



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.

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

SUZANNE M. BUMP
SECRETARY, LABOR AND
WORKFORCE DEVELOPMENT

BOARD OF REVIEW
DECISION

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

In the matter of:

Appeal number: **BR-103076-CTRM**

CLAIMANT APPELLANT:

L. J. N.
P.O. Box
Dennisport, MA 02639

EMPLOYING UNIT:

c/o UCRC
790 Turnpike St., #202
North Andover, MA 01845

S.S. #

EMP. # 72-020540

Introduction and Procedural History of this Appeal

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

The claimant was terminated in October, 2006. She filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on January 3, 2007. 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 disqualification in a decision rendered on February 9, 2007. The review examiner concluded that the claimant had engaged in a knowing violation of a reasonable and uniformly enforced employment policy under G.L. c. 151A, § 25(e)(2). The claimant sought review by the Board, which denied her application, and the claimant subsequently appealed to the District Court pursuant to G.L. c. 151A, § 42.

On December 19, 2007, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence. Following a remand hearing attended again by both parties, the review examiner issued consolidated findings of fact.

Our decision is based upon our review of the written record and recorded testimony from both DUA hearings, the original decision, the claimant's appeal, the District Court order, and the subsequent consolidated findings.

The issue on appeal is the claimant's state of mind on May 24, 2006, when she ingested illegal drugs or old prescription medications before or during work.

Findings of Fact

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

1. The claimant worked full-time as a licensed practical nurse at the employer's nursing home from February 1996 until she became separated from her employment on June 30, 2006.
2. The employer discharged the claimant for reporting to work under the influence of drugs.
3. The claimant's job responsibilities included passing out medications and doing treatments for patients.
4. On May 24, 2006, the claimant reported to work and was observed to be unsteady on her feet and slurring her words.
5. The claimant took Adivan and Klonopin that had been previously prescribed for her depression.
6. The claimant took the drugs during a break at work.
7. The claimant took the drugs because her supervisor and her co-worker said she was acting "hyper and loud."
8. The claimant took the drugs in the past when she was in a manic state to calm down.
9. The claimant did not take the drugs as prescribed by her doctor and did not have a current prescription for the drugs.
10. The claimant does not recall the last time she had taken the prescription drugs prior to May 24, 2006.
11. The claimant had also smoked marijuana and ingested cocaine.
12. The claimant does not think she was in a manic state on May 24, 2006, but people told her that she was.
13. The claimant does not know when she started acting manic.

14. The claimant had experienced manic states on and off during the year for many years.
15. The manic states would last from a few days to a few weeks.
16. The claimant felt that her manic states did not affect her judgment.
17. The claimant is not aware of any complaints about her work, only her "hyper" behavior.
18. The director of nursing sent the claimant to the emergency room for an evaluation.
19. While at the emergency room, the treating doctor ordered a drug test.
20. The drug test came back positive for opiates, marijuana, barbiturates and benzodiazepines.
21. The claimant did not advise her employer of the results of the drug test.
22. The claimant returned to work on May 25, 2006 and told her employer that her electrolytes were off because of some physical problems she had been having.
23. The employer allowed the claimant to return to work because of her explanation.
24. On June 9, 2006, the doctor notified the employer that he had reported the claimant to the board of registration in nursing because her drug test had come back positive for both prescription and illegal drugs.
25. The doctor advised the employer that under regulations, the claimant was not permitted to return to work until an investigation was complete and a decision was made regarding the claimant's nursing license.
26. The employer immediately suspended the claimant pending an investigation.
27. The claimant was not allowed to return to work.
28. The claimant's nursing license was suspended for 6 months due to her reporting to work under the influence of drugs.
29. The employer discharged the claimant in October 2006 for reporting to work under the influence of drugs.

30. The claimant is a drug addict and alcoholic and is currently in treatment for her drug abuse.
31. The claimant was not under the influence of alcohol when she reported to work on May 24, 2006.
32. The claimant was being treated by a local doctor at the time of her discharge.
33. The treatment consisted of medication and therapy.
34. The purpose of the treatment was to stabilize the claimant's manic episodes.
35. The treatment was not successful.
36. The claimant could have called out sick on May 24, 2006, but did not do so.
37. The claimant did not think that her manic condition rendered her unable to work in [sic] May 24, 2006.
38. The employer has a policy prohibiting employees from reporting to work under the influence of drugs.
39. The employer maintains the policy to ensure the safety of patients and to comply with state and federal regulations governing nursing practices.
40. The employer has not had any other employees report to work under the influence of drugs, but would discharge any employee found to have done so.
41. The claimant is aware of the policy as it is posted in the rules and regulations she received and signed for at hire.
42. The claimant was aware when she took her prescription drugs that she did not have a current prescription and was not taking the drugs appropriately and that it would have an intoxicating influence on her.
43. The claimant knew that the illegal drugs she ingested were going to have an intoxicating influence on her.
44. The claimant knew that she was under the influence of drugs when she reported to work on May 24, 2006.
45. The claimant lied to her employer about why she was incoherent on May 24, 2006.

The claimant testified at the February 1, 2007 hearing that she was a drug addict and had smoked marijuana everyday for about 25 years because she was self-medicating. She testified that she started using drugs as a teen when she was about "11 or 12" years old. She also testified that she took Adivan and Klon[o]pin on May 24, 2006 because she was "euphoric" and "really high." The claimant made no mention of having taken a prescription with Cod[e]ine due to a recent tooth extraction. The claimant testified that the drug test she had taken at the hospital confirmed the presence of both marijuana and cocaine in her system. The claimant's testimony at that time was credible.

At the hearing on April 22, 2008, the claimant's testimony was markedly different. The claimant denied being a drug addict or smoking marijuana on a daily basis. She testified that she only admitted to being an addict so that she could get her nursing license back. The claimant stated she did not recall testifying that she smoked marijuana on a daily basis and that if she did in fact testify that [she] was, it was not true. Additionally, the claimant testified that she did not think that she was acting hyper or loud on May 24, 2006 and only took the Adivan and Klonopin because her supervisor and co-worker said she appeared hyper and loud. Finally, the claimant testified that she never used cocaine and that any trace of opiates in a drug test would have come from a prescription for Cod[e]ine that she had taken for a recent tooth extraction.

The claimant's initial testimony was in person and at that time she appeared at that time to be forthcoming and honest. She answered questions directly and without hesitation. Further, the incident in question was much more recent in February 2007 than it was in April 2008, so it is more likely than not that her recollection on those events was better at the February 2007 hearing was [sic] than it was in April 2008. For those reasons, her testimony at the February 2007 hearing is deemed more credible than her testimony at the April 2008 hearing.

Ruling of the Board

The Board adopts the review examiner's consolidated 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, 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, . . .

In order to reach a legal conclusion that the claimant should be disqualified under § 25(e)(2), we must analyze her state of mind while in engaging in the conduct for which she was fired. It is well settled that "The apparent purpose of § 25(e)(2) . . . is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield v. Dir. of Div. of Employment Security, 377 Mass. 94, 97 (1979). We are required to "[T]ake into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

It is undisputed that the claimant was aware that the employer did not tolerate reporting to work under the influence of drugs. This was a reasonable employment policy designed to ensure patient safety and to comply with regulations governing the practice of nursing.

It is undisputed that the claimant violated the employment policy by working under the influence of drugs. Moreover, it is further undisputed that she suffered from intermittent episodes of mania which were not totally under control and for which treatment was not successful. The question is whether her manic episodes constituted a mitigating factor warranting approval of unemployment benefits even though she violated the employer's drug policy.

Also important to our analysis is the finding that fellow nurses told the claimant that she was in a manic state on May 24, 2006. In response, she ingested this old prescription medication in an effort to calm down and be able to work without engaging in "hyper" and "loud" behavior. The Supreme Judicial Court has held that an employee who engages in deliberate misconduct without doing so in wilful disregard of the employer's interest is not disqualified from receiving unemployment benefits. Still v. Comm'r. of Employment and Training, 423 Mass. 805 (1996). In the present case, although the claimant deliberately took these drugs, she did not do so in wilful disregard of the employer's interest. To the contrary, she was self-medicating in an effort to improve her work performance.

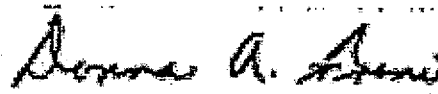
We, therefore, conclude as a matter of law that the claimant did not engage in either a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or in deliberate misconduct in wilful disregard of the employing unit's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending November 18, 2006 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 28, 2008



Donna A. Freni
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- August 27, 2008