



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

In the matter of:

Appeal number: BR_I00360

CLAIMANT APPELLANT:

EMPLOYING UNIT:
 Staffing Solutions, Inc.
 70 Blanchard Road, #102
 Burlington, MA 01803

, S.S. "i"
 Office ..

EMP. #82-695800

On August 2, 2006, 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 April 19, 2006, and July 11, 2006.

On May 8, 2006, 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 Unemployment Insurance 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 14, 2006.

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 is from a decision of the Commissioner which concluded:

The facts in this case show that the claimant did not complete her last assignment because the client asked for her removal due to absenteeism. Therefore, the issue in this case is whether the claimant's discharge resulted from deliberate misconduct in wilful disregard of the employing unit's interest or from a knowing violation of a reasonable and uniformly enforced policy or rule unless the violation was the result of the employee's incompetence within Section 25(e)(2) of the Law.

The claimant was made aware that attendance was critical to the employer because the attendance policy was reviewed at the time of hire. The employer established the reasonableness of this policy because the employer has an obligation to service the needs of their clients. Consequently, absenteeism is burdensome and jeopardizes the employer's business interests.

The facts in this case show that the claimant was absent for an extended period and that the claimant had remained absent without notice to the client on 2/22/06. The record is silent to show that extenuating circumstances beset the claimant to mitigate the willfulness of the absenteeism. Therefore, the claimant is subject to disqualification in that the employer has shown [sic] that the claimant's discharge resulted from deliberate misconduct in wilful disregard of the employing unit's interest within Section 25(e)(2) of the Law.

9. The employer's attendance policy does not specify the number of absences that would be tolerated or result in discipline. The claimant was not aware of any number of absences that would result in discipline taken against her or that would lead to her discharge.
10. The employer determines whether the number of absences warrant termination on a case-by-case basis. Also, the number of absences which warrant termination is based upon the client's request to terminate the worker.
11. Employees are not discharged based upon the same amount of absenteeism. Discharge is determined on the client's wishes and is, therefore, discretionary.
12. The claimant was not aware that her absenteeism would cause her termination.
13. The claimant was absent during the week ending February 18, 2006 because her apartment had to be de-leaded. The Claimant could not leave her children unattended while the apartment was de-leaded. The claimant also did not wish to leave her children alone because they did not live in a safe environment. The claimant's apartment was de-leaded on February 13th and February 14th.
14. The client services manager was not aware that the claimant had called out for an entire week. The claimant picked up her last pay at the company on Monday, February 20, 2006, and did not apprise the client services manager that she did not work the prior week.
15. On Tuesday, February 21, 2006, the claimant called the client to report an absence due to illness. The claimant did not call the instant employer to report the absence. The claimant was not ill on February 21st. The claimant's 12 year old son acted up in school and was suspended for a couple of days. The claimant had to stay home with her son during the period of Suspension on February 21st and February 22nd.
16. The claimant was scheduled to report to work for 8:30 a.m. on Wednesday, February 22, 2006. The claimant was a no-call, no-show on February 22, 2006.
17. The claimant neither called the client nor the instant employer to report a reason for her absenteeism on February 22nd.
18. The claimant did not provide a call on February 22nd because her home phone was disconnected and she had no money to make a call from a public pay phone. The claimant was running out of minutes on her pre-paid calling card for her cell phone and did not use the cell phone.
19. The claimant tried to use a neighbor's phone to call the client supervisor, however. The claimant knocked on the door but the neighbor did not answer. Therefore, the claimant did not make a call to the client supervisor.
20. Around 10 a.m., February 22, 2006, the client called the client services manager to ask for the claimant's removal from the assignment because the claimant had been absent the entire week of February 18, 2006, and on Tuesday and Wednesday, February 21st and 22nd. The client asked for a replacement because work was available.
21. The client services manager contacted the claimant later during the day and informed her that she was removed from the assignment. The call was made to the claimant's cell phone. The claimant gave the client services manager no reason for her absenteeism.

22. The claimant was notified of discharge on February 22, 2006 because of absenteeism.

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:

Under G: 1. c. ISIA, § 25(e)(2), the employer bears the burden of proof in establishing by substantial and credible evidence that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or to deliberate misconduct in wilful disregard of the employing unit's interest. The employer has not met its burden.

The claimant worked for the employer on a long-term assignment as an assistant administrator at a hospital of the employer's client. The employer discharged the claimant as a result of her absence from that assignment during the week ending February 18, 2006.

The employer expected the claimant to report to her assignment as scheduled, and notify the employer's recruiter directly when absent, as set forth in the employer's policy. The employer's expectations were reasonable. The employer did not establish, however, that its policy was uniformly enforced. Discipline was determined on a case-by-case basis, and termination depended on the client's request. Moreover, the claimant had not received and was not aware of the employer's policy. She was not aware that the employer expected direct notice of absences. Instead, the claimant customarily notified the client of absences. The claimant did contact and provide notice of absence to the client throughout the week ending February 18, 2006, and on February 21, 2006, when her absences were for a compelling reason. The claimant was also absent on February 22, 2006, but she was unable to call and give notice of her absence. The employer then removed the claimant from the assignment upon the client's request.

Accordingly, the employer has not established that the claimant was discharged for either a knowing violation of a reasonable and uniformly enforced rule or policy, or for deliberate misconduct in wilful disregard of the employing unit's interest. Therefore, the claimant is not subject to the disqualifying provisions 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 February 18, 2006, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS

DATE OF MAILING_ AUG 22 2006

Kevin P. Foley
Chairman

Donna A. Freni
Member

Sandor J. Lapatin
Member

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