Board of Review
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Issue ID: 0002 1377 85
Claimant ID: 598504

BOARD OF REVIEW DECISION

0002 1377 85 (Oct. 6, 2014) – Claimant's refusal to sign a conditional reinstatement agreement, which included language that reasonably could be interpreted to require her to surrender her collective bargaining rights, did not warrant disqualification under G.L. c. 151A, § 25(e)(2), because the refusal was not done in wilful disregard of the employer's interest.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits.

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on September 10, 2010. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, a DUA review examiner affirmed the agency's initial determination in a decision rendered on February 16, 2011. The examiner denied benefits on the ground that the claimant was deemed to have voluntarily resigned without good cause attributable to the employer, pursuant to G.L. c. 151A, § 25(e)(1). The claimant sought review by the Board, which affirmed, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42. On April 3, 2013, the District Court affirmed the claimant's disqualification. The claimant further appealed to the Massachusetts Appeals Court.

In a decision rendered on November 26, 2013, the Appeals Court vacated the judgments below and ordered the case remanded to the DUA for further proceedings.[1] The Appeals Court ordered that the claimant's separation be analyzed as a discharge, pursuant to G.L. c. 151A, § 25(e)(2), with the employer carrying the burden of proof. Consistent with this order, the Board held an evidentiary hearing, which both parties attended.

The issue before the Board is whether the employer's decision to terminate the claimant, when she refused to sign a conditional reinstatement agreement after a positive breath alcohol test, was attributable to deliberate misconduct in wilful disregard of the employer's interest, within the meaning of G.L. c. 151A, § 25(e)(2).

After reviewing the entire record, including the recorded testimony and evidence from the review examiner's hearing, the review examiner's decision, the claimant's appeal, the Appeals Court

[1] [Claimant] v. Dir. of Division of Unemployment Assistance, No. 12-P-1236, 84 Mass. App. Ct. 1122 (2013) (summary decision pursuant to rule 1:28), 2013 WL 6169138.

decision, and the Board hearing, we conclude that the claimant is not disqualified, under G.L. c. 151A, § 25(e)(2).

Findings of Fact

The Board's consolidated findings of fact, which include those findings adopted from the review examiner's decision in addition to its own findings, are as follows:

1. The claimant worked as a full-time Registered Nurse for the employer's hospital from October 1, 2000 until August 5, 2010. Prior to August 5, 2010, the claimant had no disciplinary history with the employer.

2. During 2010, the claimant worked the 3:00 p.m.–11:00 p.m. shift.

3. The claimant was a bargaining unit member covered by a collective bargaining agreement.

4. The employer had a Substance Abuse Policy in effect in 2010 (Exhibit 8), which required that any employee who the employer reasonably suspected might be impaired in his ability to perform the essential duties of his job or who might pose a threat to the safety or health of others due to the use of alcohol must submit to a urine, blood, or breath test.

5. The employer maintains a zero tolerance policy relating to alcohol, and it follows the U.S. Department of Labor guidelines calling for the removal from duty of anyone whose breath alcohol content (BAC) is .02 or greater.

6. The claimant was aware that the employer expected her not to report to work with alcohol in her system and that she could be tested for alcohol.

7. On July 27, 2010, approximately 45 minutes into the claimant's shift, the claimant's supervisor smelled an odor of alcohol on the claimant's breath. The supervisor did not notice anything else unusual about the claimant's appearance or behavior. The claimant was sent to the Occupational Safety Office for a BAC test.

8. At 4:02 p.m., the claimant's breath registered a BAC of .057. At 4:19 p.m., the claimant's breath was retested and the results were .05. The test was performed pursuant to U.S. Department of Transportation guidelines and the results were accurate.

9. As a result of the alcohol test, the claimant was not permitted to return to work. The next day, she was suspended. On July 30, 2010, the claimant met with a representative with the employer's Employee Assistance Program (EAP), who required that the claimant not consume alcohol, go to Alcoholics Anonymous (AA) meetings, and enter substance abuse counseling. The claimant agreed to comply with these requirements.

10. At some point, the claimant also met with a representative from the Employer's Occupational Health Services and agreed to be subject to random alcohol testing.

11. Pursuant to its Substance Abuse Policy, an employee who tests positive for alcohol and has not previously violated the policy will be conditionally returned to work provided the employee is cleared by both EAP and Occupational Health Services, participates in an approved substance abuse program, is agreeable to being monitored for substance abuse by EAP, and signs a conditional reinstatement agreement.

12. The claimant was cleared by EAP and Occupational Health Services to return to work and scheduled to return at 3 p.m. on August 5, 2010.

13. On August 5, 2010, approximately an hour before her shift was to begin, the claimant and her union representative attended a meeting with the employer's human resources representative, where the claimant was given a conditional reinstatement agreement (CRA) to sign. (Board of Review Exhibit # 4.)

14. Subsection J on the last page of the proposed CRA states:

    Provided [claimant] agrees to and adheres to all of these conditions [employer] agrees to retain [claimant] conditionally. Again, *the employer does not surrender the right of considering [claimant] as an "employee-at-will."* This is not a guarantee of employment but rather is intended to outline the conditions under which the employer agrees to allow [claimant] to continue her present employment. (Emphasis added.)

15. Other terms of the CRA required that the claimant agree to be monitored by the employer's EAP, to continue with her approved substance abuse treatment plan, and to submit to random substance abuse testing for 2 years.

16. The claimant and her union representative reviewed the provisions of the CRA in a separate room, consulted with a union attorney via telephone, and concluded that Subsection J in the CRA could render the claimant an "employee-at-will," which would substantially erode the claimant's rights under the collective bargaining agreement. The claimant was willing to accept the terms referred in to Finding of Fact 15, above.

17. Upon returning to the meeting with management, the union representative raised the concern that a provision in the CRA could take away the claimant's union rights. The union representative asked whether this provision could be changed. The employer's human resources representative stated that she was not authorized to make any changes to the CRA.

18. The claimant refused to sign the CRA because of the objectionable provision in subsection J. She would have signed a CRA that did not have this language.

19. Because the claimant refused to sign the CRA, the employer terminated the claimant.

20. In 2010, the employer used a template CRA for both its union and non-union employees. All "employee-at-will" references were supposed to be removed from a CRA that was presented

to a bargaining unit employee. Inclusion of this language in subsection J of the claimant's proposed CRA was an oversight.

Ruling of the Board

As directed by the Appeals Court, we consider whether the claimant's discharge was disqualifying under G.L. c. 151A, § 25(e)(2), which provides, in relevant part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he period of unemployment next ensuing . . . 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 . . . .

Under G.L. c. 151A, § 25(e)(2), the employer has the burden of proof. Still v. Comm'r of Division of Employment and Training, 423 Mass. 805, 809 (1996); Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

There is no question that the positive BAC results established that the claimant violated the employer's zero-tolerance Substance Abuse Policy on July 27, 2010[2]. However, because this was the claimant's first offense, she was not terminated for failing the breath test. Pursuant to the Substance Abuse Policy, the claimant was removed from her job with the anticipation that she would be conditionally returned to work under a conditional reinstatement agreement. The conditions included: (a) avoiding alcohol; (b) agreeing to be subject to random testing; (c) participating in an approved substance abuse treatment program; and (d) clearance from the employer's EAP and Occupational Health Services. The claimant agreed to all of these terms and was cleared by EAP and Occupational Health Services. However, she would not sign the CRA presented to her at the August 5, 2010 meeting. For that reason, she was fired.

At issue in this case is whether the employer's requirement that the claimant sign the CRA was reasonable such that her refusal to sign it was in wilful disregard of the employer's legitimate interest.

The claimant's only objection to signing the CRA presented to her was the provision in subsection J purporting to retain the employer's right to consider the claimant an "employee-at-will." The employer has argued that it never intended to remove the claimant's collective

[2] At the hearing, the employer also suggested that the claimant's actions violated regulations promulgated by the Board of Registration in Nursing. Although the record remained open for a period of time, the employer failed to present these regulations to the Board. The claimant submitted a July 14, 2011 dismissal letter from the Board of Registration in Nursing determining that there was insufficient evidence to substantiate allegations that the claimant violated any standard of nursing practice. (Board of Review Exhibit # 16.)

bargaining agreement protections and that inclusion of this language in subsection J was an oversight. Alternatively, it argues that this provision was meaningless, because various other provisions in the proposed CRA expressly recognized the claimant's rights under the collective bargaining agreement. However, the employer has acknowledged that the provision should not have been included in a CRA for a bargaining unit employee, which suggests that the objectionable language was not meaningless. A fair understanding of the "employee-at-will" language was that the claimant's employment would continue without the protection of the union contract or at the very least without the protection of the provision requiring the employer to have just cause for discharge. The standard meaning of "at will" employment is that it can be terminated at any time without cause. *See* Black's Law Dictionary 545 (7th ed. 1999). At minimum, inclusion of this provision in conjunction with the other references to the claimant's collective bargaining rights rendered its meaning uncertain.[3]

We see nothing unreasonable about the employer asking the claimant to sign a CRA that included requirements pertaining to alcohol abstention and treatment. However, under the circumstances presented here, it was not reasonable to demand that the claimant agree to surrender or call into question her contractual "just cause" protection. Even if the employer did not intend to include that requirement in the CRA, the employer refused to adjust the CRA once the issue was brought to its attention. Accordingly, the employer has failed to satisfy its burden to show that the claimant knowingly violated a reasonable employment rule or that the claimant's refusal to sign the proposed CRA was done in wilful disregard of the employer's legitimate interest.

We, therefore, conclude as a matter of law that the claimant is not disqualified, under G.L. c. 151A, § 25(e)(2), because the employer has failed to meet its burden to prove that it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy, or for engaging in deliberate misconduct in wilful disregard of the employer's interest.

[3] The Appeals Court concluded that "the wording of the agreement raised legitimate concerns" and also referred to the language as "ambiguous." [Claimant], 2013 WL 66169138, at 2.

The review examiner's decision and our prior Board decision are reversed. The claimant is entitled to receive benefits for the week ending July 31, 2013, and for subsequent weeks, if otherwise eligible.[4]

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 6, 2014

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Chairman

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Member

Judith M. Neumann, Esq.
Member

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

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

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[4] The record reflects that the claimant eventually returned to work for the employer under terms set forth in a settlement agreement and that the settlement included a monetary component. The Board has referred to the agency's fact finding process as to whether the settlement agreement resulted in the claimant receiving remuneration, within the meaning of G.L. c. 151A, § 1(r)(3).