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MEMORANDUM

To: Anne C. Berlin, Chief Counsel, Board of Review
From: John R. Regan, Executive Vice President, Government Affairs,
Associated Industries of Massachusetts, Inc.
Re: Request from DUA Board of Review for Comments
Date: October 29, 2010

Question Presented

How does Mammone v. President and Fellows of Harvard College (2006) effect the rule of Shepherd v. Director of the Division of Employment Security (1987) that “alcoholism is a disease that renders the conduct of its sufferer involuntary” and, therefore, an alcoholic must receive a more liberal review as to whether he or she engaged in “deliberate misconduct in willful disregard of the employing unit’s interest” under G.L. c. 151A, § 25(e)?

Conclusion

Upon review of the statutory language, as well as the case law referenced by the Department of Unemployment Assistance (DUA), Associated Industries of Massachusetts (AIM) concludes that the DUA must not allow alcoholics to receive benefits if they engage in behavior that would constitute “deliberate misconduct in willful disregard of the employing unit’s interest” had the behavior been done by a non-alcoholic. Mammone dictates that both alcoholics and non-alcoholics be held to the same standard of behavior and review.

Discussion

In Shepherd, an alcoholic was terminated for tardiness and absenteeism. The terminated employee later sought unemployment benefits. The court remanded the case because no factual finding had been made by the Agency regarding Shepherd’s mental state, i.e., whether he deliberately and willfully disregarded his employer’s interest. In that case, Shepherd arguably received a lesser standard of review than a non-alcoholic would have. In other words, due to his alcoholism, the Agency was directed to consider such things as whether he deliberately did not avail himself of help programs, or otherwise could not control

his alcoholism. Obviously, these inquiries are not made for non-alcoholics. This more liberal review gives alcoholics the opportunity to avoid loss of benefits under G.L. c. 151A, § 25(e) by saying that they could not control their alcoholism and, therefore, could not have acted deliberately and willfully.

In Mammone, the Supreme Judicial Court (SJC) held that alcoholics are not to be given a lower standard of behavior in ADA and 151B cases. Mammone holds that a person suffering from bipolar disorder who engages in egregious misconduct against his or her employer can be terminated, notwithstanding ADA and 151B protections, because the egregious misconduct has shown that the employee is not capable of performing the essential functions of the position and is, therefore, not an otherwise qualified individual with a disability entitled to those protections.

Mammone relies heavily on Garrity v. United Airlines (1995), which similarly held that if alcoholics engage in egregious misconduct, they are incapable of performing the essential functions of their jobs, and are therefore not entitled to ADA protection. Mammone is clear that alcoholism and bipolar disorder are both disabilities and are identical for purposes of this analysis. The Court states in Mammone that the employer was not even required to consider whether the employee could have performed the essential functions of his position with a reasonable accommodation due to his egregious misconduct.

A key motivating principle of Mammone, expressly stated in that case, is that alcoholics must be held to no lower standard of behavior than non-alcoholics. Once an alcoholic has engaged in the type of activity that would cause a non-alcoholic to be terminated, the alcoholic may be terminated. Thus, this case urges the DUA to not allow alcoholics to receive benefits if they engage in behavior that would constitute “deliberate misconduct in willful disregard of the employing unit's interest” had the behavior been done by a non-alcoholic. In other words, Mammone urges the DUA to hold alcoholics and non-alcoholics to the same standard of behavior and review.

AIM believes that Mammone informs Shepherd as the Supreme Judicial Court of Massachusetts has clearly stated that alcoholics should not get a lower bar for standards of behavior than non-alcoholics. Simply put, the statute, the case law presented, and the interests of fairness and equity require that behavior that would cause a non-alcoholic to lose benefits should also cause an alcoholic to lose benefits - with no lower or additional standard of review.