Ilene Titus
ATTORNEY AT LAW
120 MAIN STREET
WORCESTER, MA 01608

(508) 799-8784
FACSIMILE (508) 798-2521

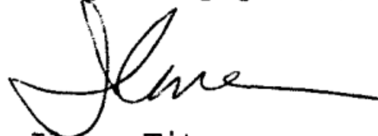
January 7, 2002

Alan Rodgers
Massachusetts Law Reform Institute
99 Chauncey Street
Boston, MA 02111-1722

Dear Alan:

Enclosed please find a copy of a favorable decision of the Board of Review along with a copy of my appeal memorandum.

Very truly yours,



Ilene Titus

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-83343**

CLAIMANT APPELLANT:

S.S. #
Office # 08

EMPLOYING UNIT:

EMP #

On December 21, 2001, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Deputy Director's representative on October 24, 2001.

On November 15, 2001, 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 December 11, 2001.

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 did not leave work voluntarily. Therefore, Section 25(e)(1) of the Law does not apply in this case.
>
> In cases involving 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's discharge was attributable to deliberate misconduct in willful 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 testimony and evidence in this case did establish that the claimant was terminated for a violation of an enforced company policy regarding "refusal to perform work assigned by supervisor." The claimant's testimony was not found to be credible in light of the employer's testimony to the contrary. Further, the claimant was aware of the policy having been given a copy of it. He had been made aware that this type of action would result in disciplinary action.
>
> While he may not agree with the degree of discipline, his actions must be considered a knowing violation. Therefore, the claimant is subject to disqualification under Section 25(e)(2) of [sic] Law.

> The claimant is subject to disqualification for the week ending 8/26/01 [sic] and until he has worked for eight weeks earning an amount equal to or in excess of his benefit rate in each week.
>
> The Board notes that the correct effective week of this disqualification should be the week ending August 25, 2001.

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 24, 2001. 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 full-time from 1988 through 8/21/01 as an automotive technician for the employer, an automotive dealership.
2. The claimant was discharged on 8/21/01 by the employer
3. The employer issues each employee a copy of its rules and policies. The claimant did receive a copy which he signed an acknowledgement of receiving such on 11/6/00.
4. Violation of policies is grounds for immediate dismissal in cases of "refusal to perform work assigned by supervisor." The employer had not warned the claimant prior regarding any refusal to perform work assigned, as the claimant nor any other employee had not refused to do work prior. The claimant was aware that any refusal to do work assigned was grounds for disciplinary action under company policy at the time of the incident, and could be cause for discharge.
5. The claimant had been warned in November 1999 about his conduct after he had urinated in the company parking area.
6. The employer had reviewed with the claimant their expectations and rules in March or April 2001 in an effort to get things working smoother.
7. The claimant was paid flat rate based on the job. If he finished the job sooner, he still was paid for the time indicated under the rate system.
8. On 8/20/01, the claimant was approached by his service manager around 2:30 PM and told that he was needed for an alignment as a vehicle had been promised to a customer that night. The claimant was currently working on a vehicle when approached. He was told to stop working on that vehicle as it was not due to be picked up but the alignment was.

9. The claimant asked if someone else was available to do it and was told no; he needed to do it.

10. The service manager asked the claimant if he was refusing to do the job and the claimant indicated that he was.

11. The service manager indicated the job needed to be done. The claimant again indicated he would not stop and do it. The service manager indicated to the claimant that he understood that he was refusing to do work as directed. The claimant acknowledged that he understood that he was. The service manager did not indicate that he would be fired for doing so.

12. The service manager called the service director at the main office and it was determined that the service director would come and help the service manager handle the situation as the service manager was new.

13. The service director came to the work location after finishing some business only to find that the claimant had left early for the day without any permission or reason provided. The claimant was scheduled to work until 5 PM and had left work at 4:30 PM. The claimant had finished all the work in his job basket, had cleaned up his tools, and left, as there was no other work in his basket to do.

14. The claimant had been approached by another manager about taking care of a flat tire for a customer and decided that the job he was doing and the tire was more important than the alignment. He did not tell the service manager of this conflict or the other manager.

15. The claimant was terminated on 8/21/01 at about 10:30 AM after starting work at 8 AM.

16. The claimant's testimony was not found to be credible in light of the credible testimony of the two employer witnesses, and the logic of the facts presented.

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

Under 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 employer discharged the claimant for his refusal to perform an assignment when directed to do so by the employer's service manager, which was a violation of the employer's policy and expectations.

The employer had a company policy and expectation that provides that an employee can be subject to immediate dismissal for refusal to perform work assigned by a supervisor. This policy and expectation was reasonable and the claimant was aware of this.

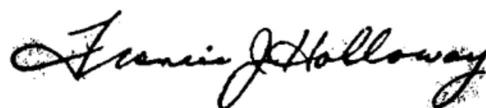
The Massachusetts Supreme Judicial Court has concluded that the term "knowing" implies some degree of intent, and that a discharged employee is not disqualified from receiving benefits unless it can be shown that, at the time of the act, the employee was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy. Still v. Commissioner of Employment & Training, 423 Mass. 805 (1996).

The Massachusetts Supreme Judicial Court has also concluded that a discharge, which occurred for an employee who refused to follow a directive given to him by his group leader because he felt that the work he was doing was of more paramount importance, was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest. Jones v. Director of Division of Employment Security, 392 Mass. 148 (1984).

On August 20, 2001, the claimant refused to perform an alignment task as directed to do so by the service manager. The claimant refused to follow the order because he was following another directive from another manager to fix a flat tire for a customer and he felt that this task was more important. The claimant was not warned at anytime during this exchange with the service manager that his refusal to do the alignment would be deemed a violation of the employer's policy and grounds for termination. In fact, during the 12 years of the claimant's employment, the claimant had always performed his work as directed and he never was warned for refusal to follow an order.

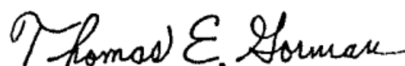
Since the claimant refused to perform the alignment task because he felt the job that he was doing as directed by another manager was more important, the Board concludes that the claimant's discharge was not due to a "knowing" violation of the employer's policy or rule or an act of deliberate misconduct in wilful disregard of the employing unit's interest. Therefore, the claimant is not subject to disqualification under the provisions of section 25(e)(2) of the Law, as cited above.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the weeks ending August 25, 2001, and subsequent weeks, if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF MAILING - JAN 04 2002

Francis J. Holloway
Chairman



Thomas E. Gorman
Member

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

rh

LAST DAY - FEB 04 2002

DIVISION OF EMPLOYMENT AND TRAINING
BOARD OF REVIEW

[redacted])
)
Claimant,)
)
v.) Docket No. [redacted]
)
[redacted],)
)
Employer.)

CLAIMANT'S APPLICATION FOR REVIEW OF DECISION

I. Introduction

Claimant [redacted] hereby requests a review of the Decision in Docket No. [redacted]. [redacted] appeals from the Decision of the review examiner finding that he is subject to disqualification and not entitled to benefits.

In support thereof, [redacted] states that the Review Examiner's Decision is not supported by law and adversely affects substantial rights. (A copy of the Decision is attached hereto)

II. The Review Examiner's Findings of Fact

1. The claimant was employed full-time from 1988 through 8/21/01 as an automotive technician for the employer, an automotive dealership.

2. The claimant was discharged on 8/21/01 by the employer.

3. The employer issues each employee a copy of its rules and policies. The claimant did receive a copy which he signed an acknowledgement of receiving such on 11/6/00.

4. Violation of policies is ground for immediate dismissal in cases of "refusal to perform work assigned by supervisor."
5. The claimant had been warned prior about his conduct after he had urinated in the company parking area.

6. The employer had reviewed with the claimant their expectations and rules in March or April 2001 in an effort to get things working smoother.

7. The claimant was paid flat rate based on the job. If he finished the job sooner, he still was paid for the time indicated under the rate system.

8. On 8/20/01, the claimant was approached by his service manager and told that he was needed for an alignment as a vehicle had been promised to a customer that night.

9. The claimant asked if someone else was available to do it and was told no, he needed to do it.

10. The service manager asked the claimant if he was refusing to do the job and the claimant indicated that he was.

11. The service manager indicated the job needed to be done. The claimant again indicated he would not stop and do it.

12. The service manager called the service director at the main office and it was determined that the service director would come and help the service manager handle the situation as the service manager was new.

13. The service director came to the work location after finishing some business only to find that the claimant had left early for the day without any permission or reason provided.

14. The claimant had been approached by another manager about taking care of a flat tire for a customer and decided that the job he was doing and the tire was more important than the alignment. He did not tell the service manager of this conflict or the other manager.

15. The claimant was terminated on 8/21/01 at about 10:30 am. after starting work at 8 am.
to him.

The review examiner concluded the evidence established that [redacted] employment was "terminated for a violation of an enforced company policy".

III. Discussion

A. There Was No Knowing Violation of a Reasonable and Uniformly Enforced Policy or Rule

The review examiner found that had been given more than one job, by two different managers, to be performed at the same time, and that had resolved the conflict by performing the job which he thought was the more important, and that based on these facts, employment was terminated for "refusal to perform work assigned by a supervisor".

1. The Employer's Policy Was Not Reasonable under the Circumstances and/or Not Reasonably Applied to

The employer's policy requiring an employee be discharged for refusing to perform a job is not reasonable where the accused employee has been assigned different jobs at the same time by different managers. felt he had to pick one job or the other and, as the review examiner found, picked the more important. No matter what job had chosen to perform at the time, he could have been discharged for failure to perform the other job.

2. Any Refusal to Perform a Job Was Not Done "Knowingly" and/or Was the Result of Incompetence to Perform More Than One Job at The Same Time as Assigned

"As a matter of law, an employee can only deemed to have committed a `knowing' violation of an employer's rule or policy within the meaning of §25(e)(2) if the employee acted intentionally. It is not sufficient that the employee merely be informed of the rule or policy." Still v. Commissioner of

Employment and Training, 423 Mass. 805, 808 (1996); Franclemont v. Commissioner of Department of Employment and Training, 42 Mass. App.Ct. 267, 272-273 (1997). In addition, "[a] mere violation of an employer's rule does not automatically justify denial of benefits." Franclemont, at 272.

The inquiry into a "knowing violation" of a rule or policy "mandates an investigation of the employee's state of mind". Still, at 810; Franclemont, at 273. "An act is done `knowingly' if it `is [the] product of conscious design, intent or plan that it be done, and is done with awareness of probable consequences'." Still, at 812. "[I]n the context of §25(e)(2), `knowing' implies some degree of intent, and that a discharged employee is not disqualified 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 an employer's reasonable rule or policy." Still, at 813. "[I]t cannot apply ... to conduct that is unintentional by virtue of being involuntary, accidental, or inadvertent." Still, at 813.

In the instant case, with respect to [redacted] physical ability to perform only one job at a time, his conduct with respect to any other conflicting jobs assigned is involuntary or inadvertent. At worst, [redacted] conduct was a "good faith lapse in judgment" which is not subject to disqualification. Still, at 815.

B. <u>There Was No Deliberate Misconduct in Willful Disregard of the Employing Unit's Interest</u>

The review examiner found that [redacted] had been given different jobs, by different mangers, to be performed at the same time, and that [redacted] had resolved the conflict by performing the job which he thought was the more important. The facts of this case are substantially similar to those of <u>Jones v. Director of Division of Employment Security</u>, 392 Mass. 148 (1984).

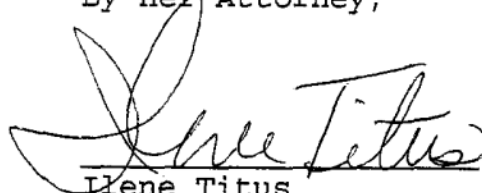
In <u>Jones</u>, the review examiner found that the claimant worked as a "material handler" from March, 1978, until his discharge on April 28, 1982. On April 28, 1982, the claimant had refused a direct order of the group leader to tag certain defective products that needed repair. The claimant refused to follow his superior's request as the claimant, himself, deemed the distribution work he was performing was of paramount importance. When the supervisor learned of the claimant's refusal, he terminated the claimant in view of a previous disciplinary warning issued to the claimant. The <u>Jones</u> Court held that such refusal was not in willful disregard of the employer's interest.

Likewise, in the instant case, the review examiner found that [redacted] was acting in what he thought was the best interest of his employer. It follows then, that there was no deliberate misconduct in willful disregard of the employing unit's interest.

IV. Conclusion

Wherefore, based on the foregoing, and consistent with G.L. c. 151A, §74 -- which expressly provides that the law should be liberally construed "to lighten the burden which now falls on the unemployed worker and his family", Reep v. Commissioner of Department of Employment and Training, 412 Mass. 845, 846 (1992) -- the review examiner's decision ought to be reversed and [redacted] granted the benefits to which he is entitled.

Respectfully submitted,
Claimant [redacted]
By her Attorney,



Ilene Titus
BBO# 045110
Attorney at Law
120 Main Street
Worcester, MA 01608
(508) 799-8784

MASSACHUSETTS DIVISION OF EMPLOYMENT AND TRAINING

HEARINGS DEPARTMENT
WEST/CENTRAL REGION
88 INDUSTRY AVENUE, STE A

SPRINGFIELD, MA 011043296
Phone: (413) 452 - 4700
Fax: (413) 784 - 1309
TDD: (800) 438 - 0471

LENE TITUS
ATTORNEY AT LAW
120 MAIN STREET
WORCESTER MA016080000

APPEAL RESULTS

Docket : [redacted]

Mail Date : OCTOBER 29, 2001

Appellant : CLAIMANT

Local Office : 8 - 0

Claimant :	Date Of Determination : 09/12/01
[redacted]	Hearing Request Filed : 09/14/01
SSN : [redacted]	Hearing Date : 10/24/01
	Location Of Hearing : WORCESTER

Employer :	Original Determination :
[redacted]	AFFIRMED [X]
	OVERTURNED [ ]
	OTHER [ ]
EMP # : [redacted]	

Appearances :

Claimant [X] Employer [X]

Claimant's Rep/Attorney [X] Employer's Rep/Attorney [ ] Interpreter [ ]

****

You may Appeal this Decision to the Board of Review.
The last date to file an Appeal is NOVEMBER 28, 2001

****

MASSACHUSETTS DIVISION OF EMPLOYMENT AND TRAINING

Hearings Department
West Central Regional Office
88 Industry Avenue
Springfield, MA 01104
Phone: 413-452-4700
Fax: 413-784-1309
TDD: 1-800-438-0471

DECISION

DOCKET NUMBER: [redacted]

I. STATUTORY PROVISION(S) AND ISSUE(S) OF LAW:

MGL Chapter 151A, §§**25(e)(1) & (e)(2)** - Whether there is substantial and credible evidence to show that the claimant left work voluntarily with good cause attributable to the employer or its agent, or involuntarily for urgent, compelling and necessitous reasons, or by discharge 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.

II. FINDINGS OF FACT:

1. The claimant was employed full-time from 1988 through 8/21/01 as an automotive technician for the employer, an automotive dealership.

2. The claimant was discharged on 8/21/01 by the employer

3. The employer issues each employee a copy of its rules and policies. The claimant did receive a copy which he signed an acknowledgement of receiving such on 11/6/00.

4. Violation of policies is grounds for immediate dismissal in cases of "refusal to perform work assigned by supervisor."

5. The claimant had been warned prior about his conduct after he had urinated in the company parking area.

6. The employer had reviewed with the claimant their expectations and rules in March or April 2001 in an effort to get things working smoother.

7. The claimant was paid flat rate based on the job. If he finished the job sooner, he still was paid for the time indicated under the rate system.

8. On 8/20/01, the claimant was approached by his service manager and told that he was needed for an alignment as a vehicle had been promised to a customer that night.

9. The claimant asked if someone else was available to do it and was told no, he needed to do it.

10. The service manager asked the claimant if he was refusing to do the job and the claimant indicated that he was.

11. The service manager indicated the job needed to be done. The claimant again indicated he would not stop and do it.

12. The service manager called the service director at the main office and it was determined that the service director would come and help the service manager handle the situation as the service manager was new.

13. The service director came to the work location after finishing some business only to find that the claimant had left early for the day without any permission or reason provided.

14. The claimant had been approached by another manager about taking care of a flat tire for a customer and decided that the job he was doing and the tire was more important that the alignment. He did not tell the service manager of this conflict or the other manager.

15. The claimant was terminated on 8/21/01 at about 10:30 AM after starting work at 8 AM.

III. CONCLUSIONS & REASONING:

Both parties were present at the hearings. The claimant was represented.

The claimant did not leave work voluntarily. Therefore, Section 25(e)(1) of the Law does not apply in this case.

In cases involving 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's discharge was attributable to deliberate misconduct in willful 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 testimony and evidence in this case did establish that the claimant was terminated for a violation of an enforced company policy regarding "refusal to perform work assigned by supervisor." The claimant's testimony was not found to be credible in light of the employer's testimony to the contrary. Further, the claimant was aware of the policy having been given a copy of it. He had been made aware that this type of action would result in disciplinary action.

While he may not agree with the degree of discipline, his actions must be considered a knowing violation. Therefore, the claimant is subject to disqualification under Section 25(e)(2) of Law.

IV. DECISION:

The determination is affirmed.

The claimant is subject to disqualification for the week ending 8/26/01 and until he has worked for eight weeks earning an amount equal to or in excess of his benefit rate in each week.

HEARINGS DEPARTMENT

BY: Michael Boduch/llr
REVIEW EXAMINER

COPIES TO:

Claimant
Claimant's Atty.
Employer
Local Office
File