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Unemployment Tax  
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DIVISION OF  
BOARD OF REVIEW

October 29, 2010

Commonwealth of Massachusetts  
Division of Unemployment Assistance  
Board of Review  
Attn: Anne C. Berlin, Chief Counsel  
19 Staniford Street, 4<sup>th</sup> Floor  
Boston, MA 02114

RE: Request for Comments: Shepherd/Mammone

Dear Ms Berlin:

Please consider this letter UTCA, Inc's formal "Written Comments" in response to your recent Request for Comments sent to our office. We thank you for the opportunity to participate.

As you know Shepherd v. DES was decided in 1983, seven years prior to the enactment of the Americans with Disability Act ("ADA") and twenty-three years prior to the Mammone v. Harvard decision in 2006. The DUA and the SJC have held, with relative consistency that alcoholism is a disease which renders the conduct of individuals involuntary and thus excuses their actions where no excuse would be valid for non-alcoholics engaging in the same action thus creating a different standard of review by the DUA under MGL 151A Section 25(e).

It is UTCA's position that the evolution and interpretation of the ADA as well as case law, specifically Mammone v Harvard and Garrity v. United Airlines, Inc, 421 Mass. 55, 653 N.E. 2<sup>nd</sup> 173 (1995), mandate the DUA no longer decide similar cases with such a broad brushstroke approach.

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The Mammone Court found that “the workplace misconduct that led to Mammone’s termination was so egregious and sufficiently inimical to the interests of his employer that it would have resulted in the termination of a non-handicapped (definition includes alcoholic) employee”. Both Mammone and Garrity decisions found that a handicapped employee who engages in the aforementioned conduct is “not a qualified handicapped person within the meaning of MGL 151B.”

This interpretation simply cannot be ignored by the DUA and directly modifies Shepherd and its interpretation. To over-simplify, the Court has found if a handicapped person, which includes an alcoholic, engages in “egregious misconduct” then he is NOT handicapped, thus no longer has the protection of Shepherd. Thus in DUA cases, the employer should not be required to prove the claimant had the ability to control the claimant’s behavior at the time of the incident.

The Mammone Court, in Hamilton v. Southwestern Bell Tele Co, 136 F.3d 1047, 1052 (5<sup>th</sup> Cir 1998) references the ADA and further defines similar type actions, “The American with Disabilities Act does not protect employee’s “emotional or violent outbursts” such as “get the F--ing finger out of my face...”...even if such misconduct is attributable to the employee’s posttraumatic stress disorder”. The inference drawn from the court decision is these types of outbursts are beyond any “protection” previously provided by the Shepherd case.

The Mammone decision also directly addresses the issue of whether or not the employer was in fact aware of the handicap. The DUA, through its interpretation of Shepherd, historically has ignored or found irrelevant the fact employers had no prior knowledge of any handicap. The Court states, “Despite the dissent’s suggestion that employers should be required to raise affirmatively the issue of reasonable accommodation, our case law does not support this position.” Thus, it appears the Court and law, to some substantial subjective degree, does not hold employer’s accountable if an employee fails to inform the employer of one’s handicap and subsequent obligation of reasonable accommodation. How then can an employer under 151A Section 25(e) be subject to a different standard? Thus again, in DUA cases, the employer should not be required to prove the claimant had the ability to control the claimant’s behavior at the time of the incident.

Mammone and all the referenced cases make a distinction between misconduct and egregious misconduct. Mammone, “Our holding that an employer does not violate MBG 151B by terminating an employee for egregious misconduct stemming from any recognized handicap is consistent with the view adopted by the majority of courts that have faced the issue...” ; “if a disabled employee engages in misconduct, an employer may terminate...that employee without incurring liability...”; Mammone further states, “To the extent that such misconduct is not egregious and sufficiently inimical to the employer’s interest, it is entitled to protection”.

This definition thus opens the door, and mandates, the Shepherd standard can no longer be “carte blanche” as soon as a handicap is alleged or found. Mammone is stating that such egregious misconduct is NOT protected regardless of handicap and that the offending employee is not a handicapped person. If that person is found not to be a handicapped person, based upon the

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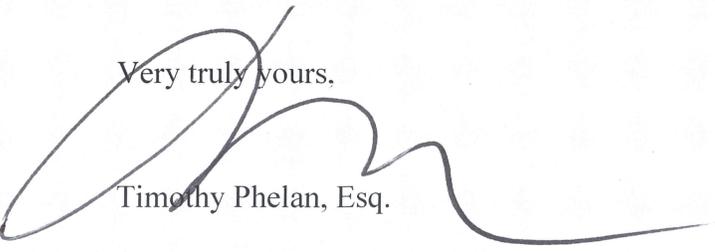
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egregious misconduct standard, then the Shepherd standards must not apply since they do so only for handicapped persons as defined by MGL 151B. They no longer have the protection of that statute. The standard of deliberate and/or willful misconduct must therefore be applied as if not a handicapped person.

The issue arising for the DUA will be how egregious misconduct will be defined, if at all, and its impact on the statutory language of 151A Section 25(e) obviously silent on “egregious”. The court referenced a two pronged test in determining whether an employee’s misconduct is egregious enough to disqualify the person from being a “qualified handicapped person”. First, you look to whether the employer terminated the employee promptly, which would show an employer’s subjective belief any person, handicapped or not, would be terminated and second, whether the misconduct was so egregious that no employer should reasonably be required to retain such an employee...even if the employee, with...reasonable accommodation, otherwise could perform the essential functions of the job”.

In conclusion, it is clear the DUA can no longer take a “blanket” approach to these types of cases and afford all claimants the protections previously provided by Shepherd. Each case must be looked at and defined differently as some will still fall under the Shepherd umbrella and others no longer will. For too long employers in the Commonwealth of Massachusetts have been required to bear the financial cost of unemployment compensation when employees engage in willful and deliberate behavior and are excused because of an alleged addiction. Employers comply with their own policies and discharge legally but are mocked by claimants who conveniently use the “alcoholic” card regardless of level of recklessness or severity of misconduct. This is not only inherently unfair but not what any legislature intended in the implementation of the aforementioned laws as justified in the Mammone decision. UTCA appreciates your willingness to be open and allow our organization to participate in this important process. Thank you for your attention to this matter.

Very truly yours,



Timothy Phelan, Esq.

cc: Suzanne Murphy, CEO, UTCA, Inc.  
Sarah Torres, Esq.