employer's rule.

26. On 3/25/99, the claimant was again absent from work and failed to call in.

27. On 3/26/99, the employer notified the claimant that she was discharged from her job for excessive absenteeism.

28. The claimant was fired from her job due to violating the employer's final warning regarding excessive absenteeism.

29. Prior to the claimant's discharge, there had been no violations of this policy by other employees and thus no discharges for this reason.

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:

The first issue to be resolved in this case is whether the claimant or the employer initiated the claimant's separation from work. The Board recognizes the findings of fact in which the Deputy Director's representative characterizes the separation as a discharge. The employer sent the claimant a letter of March 26, 1999, notifying her of termination. However, the findings of fact clearly demonstrate that the claimant had already left her employment prior to when that letter was sent by the employer. The claimant was absent from work on March 24, 1999, and did not notify the employer of her absence on that day because she believed that she was discharged. The claimant initiated the separation by leaving work due to this belief. Therefore, section 25(e)(2) of the Law is not applicable in this case.

The issue to be resolved is whether, under section 25(e)(1) of the Law, the claimant's leaving of work was with good cause attributable to the employer or involuntary due to reasons of an urgent, compelling and necessitous nature.

The claimant's belief that she was discharged as a result of her absence on March 24, 1999, was reasonable in that the employer had warned her previously that another absence from work would result in her discharge. The claimant had overslept resulting in her inability to either report to work punctually or provide timely notification of her impending absence.

The claimant has, however, established that extenuating circumstances precluded her from adhering to the employer's attendance expectations. The claimant, who suffers from panic attacks is diagnosed to have post traumatic stress syndrome. During the days immediately preceding her absence on March 24, 1999, the claimant encountered difficulties with her son who was having behavioral problems. Additionally, the claimant's boyfriend had slashed the tires on her car, resulting in her having to obtain a restraining order against him. On the night before her absence, she attended a battered women's support group, which heightened the emotional turmoil within her. As a result, she was unable to sleep.

In light of the circumstances that caused her to oversleep & her personal problems at the time, the Board concludes that the claimant's leaving of work although it was not with good cause attributable to the employer, it was for reasons of such an urgent, compelling and necessitous nature, as to make her leaving involuntary, therefore, she is not subject to the disqualifying provision of Section 25(e)(1) of the Law, cited above.

Section 14(d)(3) of Chapter 151A of the General Laws is also, pertinent and provides as follows:

> **Section 14.** Each employer shall make contributions for each year after nineteen hundred and ninety-one at the applicable rate or rates as set forth in this section on so much of its payroll as is subject to this chapter . . . .
>
> > (d) The commissioner shall determine the charges and credits to each employer's account, as follows:
> >
> > > (3) . . . Benefits which, in accordance with the provisions of this paragraph, would be charged to an employer's account shall not be so charged but shall be charged to the solvency account in any case where no disqualification is imposed under the provisions of clause (1) of subsection (e) of section twenty-five because the individual's leaving of work with such employer, although without good cause attributable to the employer, was not voluntary.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending March 27, 1999, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - APR 03 2000

Francis J. Holloway
Chairman

Kevin P. Foley
Member

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

LAST DAY - MAY 03 2000

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