



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

In the matter of:

Appeal number: **BR-113575**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

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

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Janna Goldstein, a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged on October 30, 2009. He filed a claim for unemployment benefits with the DUA but was denied benefits in a determination issued by the agency on December 31, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on March 15, 2010. The Board accepted the claimant's application for review and provided the parties with an opportunity to submit reasons for agreeing or disagreeing with the board's decision. Only the employer responded. Our decision is based on our review of the entire record including the recorded testimony and evidence from the DUA hearing, the review examiner's decision, the claimant's appeal and the employer's response.

Benefits were denied after the DUA review examiner determined that the claimant was disqualified, under G.L. c. 151A, § 25(e)(2), for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The issue on appeal is whether the claimant's positive drug test result constituted a knowing violation knowing of a reasonable and uniformly enforced policy of the employer.

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 a special needs van driver for the employer from July 14, 2003, until October 30, 2009, when he was discharged.
2. The claimant worked a varied part time schedule of hours.
3. The claimant was discharged for testing positive for marijuana on a drug test administered on October 27, 2009.
4. The employer maintains a policy entitled "Drug Free Workplace Policy" which states, "The following activities are prohibited: having possession of, being under the influence of or having in one's system illegal drugs..."
5. The policy provides the employer with measures to ensure employees' drug and/or alcohol use does not jeopardize the workplace or otherwise negatively affect the general public or the clients served.
6. The claimant was aware of the policy as it was presented to him at his time of hire and he signed for receipt of it on July 10, 2003.
7. The employer has terminated all employees who have had a positive drug test result.
8. On October 26, 2009, the claimant's supervisor received a complaint that the claimant offered illegal substances to a client in exchange for sexual favors. While the supervisor was not convinced this actually took place, it required him to call the claimant into his office and direct him to take a "for cause" drug test. The claimant denied the allegation but agreed to take a drug test the following day.
9. On October 27, 2009, the claimant went to Quest Diagnostics and had a drug test via a urine sample.
10. After 28 hours, the employer gave the claimant a number to call and when the claimant called, it was the lab, which told the claimant that his test came back positive for marijuana.
11. The results came back to the employer on October 28, 2009 after being reviewed by a certified Medical Review Officer stating that the claimant tested positive for marijuana.

12. The employer decided to terminate the claimant upon learning this information. The claimant was sent a termination letter dated and effective on October 30, 2009.
13. The claimant did not deny using marijuana while off duty and off company property at a party on a Saturday night. The reason the claimant used marijuana is now (sic) known.
14. The claimant filed for unemployment benefits on November 5, 2009, effective November 1, 2009.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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....

In a discharge case, the employer bears the burden of proof to show that the claimant should be disqualified from receiving benefits.

The employer discharged the claimant after learning that he tested positive for marijuana use in on October 28, 2009. The employer's policy prohibited employees from reporting to work with alcohol or an illegal drug in the employee's system in any amount.

We recognize that the employer had a reasonable interest and an inherent responsibility to protect its clients from employees whose ability to perform their duties is impaired due to alcohol or illegal drug usage. However, in this case, the employer has failed to establish that the application of a policy prohibiting "any amount" of such substances is reasonable, for the purposes of G.L. c.151A. The hearing record contains no evidence to show that the claimant was under the influence or impaired by marijuana use when at work, or that his off-duty use during a prior weekend had any impact on the employer's operations. See Thomas O'Connor & Co., Inc. v. Commissioner of Employment and Training, 422 Mass. 1007 (1996) (rescript).

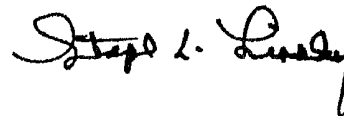
We, therefore, conclude as a matter of law that the employer failed to meet its burden to prove that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The review examiner's decision is reversed. The claimant is allowed benefits for the week ending April 11, 2009 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - December 23, 2010



Stephen M. Linksy, 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 - January 24, 2011

LH/th

