



COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF EMPLOYMENT AND TRAINING  
BOARD OF REVIEW  
Government Center  
19 Staniford Street  
Boston, MA 02114

RECEIVED SEP - 3 2003

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-89507**

**CLAIMANT APPELLANT:**

**EMPLOYING UNIT:**

Girls Incorporated of Holyoke  
P.O. Box 6812  
Holyoke, MA 01041

S.S. \_\_\_\_\_  
Office #01

EMP. #72-204390

On August 29, 2003, 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 April 17, 2003, and May 13, 2003.

On July 3, 2003, 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. Both parties 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:

The claimant did not resign from her job. Therefore, Section 25(e)((1) of the law [sic] does not apply to this matter.

In accordance with Section 25(e)(2) of the law [sic], the burden of proof is upon the employer to establish by substantial and credible evidence that the claimant was discharged for deliberate misconduct in willful disregard of the employing unit's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule, unless the violation was the result of the employee's incompetence. In this case, there was a policy or rule applicable to the conduct in question.

The employer discharged the claimant for failing to report an incident of suspected abuse. The claimant was the only witness to the actual incident. She testified that an 8-year old girl told her that another girl touched her in her private parts. The mere reporting of such an incident should warrant a further reporting to the employer. It is true that nothing may have occurred. However, it is the employee's responsibility to report such an incident, because there is the possibility of abuse. By failing to report the incident then, the claimant violated policy. This was a knowing violation of policy. The claimant was aware, at the time of the incident, that she was violating policy. She testified that she did have some concern when she spoke with the child who was touched. Therefore, in her mind, there must have been some suspicion of possible abuse.

The claimant was aware of the employer's policy. It was conveyed to her in writing and at various times through employee meetings. Such policy is reasonable. The employer maintains it to protect the safety and well being of the children it serves.

The policy was uniformly enforced. The employer witness testified that she was unaware of any cases of suspected abuse that were not reported. The claimant contended that another employee was not discharge [sic] for a similar incident. However, there were not enough details provided to determine this constituted a violation of policy.

The policy was fairly applied. There were no unusual or extraordinary circumstances surrounding the incident of 12/02.

The violation of policy was not the result of the employee's incompetence. That is because she had the ability to comply with the policy.

The claimant's attorney argued that the claimant had to make a judgment call. She further argued that the claimant concluded that abuse had not occurred and thus she did not report the incident. The policy clearly states that any suspected abuse must be reported. Based on the information the claimant had, there should have been a conclusion of suspected abuse. Therefore, the attorney's argument is dismissed. In view of the facts, the claimant is not entitled to benefits.

The determination is overturned. The claimant is not entitled to benefits for the week ending 2/1/03 and until she has worked for eight weeks and in each of said weeks has earned an amount equal to or in excess of her 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 April 17, 2003, and May 13, 2003. Both parties were present. The Deputy Director's representative then issued the following findings of fact:

1. The claimant worked as a sports specialist for the employer, a girls club, from 6/25/01 until 1/28/03, when she was discharged from her job. Subsequently, she filed a claim for benefits on 1/28/03.
2. The employer discharged the claimant for failure to report a suspected incident of physical abuse.
3. The employer has a written policy concerning the reason for discharge. It states that employees must report any suspected incident of abuse or neglect to the appropriate supervisor. Failure to adhere to this policy results in immediate discharge.

4. The employer conveyed this policy to the claimant at the time of hire and during subsequent employee meetings. These included an Office for Child Care Services (OCCS) workshop in 5/02, and orientation/policy review in 8/02 and another orientation in 9/02. The claimant attended all sessions.
5. The employer maintains the policy to insure the safety and well being of the children it serves.
6. Prior to the claimant's discharge, there had been no violators of the policy.
7. The claimant operated an after school sports program for girls aged 6 to 12 years old.
8. Sometime in late December 2002, an 8-year old girl told the claimant that another 8-year old girl touched her in her private parts.
9. The claimant spoke with both girls. The girl accused of doing the touching denied this conduct.
10. The mother of the girl who was touched is an employee. The claimant reported the incident to her. The mother responded that the girls play together. In addition, she said nothing happened and don't worry.
11. The claimant had some concern when she spoke with the child, who had been touched. However, she did not believe that the touching was inappropriate or abuse and thus did not report it to the employer.
12. On 1/24/03, the claimant was attending a meeting with other employees. The subject of the discussion caused the claimant to think about the late 12/02 incident involving the two girls. She then detailed the incident at the meeting.
13. The employer proceeded to investigate based on the claimant's revelation of the 12/02 incident.
14. The employer concluded that the claimant should have reported the incident right after it occurred in 12/02.
15. On 1/28/03, the employer discharged the claimant from her job.

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 policy of the employer at issue in this case sets forth that employees must report any suspected incident of abuse or neglect to the appropriate supervisor. After the claimant was told by one girl that another girl had touched her in her private parts, the claimant spoke with both of the girls about the incident. The girl accused of doing the touching denied this conduct. The claimant also reported the incident to the mother of the girl who had reported being touched. The mother is also an employee of the employer. The mother told the claimant that the girls play together, that nothing happened, and that the claimant should not worry about the incident. As a result, the claimant did not report the incident to the employer because she did not believe that the touching was inappropriate or abuse. Approximately two months later, the claimant detailed the incident during a discussion at a meeting of the employees, which resulted in an investigation by the employer and the claimant's subsequent discharge. Given her state of mind at the time of the incident and her investigation thereof, the claimant did not violate the employer's policy by not reporting the alleged incident immediately.

Accordingly, the employer has failed 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 of the employer. Therefore, the claimant is not subject to the disqualifying provisions of Section 25(e)(2) of the Law.

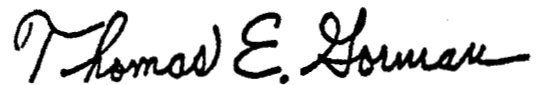
The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending February 1, 2003, and subsequent weeks, if otherwise eligible.



Francis J. Holloway  
Chairman

BOSTON, MASSACHUSETTS  
DATE OF MAILING -

SEP - 2 2003



Thomas E. Gorman  
Member

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

LAST DAY - OCT - 2 2003

mh