Board of Review
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Issue ID: 0008 9836 26

BOARD OF REVIEW DECISION

0008 9836 26 (June 11, 2014) – A public transit driver's sober, reflective decision to address her emotional turmoil by consuming alcohol prior to starting her shift rather than calling in sick or taking her lawfully prescribed anxiety medication was a knowing violation of the employer's alcohol policy within the meaning of G.L. c. 151A, § 25(e)(2).

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. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from her position with the employer on July 25, 2013. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 9, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 23, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to give the claimant an opportunity to testify and present other evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's conclusion that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant had consumed alcohol two hours before beginning her shift and operated a public transportation vehicle while well over the legal limit of blood alcohol.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked, as a streetcar motor person, for the employer, a transit authority, starting May 15, 2006. This was a part time job which later became full time.

2. The claimant suffers from Post-Traumatic Stress Disorder as a result of her involvement in an accident at work in 2009, which resulted in the death [of] another operator.

3. The claimant suffers from anxiety and takes medications for this symptom.

4. The claimant is [a] recovering alcoholic. While working for the employer she had been open about this fact. The claimant had informed the chief of operations (COO) that she was having an issue with alcohol abuse. The COO had contacted the union on the claimant's behalf. The union took the claimant to get help.

5. The claimant was treated for alcohol dependence at the [Name] Treatment Center from June 9, 2008 to June 16, 2008 and again from April 18, 2013 to April 24, 2013.

6. The employer had a policy that all safety sensitive employees were prohibited from consuming alcohol 4 hours prior to performing safety sensitive functions.

7. The reason for the above policy was to conform to Federal Transportation Authority (FTA) regulations.

8. The employer also prohibited employees from alcohol use: while on duty; during published on call hours; and within 4 hours prior to scheduled duty or published on call hours.

9. The reason for the above policy was to prevent employees from being under the influence of alcohol which would render them unfit for duty and thus create a safety issue for themselves, their co-workers, and the public.

10. When she [was] hired, in May 2006, the claimant received a copy of the employer's detailed drug and alcohol policy, which included the above two policies.

11. The employer's drug and alcohol policy stated that drug testing was to be done if there was reasonable suspicion that an employee was under the influence of drugs or alcohol.

12. Pursuant to the requirements of the FTA, the employer has discharged all employees who have tested positive on a reasonable suspicion test a second time or while they are were at a Final Warning stage of discipline.

13. The employer considered .02 or more to be a positive screening for blood alcohol.

14. The claimant performed safety sensitive functions as a motorcar operator.

15. The claimant received a 5 day suspension in February 2013, at which time she was placed on a final warning and informed that any further violation of the attendance policy could result in more severe and progressive discipline up to and including discharge.

16. The employer tracks attendance policy violations separately from other policy violations.

17. The claimant‘s son died several year ago. This was very painful for the claimant at the time [and] has continued to cause her emotional pain through the present date.

18. The claimant’s mother died in January 2013. This was also a difficult [loss] for the claimant.

19. Mother’s day has been difficult for the claimant since she lost her son. Mother’s day 2013, which occurred on Sunday, May 12th, was extremely difficult for her [sic] claimant given the additional loss of her mother a few months earlier.

20. On May 15, 2013, the claimant was feeling extremely anxious before work, which she attributed to her emotional turmoil over the Mother’s day holiday a few days prior. She did not want to call out of work because she was on a final warning for attendance and had called out a few days earlier on FMLA for her Asthma. She was afraid she would be discharged if she called out again.

21. The claimant did not want to take her anxiety medication before work on May 15, 2013 because she knew it would be in her system for 8 hours. If she was asked to take a random or reasonable suspicion drug test it would show up. She decided to instead rely on alcohol to relieve her anxiety. Her boyfriend fixed her an 8 ounce glass of vodka and cranberry juice around noon, about two hours before her shift was to start.

22. The claimant arrived late to her shift on May 15, 2013.

23. As the claimant was operating her assigned trolley car, coming into the Park Street Station, she was overcome with anxiety. She concluded that, given how she was feeling, it was not safe for her to continue driving. This decision was based on her feeling anxious not a belief that she was under the influence of alcohol.

24. The claimant used the radio to inform the employer that she could not continue to operate the trolley and that someone would need to relieve her at Park Street. She was asked to just take the trolley one more stop to the Boylston stop and she stated that she could not do so.

25. The claimant's radio announcement was considered by the OCC personnel to be erratic. It raised concerns that the claimant might be under the influence of drugs or alcohol. The Superintendent of Light Rail was notified and who [sic] went to meet the claimant at Park Street to escort her to the medical clinic for a drug screen.

26. The claimant got off her trolley at Park Street and another driver took over her trolley. The Chief Inspector for the Park Street Station met the claimant and asked her if she was OK. She stated that she was not. She explained how her mother's death and mother's day had put her on edge. Together they waited for the Superintendent to arrive.

27. When the Superintendent arrived she drove the claimant to the medical clinic. The Superintendent had been very supportive of the claimant as she had struggled with her losses and anxiety over the years. The claimant considered her a friend. She confided, during the drive to the clinic, that she had consumed alcohol around noon that day.

28. At the medical clinic, the Medical Records Coordinator, who was a certified alcohol breathalyzer technician, had the claimant complete paperwork and then escorted her into a room where the Coordinator completed a chain of custody form which the claimant signed.

29. At 4:40pm the Coordinator activated a breathalyzer and the claimant breathed into it. The reading was taken within one minute of the activation and indicated a blood alcohol level of 0.090.

30. A confirmation test was performed at 4:57pm. The results indicated a blood alcohol level of 0.091.

31. The claimant confirmed the test readings by signing the alcohol testing form.

32. The Superintendent transported the claimant home.

33. The claimant came into work the following day. She expected to be suspended for a period of time and allowed time to treat her alcoholism. She was instead suspended for 30 days with a recommendation for [discharge]. When she went to the EAP clinic for help she was told that no order to assist her had been made.

34. The claimant filed an unemployment claim which was effective May 12, 2013.

35. The claimant was sent a letter on July 25, 2013 informing her that she was discharged as of that day because she had reported for work in a condition unfit for duty and due to her prior record.

36. The claimant's union grieved the discharge on the claimant's behalf and the employer denied each level of grievance. The union voted to take the claimant's case to arbitration. The arbitration had not occurred as of the date of the present hearing, March 31, 2014.

37. On August 9, 2013, a Notice of Approval was issued stating the claimant was eligible for benefits as of May 12, 2013, under Section 25(e)(2) of the law because she had left work for an urgent, compelling and necessitous reason.

38. The employer appealed the August 9, 2013 Notice of Approval. As a result a hearing was held on September 17, 2013. The claimant did not attend the hearing because she was in the hospital. On September 20, 2013 a hearings decision was issued which overturned the August 9, 2013 Notice of Approval.

39. On September 27, 2013, the claimant appealed the September 20, 2013 decision.

40. On October 21, 2013, the Board of Review allowed the claimant['s] application for review.

41. On November 21, 2013, the Board of Review issued a Remand Order for the taking of additional evidence.

42. A remand hearing was held on March 31, 2013 and both parties attended.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the consolidated findings of fact are supported by substantial and credible evidence; and (2) whether the ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. As discussed below, we also affirm the examiner's conclusion that the claimant's conduct disqualified her from benefits.

Since the employer discharged the claimant, this case is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent 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 . . . 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 . . . .

In order for an employee's conduct to be deemed a knowing violation at the time of the act, the employee must have been "… consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Division of Employment and Training, 423 Mass. 805, 813 (1996).

After remand, the review examiner found that the claimant was aware of the employer's policy prohibiting the consumption of alcohol within four hours of the start of an employee's shift and providing that employees who tested positive for alcohol a second time or while on a final warning would be discharged. The review examiner also found that the claimant was feeling extremely anxious before her scheduled shift on May 15, 2013. She had been feeling that way since Mother's Day on May 12th, as she had recently lost her mother and had also lost her son several years before. The claimant had been prescribed anxiety medication. She had long-standing difficulty controlling her alcohol consumption and had recently completed a 7-day alcohol treatment program as a recovering alcoholic.

Consolidated findings # 20 and # 21 establish that, based on the claimant's own testimony, when faced with a bout of anxiety, the claimant made what the findings portray as a calculated decision to report to work, rather than call out, and to drink alcohol instead of taking her anxiety medication. The claimant apparently decided she would report to work out of her concerns about being on a final warning for attendance. The claimant resorted to drinking alcohol instead of taking her anxiety medication, ostensibly to avoid the possibility of a positive drug test if she were to be tested at random or due to reasonable suspicion while at work. However doubtful the latter rationale may appear, the examiner credited the claimant's testimony that, within two hours of reporting for her shift on May 15th, she deliberately chose to consume alcohol, knowing this was contrary to an important employer policy.

The review examiner further found that, after reporting for her shift and commencing to operate a trolley, the claimant was overcome by anxiety and arranged to be relieved. The employer believed the claimant sounded erratic during those communications, and ordered her to take a reasonable suspicion-based drug and alcohol test. The claimant's breathalyzer test showed a blood alcohol content (BAC) of 0.090, well over the employer's limit of .02 and also over the legal limit for operating a motor vehicle in Massachusetts.[1]

We are mindful that the Supreme Judicial Court has held that the disease of alcoholism can be a mitigating factor in determining whether a claimant's misconduct is sufficiently intentional, deliberate, or in wilful disregard of an employer's interests to constitute disqualifying misconduct. Shepherd v. Dir. of Division of Employment Security, 399 Mass. 740 (1987). However, this Board has long taken the view that "mere alcoholism or addiction to some other intoxicating substance is not by itself sufficient mitigation to overcome certain, particularly

[1] The Board notes that, under G.L. c. 90, § 24(1)(a)(1), operating a motor vehicle upon a public way with blood alcohol content of eight-one hundreds (0.08) or greater, or while under the influence of intoxicating liquor is punishable by both fine and imprisonment of up to two and one-half years. As set forth in Consolidated Finding # 20, the claimant blood alcohol content was 0.090.

egregious types of misconduct," including illegal conduct such as assault and battery and major theft. BR-123957 (April 4, 2013), *citing* BR-103415 (June 28, 2007), and BR-112754-A (March 30, 2011). Thus, even if the claimant had established that her misconduct was a result of her alcoholism, it would be difficult to accept alcoholism as mitigating the claimant's decision to operate a public transportation vehicle while well beyond the legal limit of blood alcohol content.

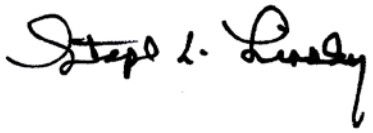
Here, however, we need not reach that difficult issue, because the claimant has not established that her misconduct was caused by her alcoholism. Rather, the record, including the claimant's testimony demonstrates that, prior to reporting for work, the claimant made a sober, reflective decision to address her understandable emotional needs by means of alcohol rather than calling out or taking her lawfully prescribed anxiety medication. Thus, we conclude that her violation of the employer's policies was a knowing and intentional one.

We, therefore, conclude as a matter of law that the claimant is disqualified from receiving benefits because her separation from employment was attributable to a knowing violation of a rule or policy of the employer, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending May 12, 2013, and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 11, 2014

Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
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.

SVL/rh