



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

*** CORRECTED DECISION ***
(March 11, 2011)

In the matter of:

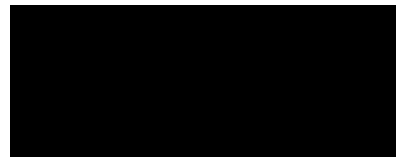
Appeal number:

BR-110099

CLAIMANT APPELLANT:



EMPLOYING UNIT:



S.S. # [REDACTED]
Hearings Docket # 514216

EMP. # [REDACTED]

Introduction and Procedural History of this Appeal

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

The claimant became separated from employment in January, 2009. She filed a claim for unemployment benefits with the DUA and was approved in a determination issued by the agency on March 13, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner overturned the agency's initial determination and denied the claimant benefits in a decision rendered on May 4, 2009. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant left her employment without good cause attributable to the employer and, thus, was subject to disqualification, pursuant to G.L. c. 151A § 25(e)(1). After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence on the issue of the claimant's alcoholism. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

Upon reviewing the recorded testimony and evidence from the remand hearing, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision, and, specifically, whether a decision should be rendered under G.L. c. 151A, § 25(e)(3). Only the claimant responded. Based upon the claimant's written response, we remanded the case a second time for additional evidence to clarify the chronology of the claimant's separation, conviction, and loss of driver's license. Both parties attended the second remand hearing, and the review examiner subsequently issued a final set of consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the final set of consolidated findings.

The issues on appeal are whether the claimant's separation is attributable to the claimant's inability to control her alcohol addiction, and, if so, whether it constitutes mitigating circumstances for awarding benefits.

Findings of Fact

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

1. The claimant applied for benefits on January 19, 2009. The Division found the claimant eligible for benefits on March 13, 2009. The employer appealed on March 20, 2009.
2. The claimant worked for the employer from August 24, 2004 to October 2008. The claimant worked as a full time program director. She managed a group home for high functioning developmentally disabled individuals in Andover, MA. The home contained six residents.
3. Part of the claimant's job responsibilities required taking the residents to appointments. The claimant needed a valid driver's license and vehicle to accomplish this part of her job.
4. The claimant quit her employment. The claimant failed to return to work from a leave of absence on January 5, 2009. The claimant failed to return to work, because she did not possess the license required to perform the work.
5. At 11:40 p.m. on October 13, 2008, the claimant had an accident in Sandown, NH. At the time of the accident, the claimant did not perform services for the employer.
6. The claimant failed to take a blood alcohol test sometime after midnight. The claimant refused to take a blood alcohol test after an ambulance took her to a hospital. The claimant went from the accident scene to the hospital sometime after 11:51 p.m. (The claimant did not remember the time that the officer asked her to

take the test. The police accident established the ambulance arriving at 23:51. The police report indicated that the officer did not ask the claimant to take a blood test until she had arrived at the hospital. The officer entered the claimant's refusal to acknowledge her rights as a refusal to take the test.)

7. The claimant had a blood / alcohol level three times over the legal limit in New Hampshire. The claimant could have lost her license for two years regardless of the failure to take the test. The claimant lost her license for one year on January 21, 2009.
8. The claimant refused to take the blood test, because she had an unclear state of mind. She had become frightened and scared by the accident. The claimant had no awareness that consequences might occur from the refusal to take a test. Her judgment was impaired. She had become terrified and did not think clearly.
9. Prior to the accident, the claimant had consumed about 13 drinks. The claimant consumed five, 8 ounce glasses of wine at home. She then went to a bar about 6:00 p.m. Between 6:00 p.m. and 11:00 p.m. the claimant consumed five Bacardi and cokes as well as three shots of whiskey.
10. At the time of the accident, the claimant did not realize or know that she had consumed alcohol in excess of the legal limit for driving.
11. Because the claimant refused to submit to a test of her blood, urine or breath, she lost her license 30 days after the date of service. The Sandown Police Department served the claimant with the required notice on October 13, 2008.
12. After the accident, the claimant's husband contacted the employer and requested a leave of absence. The claimant went on leave under provisions of FMLA. The claimant is an alcoholic and has suffered from alcoholism for 11 years.
13. After the accident in October 2008, the claimant went to a hospital for nine days of detoxification. She then went to rehabilitation center for one month, and then had an evaluation done by the state of New Hampshire. The claimant also attended driver's education classes. The claimant had mandated aftercare of attending AA meetings three times per week and abstaining from alcohol. The claimant also had to attend counseling. She did not have insurance and has not done so.
14. The claimant completed her classes during the week ending April 18, 2009.
15. The claimant has complied with these requirements with the exception of counseling. The claimant has found her marital relationship to have improved. Similarly, she has a more peaceful relationship with her children. The claimant has felt better mentally and physically.

16. The claimant had a prior conviction and loss of license for driving under the influence occur on January 29, 2003.
17. On January 5, 2009, a meeting occurred. The employer had allowed the claimant time under FMLA after the husband's call. It expired at this time. The employer learned that the claimant had lost her license.
18. The claimant and the employer discussed options for the claimant to continue her work. The claimant offered to have her husband drive her to and from work. The employer declined this offer, because the claimant needed to drive the residents to appointments. The claimant's husband would not have that availability.
19. Because the claimant had no license, she could not return to work.
20. The claimant had not been convicted for driving under the influence of alcohol (OUI) at the time of the January 5, 2009 meeting.
21. The claimant was not convicted of OUI until January 21, 2009. The claimant received a sentence of a one year loss of license, a required educational driving program and fines.
22. The claimant lost her license on January 21, 2009 as part of her sentence for OUI.
23. The employer had not hired the other employees at the claimant's location to drive.
24. The employer did not have part time work.
25. Credibility Assessment: The additional evidence hearing established that the claimant actually refused a blood alcohol test rather than a breathalyzer at the scene of the accident. The facts use both tests to mean the same thing based upon prior testimony and understanding. The claimant's attorney advised of the blood alcohol test at three times the legal limit for the state of New Hampshire. Authorities consider the blood alcohol test a more accurate measure of an individual's blood / alcohol level. The claimant's ability to remember anything concerning the accident represents a remarkable accomplishment.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact, with the exception of a portion of Finding of Fact #4, as discussed below. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law.

The review examiner rendered his decision under G.L. c. 151A, § 25(e)(1), which 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent....

* Ordinarily, when a claimant's actions trigger a "... statutory impediment that bars his employment [he] leaves his employment 'voluntarily' within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment." Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002 (1985)(rescript opinion). Underlying the Olmeda decision is the principle that the claimant is not entitled to unemployment benefits, because he brought the unemployment on himself. Id. Where this occurs, even though an employer terminates the employment relationship, the separation is deemed to be a voluntary quit, under G.L. c. 151A, § 25(e)(1). This was the basis for the review examiner's decision to deny benefits. Nonetheless, the review examiner's statement in Finding of Fact #4 that the claimant quit her employment is inaccurate in light of testimony from both parties that she had been fired¹.

Thus, we analyze the claimant's separation under G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987), the Supreme Judicial Court considered whether alcoholism mitigated the willfulness of the misconduct for which the claimant was discharged. See Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (in order to evaluate the claimant's state of mind, we must take into account the presence of any mitigating factors). The claimant in the Shepherd case was fired for absenteeism. Shepherd, 399 Mass. at 738. He had argued that he suffered from alcoholism and that his attendance issues and discharge were attributable to the disease. Id. at 740. The Court remanded the case for subsidiary findings about the claimant's state of mind at the time of the incident that caused his separation. Id.

¹ The fact that the claimant was discharged, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

We do not read Shepherd to hold that an assertion of alcoholism, once accepted by the finder of fact, becomes an absolute defense to disqualification, under G.L. c. 151A, § 25(e)(2). Before considering whether a claimant's alcoholism mitigates the denial of benefits in a particular case, a claimant must provide sufficient evidence that at the time of the wrongful conduct, the claimant suffered from the disease of alcoholism, was unable to control the addiction, and that these two factors caused the wrongful behavior and discharge. Upon establishing this foundation of evidence, the burden shifts to the employer to show that the claimant's misconduct was done deliberately or wilfully. This may be proved by evidence that the claimant was, in fact, able to control the alcohol dependence or that the claimant refused to accept help to control it. Id.

In the present appeal, the findings reveal that the employer terminated the claimant in January, 2009, because she no longer had an active driver's license that was needed in order to perform her job. The claimant's refusal to take a blood alcohol test following her arrest for drunk driving in October, 2008 caused her to be without a license at the time of her discharge². Therefore, we look closely at the claimant's refusal to take a blood alcohol test on October 13, 2008, as the incident which led to her discharge from employment.

Sufficient evidence has been produced in the record to support the review examiner's finding that the claimant suffered from alcoholism that she was not able to control at the time of the incident. This included the claimant's testimony supported by contemporaneous medical records detailing her alcohol dependence and unsuccessful efforts to address it, appearing in R. Exhibit #7. That the incident occurred in the context of an arrest for drunk driving makes the nexus between the wrongful conduct and alcohol abuse self-evident.

Moreover, the review examiner entered an express finding on the claimant's state of mind at the time of the incident. He found that the claimant's judgment was impaired when she refused to take the blood test. We see no reason to disturb this finding.

The disqualifying provisions of G.L. c. 151A, § 25(e)(2), are to be interpreted in such a manner as to lighten the burden which falls upon the unemployed worker and the worker's family, pursuant to G.L. c. 151A, § 74. The claimant's loss of her driver's license is a misdeed whose consequence burdens no one more than the claimant. Therefore, we conclude that the claimant's alcoholism mitigates the wilfulness of the misconduct for which she was fired.

We, therefore, conclude as a matter of law that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

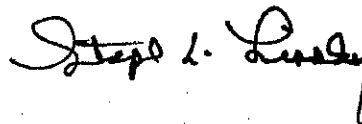
² The claimant was convicted of OUI on January 21, 2009, whereupon the claimant lost her driver's license as part of the sentence. However, we do not analyze the claimant's qualification for benefits, under G.L. c. 151A, § 25(e)(3), because the claimant's separation from employment occurred about two weeks prior to the conviction.

The review examiner's decision is reversed. The claimant is eligible for benefits for the week ending January 10, 2009 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING – February 25, 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 – March 28, 2011