



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114  
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

RECEIVED  
FEB 18 2011

BY:.....

DEVAL L. PATRICK  
GOVERNOR

TIMOTHY P. MURRAY  
LT. GOVERNOR

JOANNE GOLDSTEIN  
SECRETARY

MICHAEL TAYLOR  
DIRECTOR

JOHN A. KING, ESQ.  
CHAIRMAN

SANDOR J. ZAPOLIN  
MEMBER

STEPHEN M. LINSKY, ESQ.  
MEMBER

**BOARD OF REVIEW  
DECISION**

In the matter of:

Appeal number: **BR-112730**

**CLAIMANT APPELLANT:**

**EMPLOYING UNIT:**

Athol, MA

S.S. #XXX-XX  
Hearings Docket #530817

EMP. #40-123010

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Hildie Osley, a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was removed from his position as a truck driver with the employer on August 14, 2009, after failing a sobriety test. The claimant completed a rehabilitation program and reapplied for his position on October 21, 2009, but was not reinstated. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on September 21, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 5, 2010. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issues on appeal are whether the claimant was permanently removed from his position on August 14, 2009, and whether he may be disqualified from receiving benefits as a result of failing a random alcohol test.

#### Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked as truck driver for the employer, a moving and storage company, until 8-14-09, at a daily rate of pay.
2. On 8-14-09, the employer discharged the claimant when he failed an alcohol test in violation of the employer's drug testing policy.
3. The employer has a Controlled Substances and Alcohol Use and Test [REDACTED] that comes from the Department of Transportation (DOT) [REDACTED] Compliance Manual. The policy calls for pre-employment testing, post-accident testing, random testing which also includes reasonable suspicion testing, and return-to-duty testing.
4. The employer uses a third party safety administrative company to determine who and when random testing is done. Urine and/or breathalyzer testing is used at Athol Memorial Hospital which is a licensed facility. All employees who are in safety sensitive positions are subject to random testing, and all employees who test positive for controlled substances and/or alcohol are terminated. For alcohol, the breathalyzer limit is .04.
5. The DOT regulations allow drivers to drive 90 days after a positive drug or alcohol test. The employer's insurance carrier is more stringent. The insurance company's Driver Screening Criteria states in part as follows: "Any driver who has any of the following offenses will be considered by [insurance company] as UNACCEPTABLE:" Included in the list is the following: "15) Any driver having failed a drug test or alcohol testing administered per FMCSR guidelines in the last 18 months."
6. The purpose of the policy is to ensure safety and meet DOT requirements. The claimant received and signed for the policy on 4-17-1996 and again on 10-7-1998 after it was updated. Compliance with the company's drug and alcohol policy is a condition of employment. The policy and consequences for violation were reviewed at various meetings at which the claimant was in attendance.
7. Normally, employees are notified by the dispatcher or fleet maintenance of a random test the day before the test is to be done. During the claimant's lengthy employment, he was tested numerous times and passed all tests.

8. On 8-13-09, the claimant was notified in the afternoon that he was to report to Athol Memorial Hospital between 6:30 and 7:00 a.m. for a random drug test. Athol Memorial Hospital is certified to do DOT drug and alcohol testing.
9. The night of 8-13-09, the claimant stayed in a motel. He had a dispute with his wife and had "a few beers".
10. On 8-14-09, the claimant reported for his test at about 6:30 a.m. At 6:41, the claimant had a breathalyzer test and tested .068, which was over the limit of .04. At 7:12 the claimant had a second breathalyzer test and tested .054, which was still over the limit. The claimant was shown the results and did not dispute them.
11. The testing facility called the employer, indicated that the claimant could not be allowed to drive, and asked that he be picked up. When the claimant was picked up by his supervisor, the supervisor said, "Need I say any more?" He did not specifically state that the claimant was discharged. Nor did he tell the claimant he was suspended for six months.
12. At no time during his employment, did the claimant consider himself to be an alcoholic or identify himself to the employer as an alcoholic.
13. On 8-14-09, Fleet Safety Services, Inc. sent the claimant a letter notifying him of his immediate removal from any safety position. Said letter stated in part as follows: "Before you can resume any safety sensitive function the DOT requires an evaluation by a DOT qualified substance abuse professional (SAP), the completion of any recommended counseling or education programs, a post treatment SAP evaluation and a negative result on a return-to-duty substance and alcohol test. In addition you will be subject to a minimum of six (6) follow-up tests in the year following you [sic] return to duty. The SAP has the option of requiring as many additional follow-up tests as thought necessary for a maximum period of five (5) years."
14. The claimant interpreted the 8-14-09 letter to mean that if he complied with the stated requirements, he could return to his job in six months.
15. On 8-17-09, the claimant filed a claim for unemployment benefits.
16. The claimant complied with the requirements set forth in the 8-14-09 letter and attended six AA education meetings and six individual substance abuse counseling sessions with a licensed social worker between 9-14-09 and 10-7-09.
17. In meeting with the licensed social worker, the claimant initially denied alcohol as a problem and considered his actions a mistake. During or after his sessions with the licensed social worker and AA meetings, the claimant acknowledged that he is an alcoholic.

18. On 10-1-09, the SAP counselor sent the employer a letter notifying [sic] that the claimant had successfully complied with his recommendations and had made progress sufficient to warrant return to safety-sensitive functions, and indicated that the employer could "now schedule him for his return-to-duty test".
19. On 10-21-09, the claimant wrote the employer a letter asking for his job back.
20. The claimant was not insurable with the employer's insurance carrier. He was not rehired by the employer.

#### Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact with the exception of a portion of Finding #2, as set forth below. The remaining findings are supported by substantial and credible evidence. However, we reach our own conclusions of law.

Although Finding #2 states that the employer discharged the claimant from his position as a truck driver after the claimant's sobriety test on August 14, 2009, there is insufficient evidence to conclude that he was terminated at that point. The employer's letter to the claimant on that date, which is set forth in relevant part in Finding #13, does state that the claimant was removed from his position. However, the plain language of the letter provides that if the claimant is evaluated "by a DOT qualified substance abuse professional (SAP), [completes] any recommended counseling or education programs, a post treatment SAP evaluation, and [has] a negative result on a return-to-duty substance and alcohol test[,]" he could re-qualify for his position, subject to further follow-up tests. Essentially the same terms are set forth under the employer's drug and alcohol testing policy, included in Exhibit #9, the employer's handbook.<sup>1</sup> The employer's handbook further states that the claimant could not be considered for re-qualification for a period of ninety days. Were this a permanent severance of employment, the employer would not have set forth conditions for returning to work. Based upon a fair reading of both the letter and the policy, we think the claimant's separation on August 14, 2009, is more accurately characterized as an indefinite disciplinary suspension for at least ninety days, subject to the claimant satisfactorily completing the several conditions.

Where an employer has imposed a disciplinary suspension, we decide the claimant's eligibility under G.L. c. 151A, § 25(f), which provides, in relevant part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

---

<sup>1</sup> These provisions of the employer's handbook, while not explicitly incorporated into the review examiner's findings, are part of the unchallenged evidence introduced at the hearing and placed in the record, and are thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

Application of G.L. c. 151A, § 25(f), is further explained by regulation; 430 CMR 4.04(4) provides, in pertinent part, as follows:

A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, *provided* it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, *that such suspension was for a fixed period of time* as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension. (Emphasis added.)

When the employer removed the claimant from his position on August 14, 2009, it was not for a fixed period of time. He was suspended for an indefinite period of at least ninety days. Therefore, while the claimant was out of work during this period of indefinite suspension for violating the employer's alcohol policy, he may not be disqualified under G.L. c. 151A, § 25(f).

On October 21, 2009, however, the employer severed the employment relationship. Thus, we analyze the claimant's eligibility for benefits from this point forward under G.L. c. 151A, § 25(e)(2).

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . 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 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 . . .

To be a knowing violation at the time of the act, the employee must have been "[c]onsciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r. of Employment and Training, 423 Mass. 805, 813 (1996).

According to the review examiner's findings, the decision not to reinstate the claimant was made because the claimant would not be covered by the employer's insurance carrier. This was a business decision, which the employer had a right to make. However, there is no reference in the alcohol policy that would have provided notice to the claimant that the employer's inability to provide insurance coverage after failing a breathalyzer test would subject him to discharge. At the time of the act, the claimant could not have been consciously aware of these consequences. Under Still, he may not be disqualified from receiving unemployment benefits when he was terminated as a result.

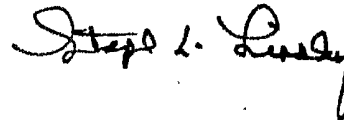
We, therefore, conclude as a matter of law that because the claimant was not terminated, but placed on an indefinite disciplinary suspension until October 21, 2009, he may not be denied benefits under G.L. c. 151A, § 25(f), up to that point in time. We further conclude that because the claimant's discharge on October 21, 2009, was not attributable to a knowing violation of a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2), he may not be disqualified thereafter.

The review examiner's decision is reversed. The claimant is entitled to receive benefits beginning the week ending August 22, 2009, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - February 17, 2011**



John A. King, Esq.  
Chairman



Stephen M. Linsky, Esq.  
Member

Member Sandor J. Zapolin did not participate in this decision.

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

**LAST DAY TO FILE AN APPEAL IN COURT- March 21, 2011**

COMMONWEALTH OF MASSACHUSETTS  
GENERAL LAWS CHAPTER 151A, SECTION 42  
APPEALS TO THE COURTS

"The commissioner or any interested person aggrieved by any decision in any proceeding before the board of review may obtain judicial review of such decision by commencing within thirty days of the date of mailing of such decision, a civil action in the district court within the judicial district in which he lives, or is or was last employed, or has his usual place of business, and in such proceeding, every other party to the proceeding before the board shall be made a defendant. If an appeal to the board of review is deemed denied pursuant to subsection (a) of section forty-one because the board failed to act upon such appeal, judicial review may be obtained by commencing a civil action as prescribed in the preceding sentence, except that the time for commencing such action shall run from the date such appeal is deemed denied. The commissioner shall be deemed to have been a party to any such proceeding before the board. The complaint shall state the grounds upon which such review is sought. The plaintiff shall serve a copy of the complaint upon each defendant by registered or certified mail, return receipt requested, within seven days after commencing the action for judicial review.

Except as otherwise provided in this section, or if inconsistent with the provisions of this section, such proceeding shall be governed by the Rules of Civil Procedure for the district courts and the municipal court of the city of Boston. The findings and decisions of the board shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. Any proceeding under this section shall be given precedence over all other civil cases.

An appeal may be taken from the decision of the justice of the district court directly to the appeals court. Notice of appeal shall be filed in the office of the clerk of the district court within thirty days after entry of the judgment by the clerk. The completion of such appeal shall be made in accordance with the Massachusetts Rules of Appellate Procedure. Benefits shall be paid or denied in accordance with the decision of the trial court justice during the pendency of such appeal."

The commissioner shall make every reasonable effort to file with the court a certified copy of the decision of the board of review, including all documents and a transcript of all testimony taken at the hearing before said board or the commissioner as the case may be, within twenty-eight days after service of the complaint upon the commissioner or within twenty-eight days after the commencement of the action for judicial review by the commissioner. Each defendant shall file an answer within twenty-eight days after receipt of the complaint, except that the commissioner may, by way of answer, file in court within such time period a certified copy of the record of the proceeding under review.

**IMPORTANT**

This notice contains information about your rights or obligations, and should be translated immediately. If you need a translator, ask for a listing of translation services at your DUA office.

**ВАЖНОЕ СООБЩЕНИЕ**

В этом сообщении содержится информация о Ваших правах и обязанностях, и оно должно быть срочно переведено Вам. Если Вам нужен переводчик, попросите список переводческих компаний в своем DUA офисе.

**IMPORTANT**

Este aviso incluye información sobre sus derechos y obligaciones, y debe traducirse de inmediato. Si necesita un traductor, solicite el listado de servicios de traducción en la oficina de la DUA correspondiente.

**IMPORTANTE**

Questo avviso contiene informazioni sui Suoi diritti ed obblighi e deve essere tradotto immediatamente. Se ha bisogno di un traduttore, chieda l'elenco dei servizi di traduzione presso la DUA.

**IMPORTANTE**

Este comunicado contém informações sobre os seus direitos ou obrigações. Ele deve ser traduzido prontamente. Se precisar de um tradutor, solicite no escritório DUA mais próximo uma lista dos serviços de tradução.

ສຳຄັນ  
ງູ້ສະບັວຍລາຍລະອຽດກ່ຽວກັບທ່ານ, ເຊິ່ງ ບຸກຄົນອື່ນໄດ້ມາ  
ສຳຜັດບັນນີ ປະກອບດ້າງ ໆ ກັບສິດທິລະບົບຂອງຕາງ ໆ  
ຂອງທ່ານໄດ້ຮັບສິ ໂລດ. ຖ້າ ທ່ານຕ້ອງການໃຊ້ຜົນຂອງພາສາ, ໃຫ້ຂໍ  
ລາຍການປະກອບຂອງພາສາທີ່ ມີ ໃວ່ໃຫ້ໃຊ້ໃນນັ້ນ. ນາມຕ້ອງການ  
DUA ຂອງທ່ານ

**សំខាន់**

ប្រសិនបើមានព័ត៌មានអំពីសិទ្ធិ ឬ កាតព្វកិច្ចរបស់អ្នក ។ សូមអោយគេបកប្រែឯកសារនេះ  
ឆាប់រហ័ស ។ ប្រសិនបើអ្នកត្រូវការបកប្រែសូម សួរការិយាល័យសេវាអប់រំសម្រាប់សិស្ស  
ដែលមានមតិយល់ឃើញ DUA របស់អ្នក ។

**ENFOOTAN**

Nôti sa a genyen enfòmasyon sou dwa w oubyen obligasyon ke ou genyen, epi ou fèt pou ou fè tradwi l kounyè a. Si ou bezwen ou moun ki pou tradwi pou ou, mande ou lis ki genyen sèvis ke yo ofri pou tradiksyon nan biwo DUA ke ou konn ale a.

**QUAN TRỌNG**

Thông báo này bao gồm thông tin về quyền hạn hoặc trách nhiệm của quý vị và phải được thông dịch ngay. Nếu cần một thông dịch viên, hãy yêu cầu một danh sách dịch vụ thông dịch tại văn phòng DUA của quý vị.

**重要**

本通知包含有關閣下權利或義務的資訊，應即刻翻譯。如果閣下需要翻譯人員，請到閣下的DUA辦事處要求一份翻譯社的名單。

