



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

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25(e)(2)

Lapse in Judgment

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BOARD OF REVIEW
DECISION

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MEMBER

STEPHEN M. LINSKY, ESQ.
MEMBER

In the matter of:

Appeal number:

BR-114384

CLAIMANT APPELLANT:

EMPLOYING UNIT:

Bright Horizons Children's Center
c/o TALX Employer Services
P.O. Box 1160
Columbus, OH 43216-1160

S.S. #
Hearings Docket # 548334

EMP. # 60-062450

Introduction and Procedural History of this Appeal

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

The claimant was discharged from her position with the employer on January 13, 2010. She filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on April 2, 2010. 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 May 18, 2010. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, 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. Neither party responded. Our decision is based upon our review of the entire record.

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The issue on appeal is whether the claimant, a childcare worker, engaged in deliberate misconduct when she gave a child a bottle with a faded, illegible name label.

Findings of Fact

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

1. The claimant worked full-time as an infant teacher for the employer, a childcare center, from 2/28/08 until her separation on 1/13/10. The claimant earned \$12 an hour.
2. The claimant was discharged for violating the employer's infant feeding policy.
3. The employer maintains an infant feeding policy. The policy requires that employees verify that bottles are properly labeled with the child's name, date of preparation, expiration date and color code. An employee is required to check the bottle upon removing it from the refrigerator to make sure it is the correct bottle. The employee is required to check the label again before marking her initial on the child's communication form, and then warm the bottle for consumption. Once the bottle is warmed, the employee is required to check the bottle once again to make sure it is the correct bottle. Finally, the employee is required to perform a last verbal check with a coworker to ensure the correct bottle is being fed to the child.
4. The infant feeding policy also states that unlabeled bottles and bottles not labeled with the child's full name are not to be used.
5. The purpose of the employer's policy is to ensure the health and safety of the children by feeding the correct bottle to each child.
6. The employer enforces their infant feeding policy through a series of disciplinary steps. An employee is issued a written counsel upon the first violation of the policy and a written reprimand upon the second violation of the policy. If an employee violates the policy a third time, she is terminated.
7. The employer has not had an employee commit a third infant feeding policy violation. The employer would terminate an employee who committed a third violation.

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8. The claimant was aware of the infant feeding policy because she received a copy of the employee handbook containing the policy. In addition, the claimant was aware of the procedure as the result of her daily job duty of feeding infants and a prior warning for violating the policy.
9. On 9/18/09, the claimant received a written reprimand for violating the infant feeding policy. Although her first offense, the claimant was issued a written reprimand instead of a written counsel based on the severity of the offense. The employer deemed her first offense worthy of written reprimand because she failed to report the feeding error to management, as was the employer's policy.
10. The claimant was issued the written reprimand by her supervisor. The claimant was told by her supervisor on 9/18/09 that another violation of the infant feeding policy would result in her termination.
11. The only warning the claimant received for violating the infant feeding policy was on 9/18/09. Over the course of the claimant's employment she received several other warnings for policy violations unrelated to the employer's infant feeding policy.
12. As a result of the claimant's continued policy violations, the claimant's supervisor issued the claimant a memorandum of final warning on 10/30/09. The claimant was informed that failure to follow any of the employer's policies or failure to perform the duties of her job would result in immediate termination.
13. On 1/12/10, the claimant gave a child the wrong bottle. The claimant gave the child a bottle labeled with a purple sticker, which was the child's assigned sticker color. The label on the bottle given to the child, however, was faded making the child's name illegible. The claimant took a bottle marked with a purple sticker and fed the bottle to the child even though the label was illegible and the claimant could not verify the appropriate child's name on the bottle.
14. The claimant's coworker discovered the error when she went to feed the child whose bottle was given to the first child by the claimant. The coworker contacted management to report the error.
15. On 1/13/10, the claimant was discharged for violating the infant feeding policy.

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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 deliberate misconduct in wilful disregard of the employing unit's interest, . . .

In this case, the claimant was aware of the employer's expectation that she comply with the infant feeding policy, and refrain from feeding children with unlabeled or only partly labeled bottles. The claimant had previously received a warning for failing to comply with the infant feeding policy. Nonetheless, the claimant gave a child a bottle with an illegible name on the label. The color code on the bottle matched the one assigned to the child, but the bottle belonged to a different child with the same assigned color code.

In order to deny benefits, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Director of Div. of Employment Security, 377 Mass. 94 at 97(1979). Thus, "the critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Id.

Here, there is no indication in the record that the claimant intended to harm the employer when she gave the child a bottle with an illegible name on the label. The claimant thought she was giving the child the correct bottle because the color code and shape of the bottle with the faded label were the same as the child's bottle.¹ Although the best course of action would have been to refrain from using a bottle with a faded label, as required by the employer's infant feeding policy, the claimant's failure to do so, at most, shows a good faith lapse in judgment and/or carelessness, rather than intentional disregard of the employer's interest, and, therefore, the claimant is not disqualified under § 25(e)(2). See Garfield, 377 Mass. at 97.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

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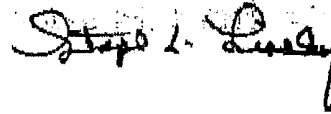
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The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 27, 2010, and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 9, 2011



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-April 8, 2011

sv/rb

