COMMONWEALTH OF MASSACHUSETTS
DIVISION OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW
Government Center
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Boston, MA 02114

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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

Allan: A good decision from Jim Rowan's NHLS Poverty Clinic

In the matter of:

Appeal number: **BR-91976**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

On March 26, 2004, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Deputy Director's representative on January 13, 2004.

On February 13, 2004, 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). Both parties were invited to present written argument stating their reasons for agreeing or disagreeing with the Deputy Director's decision. Only the claimant responded within the time allowed.

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

The appeal of the claimant is from a decision of the Deputy Director which concluded:

> Since the claimant did not leave work voluntarily, Section 25(e) (1) of the Law does not apply to this case.
>
> In accordance with Section 25(e) (2) of the Law, the burden of proof is on 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 for 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.
>
> Given the facts as stated above, the employer has failed to present substantial and credible evidence to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced company rule or policy. The employer presented no evidence of a rule or policy applicable to this case.
>
> The question then becomes whether the claimant was discharged from her job for deliberate misconduct in wilful disregard of the employer's interest.
>
> The employer expected its employees to refrain from using vulgar language directed at the Owner. The employer's expectation was reasonable; the employer had this expectation because the Owner considers the use of vulgar language unacceptable and it is important to the Owner that such language not be used.

The claimant was aware that she should not use vulgar language toward her boss and the Owner. This was a standard of conduct the employer had a right to expect.

In violation of the employer's expectation, the claimant called the Owner at her home to discuss why she was not being compensated for her injury, and used vulgar language. Among other things, the claimant told the Owner that she did not follow through with anything she says, and then told the Owner that she could have gotten "fucked up the ass" for not having her paycheck go through during the first year the claimant worked for the employer. Upon the claimant's use of such language, the Owner told the claimant she was fired.

This examiner considered the circumstances surrounding the claimant's use of the vulgar language, including that she was trying to be compensated for her injury. It is concluded that neither this nor any other circumstances presented were sufficient to mitigate the claimant's conduct.

Based on all of the above, it is concluded that the employer has met its burden of proof. The claimant is subject to disqualification from the receipt of benefits.

The claimant is denied benefits for the week ending November 1, 2003 and until she has had eight weeks of work and in each week has earned an amount that is equal to or in excess of her weekly benefit rate.

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 a hearing on January 13, 2004. Both parties were present. The Deputy Director's representative then issued the following findings of fact:

1. The employer employed the claimant from March 2002 until October 28, 2003, when she was discharged from her job.

2. Throughout her employment, the claimant was employed full-time, as an aesthetician in a salon.

3. The claimant was discharged from her job for using vulgar language directed at the President/Owner (the "Owner").

4. The claimant reported to the Owner of the salon and to the Manager of the salon.

5. The employer expected its employees to refrain from using vulgar language directed at the Owner.

6. The employer had this expectation because the Owner considers the use of vulgar language unacceptable and it is important to the Owner that such language not be used.

7. On September 22, 2003, the claimant injured herself at work. The claimant was absent from work from about September 24 through September 27, 2003. The employer paid the claimant for that time she was out of work. After September 27, the claimant reported to work sporadically when she felt well enough to work.

8. On or about September 26, 2003, the claimant discovered that the employer did not have worker's compensation. The employer did not know at the time that it did not have worker's compensation.

9. At one point after the claimant was injured, the Owner told her that she knew how back injuries were and to take as much time off as she needed.

10. The claimant had a number of discussions with the manager about filing for worker's compensation benefits.

11. The claimant called the employer on almost a daily basis after her injury to find out how the employer intended to compensate her for her injury.

12. Sometime in about [sic] the week ending October 25, 2003, the claimant complained to the Owner about the Owner not having non-latex gloves. After a discussion about the gloves, the Owner told the claimant, don't let the door hit your ass on the way out [sic]. The claimant asked the Owner if she was firing her, to which the Owner said no [sic].

13. On October 28, 2003, the claimant called the Owner at the Owner's home to discuss why she was not being compensated for her injury. The claimant told the Owner there was a problem with the pay and that the Owner had promised to pay her. The Owner told the claimant that she had heard that the claimant was complaining a lot. The claimant told the Owner she had been complaining because the Owner did not follow through with anything she says. The claimant told the Owner that she had said she would pay the claimant for the time she was out of work, and not to worry about it. The claimant told the Owner she had not gotten worker's compensation and no one had ever called her back. The claimant told the Owner that for the first year the claimant worked for her that her paycheck did not go through 80% of the time, and for that, she could have gotten "fucked up the ass", but because they were friends, she had let it go. The Owner told the claimant do not let the door hit your ass on the way out, do whatever you want to do, file for unemployment, you are fired [sic].

14. On October 30, 2003, the claimant filed a claim for unemployment benefits.

After reviewing the record, the Board adopts the findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes as follows:

Under Massachusetts General Laws, Chapter 151A, §25(e)(2), the burden is upon the employer to establish by substantial and credible evidence that the discharge of the claimant was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule of the employer, or due to deliberate misconduct in wilful disregard of the employer's interest. The employer has not met its burden.

The employer failed to establish that it had any rule or policy applicable to the claimant's situation. The employer also failed to establish that it had a reasonable expectation that its employees would refrain from using vulgar language directed at the Owner, because the Owner herself had used vulgar language toward the claimant sometime during the week ending October 25, 2003, prior to the final incident on October 28, 2003. Furthermore, prior to October 28, 2003, the claimant had been contacting the employer on an almost daily basis after she suffered a back injury at work on September 22, 2003, to find out how the employer intended to compensate her in regard to the injury. At the time that the claimant filed a worker's compensation claim, it was discovered that the employer did not have such coverage, and the claimant was not able to proceed on such a claim.

When the claimant and the Owner spoke over the telephone on October 28, 2003, the claimant was upset about the employer's failure to compensate her in regard to her back injury, which constitutes mitigating circumstances for the claimant's use of vulgar language while speaking with the Owner. In addition, the Owner also used vulgar language during this conversation. Furthermore, this was a private conversation that occurred over the telephone, and not in the workplace in front of staff or customers. Under such circumstances, the employer has failed to establish that the claimant engaged in a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or in deliberate misconduct in wilful disregard of the employer's interest.

Accordingly, since the employer has failed to establish that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule of the employer, or due to deliberate misconduct in wilful disregard of the employing unit's interest, the claimant is not subject to the disqualifying provisions of Section 25(e)(2) of the Law cited above.

The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending November 1, 2003, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - MAR 3 1 2004

Francis J. Holloway
Chairman

Thomas E. Gorman
Member

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

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LAST DAY - APR 3 0 2004