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41 BR 95193  
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January 21, 2005

Allan Rodgers, Esq.  
Massachusetts Law Reform Institute  
99 Chauncy Street, Suite 500  
Boston, MA 02111-1722

RE:

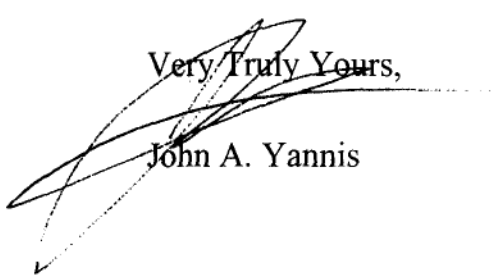
Bd. Of Review Dkt. BR-95193

Dear Allan,

For your next Employment Rights Coalition mailing, perhaps, here is a decision in a case where I represented the claimant. You will see that I first had to get it remanded due to my client having no notice of the original hearing date -- the Board, to its credit, decided that issue within days -- and then handle the remand hearing. This was a nice surprise to win, since I left the hearing 90-95% convinced we had not only lost, but lost badly.

It is somewhat complex factually, but I think what might be of interest and perhaps of wider significance is what the Board made of the fact that the immediate supervisor/manager did not feel the claimant had "committed a serious offense" (my phrase, by the way). He obviously reported the events to H.R, but it was H.R. -- not the immediate supervisor -- which concluded that something horrible had supposedly occurred. The key sentence in the Board's decision, in my view, is: "Since the claimant's manager did not find the claimant's behavior so egregious as to warrant discharge, there is no reason to believe the claimant would have known that she could be discharged for her actions." I'd be happy to chat further. Take care.

Very Truly Yours,

  
John A. Yannis

Encl.



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

Tel. (617) 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-95193**

**CLAIMANT APPELLANT:**

[REDACTED]

**EMPLOYING UNIT:**

[REDACTED]

On January 18, 2005, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Commissioner's representative on October 14, 2004, and December 17, 2004.

On November 19, 2004, the Board allowed the claimant's application for review of the Commissioner'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 Commissioner to take additional evidence and to make further findings of fact. The Commissioner returned the case to the Board on December 28, 2004.

The Board has reviewed the entire case to determine whether the Commissioner's decision 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 Commissioner which concluded:

The claimant did not attend the hearing. She did not leave work voluntarily, and Section 25(e)(1) is not an issue in this case.

In accordance with Section 25(e)(2) of the Law, the burden is upon the employer to establish that the claimant's discharge was for the knowing violation of a reasonable and uniformly enforced policy, or for deliberate misconduct in willful disregard of the employer's interest.

No testimony or evidence was introduced to show the discharge was for the violation of an employer rule or policy. The issue of deliberate misconduct must be addressed in this case.

The employer expected the claimant would not air her grievances about her manager with her subordinates, nor repeat confidential conversations the manager had with her to subordinates. The expectation was reasonable, as this does undermine the authority of the manager and creates an unpleasant work environment. The claimant was aware of the expectation, as she conceded to the Human Resource officer that she should have gone to her with [sic] complaint and she also told her subordinate that she had betrayed her by going to speak to the manager about their conversation. The claimant's actions were deliberate misconduct in willful disregard of the employer's interest. She is subject to disqualification under Section 25(e)(2) of the Law.

Benefits are denied for the week ending May 15, 2004, and until the claimant has worked eight weeks and in each week earned an amount that is equal to, or in excess of, her weekly benefit rate.

**Section 25 of Chapter 151A of the General Laws** is pertinent and provides, in part, 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 Commissioner's representative held a hearing on October 14, 2004. Only the employer appeared. After reviewing the record, the Board remanded the case to the Commissioner to take additional evidence and to make further findings of fact. The Commissioner's representative held a remand hearing on December 17, 2004. Both parties appeared. The Commissioner's representative then issued the following consolidated final findings of fact:

1. The claimant was employed as an assistant branch manager of a bank, from 2001, until May 10, 2004, when she was discharged.
2. The employer discharged the claimant for undermining the authority of her manager.
3. The claimant had been transferred to her location in August, 2003. She was on a probationary period because of warnings in her file. The probation ended in November, 2003. The branch manager informed her that he would be scrutinizing her performance.
4. The claimant did not want her subordinates to know that she was on probation. She found that the manager did not communicate things to her that she should have been informed about. She mentioned this to him, and he admitted he had made errors in failure to communicate and would try harder. The claimant found that in most instances, he did improve. The claimant's subordinates also observed that the manager did not always communicate matters to the claimant, and that he seemed harsh with her.
5. The manager had spoken to the claimant about an issue with one of her subordinates for several months. The claimant had discussed this issue with the subordinate when they had one-on-ones. He again mentioned it, and told the claimant that the subordinate was 'outside of a bell curve.'
6. The claimant went and told her subordinate what the manager had said. The conversation then turned to how the manager treated the claimant.
7. The claimant's subordinate went to see the branch manager on April 30<sup>th</sup>, when the claimant was not at work. She asked him if he had issues with her performance and told him what the claimant had told her. The manager then determined he was going to meet with the two of them.

8. When the claimant arrived at work, she met with the manager and her subordinate. The manager stated he had been venting and told the claimant she should not have said anything to her subordinate, and that he was not displeased with her performance at that time. The claimant's subordinate then told the claimant that she needed to speak to the manager about her dissatisfactions. She told the claimant that she, the claimant, enjoyed letting her know how mean she thought the manager was. She then told the claimant, "I know you must feel I stabbed you in the back." The claimant responded that she felt betrayed. The manager then asked the subordinate to leave so he could discuss the claimant's dissatisfactions with her. The claimant then told him that she thought he was harsh, and the manager apologized, and stated he did not realize he was being harsh.
9. The manager contacted Human Resources to report the interaction between the claimant and her subordinate in his office. He had no intent to discharge the claimant, nor did he state that he thought a serious offense had been committed. On May 7, 2004, the claimant met with the Human Resource officer. She admitted speaking about the manager in a derogatory manner with her subordinate because she was frustrated with him, but she never expressed to the subordinate that she thought the manager was mean or rude. She also stated that she did tell her subordinate that she felt betrayed, and admitted that this would place the subordinate in a difficult situation. She was suspended.
10. The claimant was aware she was to follow a chain of command if she had an issue with her manager. She could have either gone to the regional manager or to Human Resources with any issues she had.
11. The employer provided hearsay testimony that the claimant had told a co-worker that the manager was mean and rude. The claimant credibly denied she had stated this. She was frustrated with her manager because he frequently did not communicate matters to her which she should have known about and she found him to be harsh in his manner. When the claimant told her co-worker that she felt the co-worker had betrayed her, this was in response to the co-worker telling the claimant that she, the claimant, must feel that she had been stabbed in the back. The claimant's response was appropriate to the situation; the co-worker should not have raised issues about the claimant's dissatisfaction with the manager at a meeting which concerned the subordinate's performance.

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

There is no suggestion in the findings that the claimant either knowingly violated a reasonable and uniformly enforced rule or engaged in deliberate misconduct in willful disregard of the employer's interests. The claimant may have exercised poor judgment in conveying her manager's comments regarding a subordinate, but the facts indicate that the manager, on occasion, treated the claimant harshly. Ideally, the claimant would have found a method to handle her frustration with her manager that did not convey a negative attitude about him.

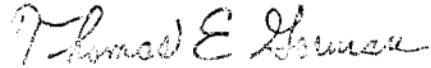
The claimant's manager, after discussing what became the final incident with the claimant, apologized for treating her so harshly. Her manager had no intention of discharging the claimant for her behavior. In fact, the manager did not believe a serious offense had been committed. Since the claimant's manager did not find the claimant's behavior so egregious as to warrant discharge, there is no reason to believe the claimant would have known that she could be discharged for her actions. Therefore, the claimant was neither discharged for a knowing violation of a reasonable and uniformly enforced rule or policy nor for deliberate misconduct in willful disregard of the employing unit's interest within the meaning of section 25(e)(2) of the Law cited above.

The Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending May 15, 2004, and subsequent weeks, if otherwise eligible.



Kevin P. Foley  
Chairman

BOSTON, MASSACHUSETTS  
DATE OF MAILING - JAN 19 2005



Thomas E. Gorman  
Member



Donna A. Freni  
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- FEB 18 2005