

MAR 14 REC'D



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR-269454**

APPELLANT: (claimant)

RESPONDENT: (employer)
Yankee Candle Company, Inc.
P.O. Box 110
S. Deerfield, MA 01373

Office # 02

On February 16, 2000, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Deputy Director's representative on November 2, 1999 and November 22, 1999.

On January 13, 2000, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The Board remanded the case to the Deputy Director for further review and to make subsidiary findings of fact from the record. The Deputy Director returned the case to the Board on February 15, 2000.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

The claimant did not leave work voluntarily. Therefore, Section 25(e)(1) is not applicable to this matter.

In accordance with Section 25(e)(2), the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant's discharge was 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, provided that such violation is not shown to be as a result of the employee's incompetence.

Given the facts as stated above, it is concluded that there is substantial and credible evidence to establish that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interests. The employer discharged the claimant for conducting personal business while on company time. The claimant was fully aware of the employer's expectation that he not conduct personal business on company time, because he had been told, warned, and placed on probation for previously conducting personal business on company time. The employer's expectation was reasonable because the employer pays employees to work and when they are conducting personal business, they are not working. The claimant did conduct personal business on company time when he took merchandise to a cashier and asked her to ring it up when she got a chance. He conducted the personal business on company time because he did not know if he would get a morning break because he was going to the telethon. Such reason does not constitute mitigating circumstances.

In view of the facts, the claimant is subject the disqualification and denied benefits.

Benefits are denied beginning with the week ending 9-11-99 and indefinitely, [sic], until the claimant has had eight weeks of work and in each week has earned an amount that is equal to or in excess of his weekly benefit amount

Section 25(e)(2) of chapter 151A of the General Laws is pertinent and provides as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for –

- (e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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. . .

The Deputy Director's representative held hearings on November 2, 1999 and November 22, 1999. Both parties appeared. The Board remanded the case to the Deputy Director for further review and to make additional findings of fact. Whereupon, the Deputy Director's representative made the following consolidated findings of fact:

1. The claimant worked as Santa Claus for the employer, a candle company, from 9-7-93 to 9-9-99, at an ending rate of about \$15.30 per hour.
2. On 9-9-99, the employer discharged the claimant for conducting personal business on company time after warning.
3. On or about 5-3-95, the claimant received an employee handbook setting forth the employer's rules and policies. He signed an acknowledgement of receipt which stated in part as follows: "I acknowledge that it is my responsibility to read the handbook, to familiarize myself with the rules and policies it contains, and to abide by those rules and policies, at all times." The claimant chose not to read the handbook.
4. The employer's policy handbook does not specifically address employee purchases.
5. The employee handbook does address employee conduct, which includes a definition of insubordination, i.e. the refusal by an employee to follow management's instruction concerning a job-related matter.
6. On 8-31-98, the claimant received a first warning for conducting personal business on company time after using the ATM machine in the store while on company time. The warning stated, and the claimant was told, that the employer expects employees to be working at all times while on company time. It further stated, and the claimant was told, that he was expected to be in his work area on time and not taking care of personal matters while on company time. The claimant was placed on a three-month probation. The warning also stated that if the claimant adhered to the conditions during the probationary period, the warning would cease to be active and he would revert to the status of a regular employee. It further stated that failure to adhere to these conditions would likely result in further disciplinary action, up to and including termination.

of mind in performing the acts that cause his discharge. The Board must take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors. Garfield v. Director Div. of Employment Security, 377 Mass. 94, 97 (1979).

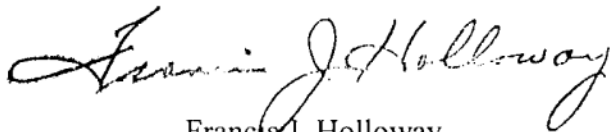
Here, the employer had an expectation the employees would refrain from conducting personal business on company time. That expectation is reasonable to protect the employer from lost productivity. The claimant was aware of this expectation and had received a prior warning about it.

The claimant was discharged after he purchased some items when he was on the clock. The facts reveal that the claimant selected the items he wished to buy before he had punched in that morning. The claimant attended a morning meeting where he was informed he would be working on a telethon that day. Following the meeting the claimant took the merchandise he intended to purchase to a cashier before the store was open to customers. He asked the cashier to ring up the merchandise when she got a chance and he left the merchandise with her. It took the claimant about two minutes to bring the merchandise to the cashier.

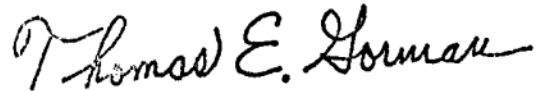
The evidence shows that the claimant did not act in intentional disregard of the employer's interests in this case. After his morning meeting the claimant was unsure whether he would be able to take his regular morning break. In addition the facts show that the claimant previously witnessed other employees purchase items and engage in personal business without incurring disciplinary action. Under the circumstances, the Board concludes that the claimant's failure to abide by the employer's reasonable expectation was a momentary lapse in judgment, not in wilful disregard of the employer's interest, and not disqualifying under the Law.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending September 11, 1999, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - MAR 13 2000



Francis J. Holloway
Chairman



Thomas E. Gorman
Member



Kevin P. Foley
Member

APPELLANT: I.D. # [REDACTED]
RESPONDENT: I.D. # [REDACTED]

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY - APR 12 2000