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.

BOARD OF REVIEW DECISION

In the matter of:

Appeal number: **BR-118870**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

S.S. #

EMP. #

Hearings Docket # 577190

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Stephen Dougal, 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 discharged from his position with the employer on January 7, 2011. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 25, 2011. 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 April 15, 2011. 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 remanded the case to the review examiner to make subsidiary findings from the record relative to: (1) who the claimant was expected to notify; (2) if he left the workplace; and (3) his state of mind at the time of the incident for which he was fired. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant's conduct in telling a co-worker, rather than the supervisor, that the claimant was leaving for the day was mitigated by the facts that a) at the time, the claimant's medication for bipolar disorder was not working properly, and b) the supervisor had just directed an obscenity at the claimant.

Findings of Fact

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

1. The claimant worked full-time for the employer, a machine shop, as a press operator, from September 1, 2000 until January 7, 2011. The claimant was paid 13.00 per hour.

2. The claimant was discharged because he did not notify his supervisor he was leaving the workplace during work hours.

3. The claimant was expected to "notify somebody" if he was leaving the workplace during work hours.

4. The claimant had been warned for leaving the workplace without notifying his supervisor when he went across the street to look at some tire rims.

5. About three weeks before January 6, 2011, the claimant left the workplace to purchase cigarettes. The claimant left his machine running. The claimant was warned the next time he left work without notifying his supervisor he would be terminated.

6. The claimant was aware the next time he left work without notifying his supervisor he would be terminated.

7. On January 6, 2011, at about 9:45 a.m., the claimant had coffee at the front of the shop. Drinking coffee at the front of the shop was prohibited due to FDA regulations. The claimant had been previously warned "not to drink fucking coffee at the front of the shop".

8. At about 11:45 a.m. the claimant's machine broke down. The claimant's supervisor went to the claimant's machine and inspected some parts. A number of the parts were machined incorrectly. The claimant's supervisor also noticed coffee had been spilled on the shop floor. The claimant's supervisor got upset and told the claimant "don't drink fucking coffee in front of the shop".

9. The claimant's supervisor had not directed profanities at the claimant prior to January 6, 2011.

10. The claimant got upset his supervisor used profanity.

11. The claimant told a coworker: "I'll see you in the morning [coworker]. I'm punching my card and I'm going home."

12. The claimant did not notify his supervisor he was leaving the workplace.

13. The claimant next reported for work on January 7, 2011.

14. The claimant was discharged.

15. On January 6, 2011 the claimant was taking medication for his bi-polar disorder. The medication was not working effectively for the claimant. "It was working in a different way."

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact, with the exception of portions of #7.[1] 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, or 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 . . .

As a threshold matter, we note that it is not clear whether the employer's expectation was that the claimant had to notify "somebody," or the employer expected the claimant to specifically notify his supervisor, prior to leaving the work area. It was undisputed that the claimant notified a co-worker prior to leaving on January 6, 2011. Assuming, *arguendo*, that the employer expected the claimant to notify his supervisor specifically, and that the claimant was aware of this expectation, we now turn to the question of whether the claimant's failure to notify the supervisor was mitigated by the circumstances. We believe it was. The claimant suffers from bi-polar disorder, and, according to the claimant, his medication for this disorder was not working effectively on

[1] The last sentence of finding of fact #7 should read, "The claimant had been previously warned not to drink coffee at the front of the shop." We remove the obscene language from the coffee directive in finding of fact #7 because finding of fact #9 states that the supervisor had not previously directed profanities at the claimant. 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).

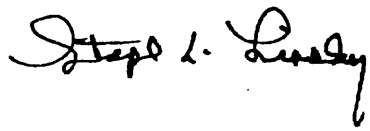
January 6, 2011. Thus, when the supervisor directed obscenities at the claimant for the first time in the claimant's ten-year tenure, the claimant was understandably upset. The claimant's conduct in notifying a co-worker that he was leaving, rather than telling his supervisor, who had just finished yelling at the claimant, was mitigated by these circumstances and as such did not rise to the level of deliberate misconduct, or a knowing violation of a rule.

We, therefore, conclude as a matter of law that the claimant's failure to notify his supervisor prior to leaving on January 6, 2011 was mitigated by the fact that his supervisor had just directed an obscenity at the claimant, and by the fact that the claimant believe his medication for bi-polar disorder was not working effectively at the time. Thus, the claimant is not subject to disqualification, under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending January 15, 2011 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING – October 14, 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- November 14, 2011

CH/es