



COMMONWEALTH OF MASSACHUSETTS
DIVISION OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. (617) 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

**DECISION
OF
BOARD OF REVIEW**

Client
represented by
Minsu Longjurn,
GBLS

In the matter of:

Appeal number: **BR-92307**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

c/o Jon-Jay Associates, Inc.
P.O. Box 779
Lynnfield, MA 01940

EMP. # 72-000010

On August 24, 2004, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Commissioner's representative on November 14, 2003, January 5, 2004, April 14, 2004, May 14, 2004, May 18, 2004, and May 27, 2004.

On March 19, 2004, the Board allowed the claimant's application for review of the Commissioner'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 Commissioner to take additional evidence and to make further findings of fact. The Commissioner returned the case to the Board on July 9, 2004.

The Board has reviewed the entire case to determine whether the Commissioner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The appeal of the claimant from a decision of the Commissioner which concluded:

The claimant did not quit his employment. Therefore, Section 25(e)(1) of the Law does not apply in this case.

In accordance with Section 25(e)(2) of the Law, the burden is upon the employer to establish by substantial and credible evidence that the discharge of the claimant was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule of the employer or due to deliberate misconduct in wilful disregard of the employer's interest.

The claimant and employer offered competing contentions of the supervisor and claimant swearing at each other and whether the claimant reported to work on June 17, 2003. These contentions are not relevant, however, as they occurred after the incident that led to the claimant's discharge.

The employer had a rule of conduct that employees should not commit insubordination. The claimant was aware of this rule of conduct as it was posted on bulletin boards that were next to areas where the keys employees needed for their work were kept, and the claimant testified at the hearing that he understood he was to follow the directions of his supervisors. This rule of conduct regarding insubordination was reasonable because the employer's basic operations could not

be completed when the orders of supervisors were refused. But, the employer did not uniformly enforce this rule of conduct. The claimant had refused an assignment in the past and not been discharged. Moreover, the employer disciplined other employees who have been insubordinate based on its assessment of how extensive the insubordination was and what prior discipline the employee had received regarding all the employees' prior infractions of its rules of conduct.

As such, it cannot be concluded that the discharge of the claimant was based on a knowing violation of a reasonable and uniformly enforced policy or rule of the employer. The only issue to be decided, then, is whether the discharge of the claimant was due to deliberate misconduct in wilful disregard of the employer's interest.

The employer expected its employees to accept assignments given them from supervisors. The claimant was aware of this expectation as a prohibition on insubordination was posted on bulletin boards that were next to areas where the keys employees needed for their work were kept, and the claimant testified at the hearing that he understood he was to follow the directions of his supervisors. This expectation was reasonable because the employer's basic operations could not be completed when the orders of supervisors were refused.

Finally, there is a lack of substantial and credible evidence to establish any mitigating factors to excuse the claimant's compliance with the reasonable expectation of the employer. While the claimant was fearful of working with A. because of the prior treatment he had received from A. — namely the December 2002 incidents — the mere fact that he was to be reassigned to A. does not establish that such treatment was reasonably imminent. Furthermore, the claimant alleged that A. had in the past unfairly disciplined him for being late to work when others were just as late without any discipline from A. The only warning in the record for attendance, however, was for failing to notify A. regarding the claimant's tardiness. As such, there is no support for this allegation. The claimant also contended that given the difficulty the claimant had with A., as evidenced by the union meeting regarding the claimant's future assignments with A., the claimant had some justification to refuse the assignment. There is nothing in the record, however, to establish that the employer had indicated to the claimant at this meeting that there would be no future assignments with A.

Therefore, the employer has established by substantial and credible evidence that the discharge of the claimant was due to deliberate misconduct in wilful disregard of the employer's interest.

Accordingly, the claimant is subject to disqualification and is denied benefits.

The claimant is not entitled to receive benefits for the week ending August 16, 2003, until he has had eight (8) 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 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be

The Commissioner's representative held hearings on November 14, 2003 and January 5, 2004. Both parties appeared at each hearing. After reviewing the record, the Board remanded the case to the Commissioner to take additional evidence and to make further findings of fact. The Commissioner's representative held remand hearings on April 14, 2004, May 14, 2004, May 18, 2004, and May 27, 2004. Again, both parties attended each of the proceedings. The Commissioner's representative then issued the following consolidated final findings of fact:

1. The claimant worked for the employer from October 2000 until June 24, 2003, when he was discharged.
2. The employer discharged the claimant for refusing a work assignment on June 16, 2003.
3. The employer provides cleaning services at a local university. The claimant was one of the employees who did that cleaning.
4. The claimant began working for the employer on a part-time schedule. During the summer of 2002, the claimant switched to a full-time schedule.
5. The claimant also began working at a facility, which for the sake of clarity in these findings will be called L., at this time. L. was part of the employer's river houses complex.
6. The claimant is a member of a bargaining unit represented by a labor union.
7. The employer has rules of conduct posted on bulletin boards. These bulletin boards are next to areas where the keys employees need for their work are kept.
8. On the posting of the employer's rules of conduct, it states that infraction of these rules of conduct may result in disciplinary action by the employer, including termination of employment. "Insubordination or other disrespectful conduct" is listed as one such infraction.
9. The employer has this rule of conduct because its basic operations are not completed when the orders of supervisors are refused.
10. The claimant understood that he had to follow the directions of his supervisors in regards to his cleaning responsibilities.
11. Prior to the incidents at issue here, employees other than the claimant have refused assignments from their supervisors. The employer has disciplined these employees based on its assessment of how extensive the insubordination was and what prior discipline the employee had received regarding all the employees' prior infractions of its rules of conduct.
12. On September 6, 2001, the claimant received a written warning from the employer regarding his refusal of an assignment on July 31, 2001.
13. On September 2 or 3, 2002, the claimant injured the third and forth [sic] fingers of his left hand when a recycling bin fell on them.
14. The claimant was treated for the injury at a health clinic on September 3, 2002.
15. The claimant informed the employer of the injury on September 4, 2002.

17. On September 10, 2002, the claimant visited the clinic's occupational health unit. It advised the claimant that he could return to work that day with the restrictions that he not lift anything more than twenty pounds and do no pushing or pulling with weight greater than twenty pounds. The claimant had a follow-up appointment scheduled for September 19, 2002.
18. It is unknown what further treatment the claimant received for the injuries to his fingers.
19. On November 7, 2002, the claimant asked his supervisor at the time, who for the sake of clarity in these findings will be called A., if he could leave work early because he felt poorly. The claimant made this request soon after arriving to work that day. The claimant did not explain the source of his poor feelings, namely an illness in his left knee and left toe, and the claimant had not finished his cleaning assignments when he asked for permission to leave work early.
20. The claimant's knee and toe had first started bothering the claimant approximately two weeks prior to November 7th, and at this point the claimant had a fever and could not walk without pain.
21. A. initially refused the claimant permission to leave work and said that if the claimant left work he had better not come back.
22. It is unknown why A. initially refused the claimant permission to leave work and why A. told the claimant that if the claimant left work he had better not come back.
23. After a few hours, the claimant had a co-worker request permission from A. for the claimant to leave work early. The co-worker attained that permission, and the claimant then left work.
24. The claimant reported to a local clinic, but because of a lack of medical supplies and concern over the claimant's condition, the clinic transferred the claimant to a hospital where the claimant was treated for gout.
25. The claimant was released from the hospital on Saturday, November 9, 2002.
26. The hospital cleared the claimant for work but indicated that his movement, including such basic tasks as walking, would be limited for a week, and so he needed to be allowed to rest frequently and attain follow-up care from his primary care physician.
27. Because of his gout, the claimant did not work from November 11, 2002, through November 15, 2002. The claimant returned to work on November 18, 2002.
28. A. did not apologize to the claimant for refusing to honor the claimant's request to seek medical treatment.
29. It is unknown why A. did not apologize.
30. On November 18, 2002, because of delays in the train the claimant and co-workers took to work, the claimant and those co-workers were late to work by thirty minutes.

32. Later in the day on November 21st, the claimant told his crew chief that he was leaving work early to speak with a union representative about the warning he had received, and the crew chief granted the claimant permission to leave.
33. On November 21, 2002, A. completed an accident report for the employer in which he indicated that the claimant's medical problems in November 2002 constituted a transfer of the injury to the claimant's fingers from September 2002 to the claimant's knees.
34. A. indicated on the accident report that the claimant missed work from November 11, 2002, to November 15, 2002.
35. On November 27, 2002, the claimant received a warning for leaving work early at 2 PM without permission on November 21, 2002.
36. On December 2, 2002, the claimant arrived late to work by less than fifteen minutes because of delays in bus service. He also left work at noon to pay bills that were due after getting permission to leave from his crew chief.
37. On December 3, 2002, the claimant received a warning for being late to work the previous day and for not notifying his supervisor, A., when he left work early at noon on the previous day. Others who were late to work on December 2nd did not receive warnings from the employer.
38. Because of this warning, the claimant was suspended from work from December 4th to December 6th.
39. It is unknown why A. singled the claimant out among his co-workers for these warnings.
40. The relationship between the claimant and A. was one of employee to supervisor. The claimant believed that A. did not treat him fairly when the claimant received the three warnings after his illness in November 2002. In other respects, the claimant did not think A. was his enemy.
41. These warnings arose because of information A. supplied to his manager. The manager then issued the November and December 2002 warnings against the claimant as supervisors did not have the authority to discipline employees.
42. The manager who issued these warnings to the claimant did not threaten the claimant in regards to his immigration status.
43. When the claimant returned from the December 4th through 6th suspension, the employer reassigned the claimant to another supervisor at another part of the employer's facilities.
44. The claimant no longer reported to A. as a result of this reassignment and had no further interactions, relationship, or contact with A. until June 16, 2003.
45. The employer made this reassignment because of the recent spate of warnings issued against the claimant and because one of the employer's staff in the river houses complained about the quality of work the claimant did.
46. At some point in 2003, the claimant was reassigned to yet another part of the

47. Around two weeks prior to June 16, 2003, the claimant, along with a union representative, met with the employer to discuss future assignments with A. At this meeting, the employer said that it would try to keep the claimant from being assigned to A. again but that it could not guarantee that an assignment with A. might not happen in the future.
48. At this point, the claimant did not want to work for his former supervisor because of what happened to him on November 7, 2002.
49. In June 2003, the employer decided to transfer the claimant to the river houses despite the agreement with the union to try to keep the claimant from being assigned to A. again.
50. The claimant was one of four to five others from the main yard that were being transferred to the river houses. Personnel from other parts of the employer's facilities were transferred as well, and the employer also hired additional personnel to work at the river houses.
51. There was a lot of work that needed to be done at the river houses because of graduation ceremonies, the departure of the senior class from the facilities there, and preparations needed for summer classes.
52. This reassignment to the river houses was most likely going to be temporary until the needed work was completed.
53. The employer selected the claimant for this transfer because he was at the main yard on a temporary assignment, and it was operationally easier for the employer to reassign someone on a temporary assignment than to remove someone with a permanent assignment whose work would then be disrupted for a short period of time.
54. The manager who re-assigned the claimant to work with A. was not trying to make the claimant's life more difficult.
55. On June 16, 2003, the claimant's supervisor at the time, who for the sake of clarity in these findings will be called M., told the claimant that he was being reassigned to work for A. The claimant refused the assignment. M. told the claimant to begin working for A. twice more, and twice more the claimant refused the assignment.
56. During each request, M. asked the claimant to report to a specific building, which for the sake of clarity in these findings will be called W., L2., and Q. These three buildings were also part of the employer's river houses complex.
57. When M. requested the claimant to report to L2., she did so at the suggestion of A., whom she called while meeting with the claimant.
58. The claimant replied that he did not know where W., L2., and Q. were because he did not want to work for A.
59. M. made these requests to the claimant through a crew chief who served as a translator. The claimant's responses were in turn translated to M. by the crew chief.
60. The crew chief told the claimant as part of his translation that M. wanted the claimant to report back to the river houses to work for A.

62. The crew chief did not mistakenly translate "river houses" as "houses across the river."
63. At one point, the claimant explained to M. that he had experienced problems with A. in the past and did not want to work for him again.
64. M. did not indicate to the claimant that going home rather than accepting the assignment with A. would sever his employment.
65. On the third request, M. told the claimant to accept the assignment or go home. The claimant left work then and went home.
66. The claimant went home rather than accept the assignment with A. because he did not want to work again for A. It is not known why the claimant specifically had this desire to not work for A. at this time.
67. The claimant believed that the employer might discipline him because he went home, such as a week-long suspension, but he did not think that his job was in jeopardy because of his decision to go home.
68. After the claimant arrived home, he spoke with his spouse about what had happened. After this discussion, the claimant thought his job with the employer might be in jeopardy and called A. about reporting to work the next day.
69. The claimant returned to work on June 17, 2003, to L2.
70. The claimant did not report to A. on June 17th, however, but to a crew chief. As a result, A. did not immediately learn that the claimant had returned to work that day.
71. At some point, A. realized that the claimant had returned to work. After consulting with his manager, A. sent the claimant home when the claimant reported to work on June 18, 2003.
72. Beginning on June 18th, the claimant was suspended pending an investigation into what had happened on June 16, 2003.
73. On June 24, 2003, the claimant, accompanied by a representative of his union, met with the employer. At this meeting, the employer informed the claimant that his employment was terminated.

CREDIBILITY ASSESSMENTS:

The claimant testified that he was disciplined for leaving work early on November 21, 2002, and on December 2, 2002, even though he had permission from crew chiefs to leave work. While doubts are raised about this testimony, as the claimant did not seek out any permission directly from A. for leaving work on these occasions, but when gravely ill on November 7, 2002, he did not leave work without first securing permission from A. to do so, the crew chiefs involved did not testify in regard to these events. As such, the claimant's specific testimony about the events of November and December 2002 and the associated warnings he received survives the general refutation A. offered on behalf of the employer.

Other testimony from the claimant did not fare so well, as the claimant offered contradictory and confusing testimony that made it difficult if not

The claimant accused his supervisor's manager of trying to make the claimant's life more difficult by reassigning him back to the river houses and for threatening the claimant in regards to his immigration status. The first accusation was not credible as the claimant offered nothing but his own belief in support of speculation regarding the motivation of the manager. The second accusation was not credible as it had not been made at all over the course of the original hearing and there was no circumstantial or direct evidence outside of the claimant's testimony in support of the allegation.

The claimant made two allegations to explain why he went home on June 16, 2003, rather than accept the new assignment offered to him. The claimant alleged that the location of the new assignment discussed on June 16, 2003, was not interpreted correctly — as "houses across the river" rather than the "river houses" — and he did not know where the houses across the river were. The claimant also alleged that he did not accept the new assignment because he did not want to report to work with A. and, when given a choice between reporting to A or going home, he chose to go home.

These allegations contradict each other. If the claimant knew he was to report to A. but did not want to, then he at least knew where to report because of his prior work with A. If the claimant did not know where to report because of poor translation, then his prior experience with A. did not matter in his decision to go home and not accept the reassignment.

On its face, moreover, the allegation regarding poor translation is not credible for the following reasons. First, the claimant never raised this concern during the original hearings. Second, the claimant refused to explain why or what led him to believe that poor translation had occurred on June 16th. Finally, the claimant refused to explain what was the linguistic difference between the phrases "river houses" and "houses across the river" that had allegedly confused him.

As such, it is concluded that the claimant decided to go home rather than accept the new assignment because the new assignment meant reporting to A. again. In regards to this issue, the claimant once more provided conflicting testimony, and as such these conflicts make it impossible to identify the claimant's specific thinking in this matter.

At the original hearings, the claimant testified that he did not want to work for A. because of what happened with A. on November 2002, and because he had received warnings in late 2002 for the same conduct — being late to work — allegedly committed by his co-workers. At the remand hearings, the claimant at first explained that he did not want to work again with A. because A. had initially denied him permission to leave work to go to the hospital on November 7th. The claimant then testified that he did not want to work for A. because of the series of warnings he received when he returned to work after his gout flared up and not because of A.'s initial refusal to allow the claimant to leave work on November 7th. The claimant then testified on direct examination at first that he was upset with A. because A. considered cleaning the building more important than serious problems with the claimant's health. The claimant then explained that he did not want to work with A. because A. had refused him permission to leave work on November 7th, because he had received three warnings when he returned to work after his November 2002 illness, and because he feared that A. would again deny him permission to leave work and go to the hospital if he should experience another medical problem. The claimant then testified on cross that if he had not been transferred to another assignment in December 2002

Because of the internal contradictions in his testimony, all that can be concluded is that the claimant did not want to work again for A. It cannot be determined why the claimant specifically had this desire to not work for A. at this time.

The claimant also alleged that he understood his supervisor as offering him a choice between going home or reporting to A. and that he decided to go home without concern for the consequences of that decision. As with the claimant's other testimony, the claimant offered contradictory explanations for this belief, and at the remand hearing the claimant changed his explanation and beliefs from question to question. The claimant testified that he thought the employer might discipline him because he went home, by possibly giving him a week-long suspension, and that he did not think that his job was in jeopardy because of his decision to go home. He alleged that he did not know where he was supposed to go because of poor translation and chose to go home. He believed the employer offered the two options because it wanted to investigate the claimant's problems with A. At one point the claimant discussed his prior dealings with A. as the reason he decided to go home, and then he asserted that he was never told on June 16th to report to A. Finally, at the start of the original hearings, the claimant testified that he did not want to work for A. because of his November 2002 illness and that M. then told him: (1) she did not care about prior incidents; and (2) that if the claimant went home he should not come back to work as she, like A., did not want him working for her.

Given these problems in the claimant's testimony, only the testimony that fits with the claimant's actions on June 16th can be considered substantial evidence. After arriving home and speaking with his spouse on June 16th, the claimant called A. about reporting to work the next day. As such, it is concluded that the claimant had at least some concern over what would happen to his job when he chose to go home rather than report to A. as he raised the issue with his spouse and then in a call to A. The testimony from the claimant that best fits with these actions is the claimant's testimony that when he went home on June 16, 2003, he believed that the employer might discipline him because he went home, such as a week-long suspension, but he did not think that his job was in jeopardy because of his decision to go home.

In regards to the actions of A. on November 7, 2002, the credible medical documentation presented at the hearing established that the claimant was seriously ill on November 7th, went to the hospital, and then missed work from November 8, 2002, to November 15, 2002. When A. prepared an accident report about the claimant's illness, however, A. only indicated that the claimant missed work from November 11, 2002, to November 15, 2002. As such, A.'s denial of not allowing the claimant to leave work when he first requested permission is not credible in light of this medical documentation and the accident report A. completed.

Finally, the employer's denial that the claimant did not work on June 17, 2003, was not credible. The employer based its testimony on time records that, it indicated at the remand hearings, had been changed several times, and the employer did not produce any original time or attendance records at the hearings. Because of the changes in the documentation, the employer presented two different versions of what happened during June 16th through June 18th at the original and remand hearings. In light of these changes in testimony and the problems with the employer's documentation, the claimant [sic] testimony about his actions on June 17th and June 18th is considered

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

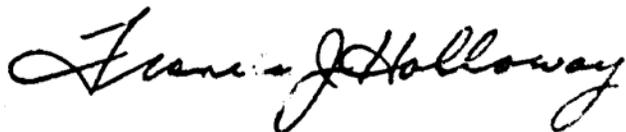
The employer discharged the claimant, a cleaner, for refusing to accept a job transfer on June 16, 2003. Although the Board does not dispute the inherent right of an employer to transfer an employee to a different on site location because of workload demands, the expectation of the employer, in this instance, was unreasonable. The transfer would have required the claimant to report to an ex-supervisor who had treated the claimant unfairly. This ex-supervisor had refused to recognize a legitimate illness besetting the claimant; he had refused to allow the claimant to seek medical treatment; he never apologized to the claimant after learning of the claimant's subsequent hospitalization; and, lastly, the ex-supervisor, when imposing discipline, treated the claimant more harshly than the claimant's colleagues.

The fact the employer transferred the claimant to another site after union intercession about the unfair treatment perpetrated upon the claimant by the ex-supervisor demonstrates the merit of the claimant's position.

When the claimant was told on June 16, 2003, that he would again have to report to his ex-supervisor, the claimant did indicate to management that he had experienced problems with this supervisor in the past and that he did not want to work for him again. Despite the claimant's protest, the claimant was told that he either accept the assignment or go home. The claimant went home. However, as the Commissioner's representative has found, "M. did not indicate to the claimant that going home rather than accepting the assignment with A. would sever his employment." Although the claimant subsequently tried to reach some type of accommodation with the employer, the employer deemed the claimant's refusal to accept the transfer warranted his discharge which was effected on June 24, 2003.

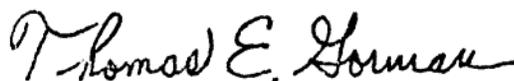
The employer has failed in its burden of proof to establish the claimant's discharge was either attributable to deliberate misconduct in wilful disregard of the employing unit's interest or that his discharge was for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer within the meaning of section 25(e)(2) of the Law cited above.

The Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending August 16, 2003, and subsequent weeks, if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF MAILING - AUG 26 2004

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 - SEP 27 2004