

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Stephen M. Linsky, Esq.
Member
Judith M. Neumann, Esq.
Member

Issue ID: 0011 0254 86
Claimant ID: 10136674

BOARD OF REVIEW DECISION

0011 0254 86 (Sept. 29, 2014) – The evidence showed that, when the claimant tested positive for alcohol in violation of her last chance agreement, she had been making a sincere effort to control her alcoholism, but was unable to maintain her sobriety. Accordingly, notwithstanding the last chance agreement, the claimant's alcoholism mitigated the wilfulness of her misconduct within the meaning of the Supreme Judicial Court's Shepherd decision

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm on different legal grounds.

The claimant was separated from her position with the employer on March 19, 2013. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 9, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 13, 2014. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had left her employment involuntarily for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to take additional evidence on the circumstances of the claimant's separation from her employment, and her efforts to control her alcoholism. 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 before the Board is whether the review examiner's conclusion, that the claimant quit her employment involuntarily as her alcoholism provided her with urgent, compelling, and necessitous reasons for doing so, is supported by substantial and credible evidence and is free from error of law.

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 for the instant employer as a phlebotomist and she was employed in this position from 11/9/09 until her separation on 3/19/13.
2. The business is a medical center.
3. On 11/10/09 the claimant signed a Letter of Agreement which states in part:

I have received a copy of the following policies critical to our working environment and I agree to uphold and promote the provisions of these policies.

- HR207 Substance Abuse

4. The employer's **Substance Abuse Management Procedures** states in part:

Fitness for Duty Examinations

(company name) may require an employee to have a Fitness for Duty Examination, which may include drug and alcohol testing based on the clinical judgment of the examiner, where a supervisor or department head, based on his or her completion of the Visual Observation Check List, reasonably suspects that an employee's fitness to perform his or her essential duties is or may be impaired or that the employee poses a direct threat to the safety or health of patients or others in the workplace.

5. On 8/31/12 at work the claimant appeared to her immediate supervisor to be in a serious dangerous emotional condition and for her own safety the supervisor brought her to health services.
6. At health services the claimant was administered an alcohol and drug test and the results were positive for cocaine.
7. As a result of that positive test and in order to return to the job the claimant signed a Last Chance Agreement, which states in part:
 - After my return to work, I agree to submit to random alcohol and drug screens performed through the (company name). I understand that if I am contacted on a day I am scheduled to work, I will be expected to report to Employee Health Service on that day. If I am contacted on my day off, I may be allowed up to 24 hours to respond depending on my circumstances.
 - If it should be determined that I am again in violation of Substance Abuse/Drug Free Workplace Policy at (company name), I understand that I will be reported to my Manager and the Human Resource Department, that I will be immediately terminated from employment at (company name).

8. The claimant managed to stop doing drugs cold turkey on her own following the incident that led to the last chance agreement. At this time she knew there was an issue with alcohol, but she did not know that she was an alcoholic. At this time she was attending daily meetings to address the alcohol issue and she was seeing a therapist. (3b).
9. The claimant was able to get sober on a number of occasions during the 12 step program but she did not remain sober. (3b) (3d)
10. The claimant determined she was an alcoholic in January 2013 when she could not wake up or function without a drink. (3a)
11. Around 3/19/13 the claimant was having some legal issues around the custody of her 11 year old and sixteen year old child. The claimant was drinking and not in control of her alcoholism at this time. (3c) (3f)
12. On 3/19/13 the claimant was sent for a random drug/alcohol test and tested positive for alcohol.
13. When the claimant did not report for work following the testing the claimant's supervisor texted her and she responded and told her supervisor that she was going south to be with family.
14. The claimant has family in the South and in her inebriated state of mind she believed that it would be best to enter rehabilitation/detox in an area where she had family close by, however the claimant's father and other family members are alcoholics and she realized upon her arrival that these conditions would not be helpful. The claimant's intent was to stay there during her recovery period, not permanently, but she returned to this area to attend rehab/detox. (2)
15. On 3/27/13 the manager sent the claimant the following:

The purpose of this letter is to address your employment status with (company name).

On March 21, 2012, I left a message on your cell phone voice mail to contact me to schedule a meeting. I also texted a message to you requesting to speak with you. As of today, I have not received any communication from you as requested. I am writing at this time, to inform you that your employment at (company name) is being terminated. Enclosed is a copy of a document indicating the reason for your termination, along with two paychecks. I also need to inform you that you will not be eligible for rehire here at (company name) in the future.

16. The claimant is an alcoholic in recovery at the time of the remand hearing. She is participating in the same 12-Step program for alcoholism which she began as a result of signing the last chance agreement; she has been sober for 21 weeks; she

has been in counseling with a therapist since May 2013, and she has been in counseling with a hypnotherapist since July 2013.

17. Both the employer and the claimant agree that the claimant was discharged.(1)
18. The claimant was discharged because she violated the terms of the Substance Abuse Rehabilitation Monitoring Agreement which stated in part:

If it should be determined that I am again in violation of the Substance Abuse/Drug Free Workplace Policy at (company name), I understand that I will be reported to my Manager and the Human Resource Department, that I will be immediately terminated from employment at (company name). (1b)

19. The company Substance Abuse Policy states in part:

Policy

It is essential for the provision of safe, high quality patient care that (company name) promote and maintain an environment free of substance abuse. In order to fulfill our mission of excellent patient care, we must maintain a work environment that:

- Is safe for our patients and our employees;
- Is conducive to the delivery of high quality care;
- Allows employees to attain the highest work standards.

Scope

Adherence to this policy is the responsibility of employees, physicians, affiliating students and others associated with the (company name).

Procedure

- When there is reasonable cause to believe that an individual's ability to perform essential job functions may be impaired by the use of alcohol and /or illegal drugs, or where that individual may pose a direct threat to the safety or health of others, he or she may be required to submit to a fitness for duty examination, including drug and alcohol testing. Fitness for duty examinations may be requested by Health System management, supervisors or EAP consultants.

Prior to transferring into positions involving driving corporate vehicles for which a DOT (Department of Transportation) card is required, employees will have a urine drug test performed through Employee Health Service.

All employees driving corporate motor vehicles for business purposes, whether covered by the DOT or not, will be required to submit to post-

accident drug and alcohol testing following motor vehicle accidents that meet the DOT criteria as listed in Human Resources policy HR 208: Department of Transportation (DOT) Mandated Drug and Alcohol Testing.

- (company name) is committed to the rehabilitation of employees with substance abuse problems. The performance of such an individual will be managed in a manner which facilitates his her [sic] timely entry into an effective treatment program. In cases where there has been no harm done to the patients, employees or Health System's property and it is likely that no harm will be done, the potential return of that individual to the work force will be considered if he and or she agrees to participate in a monitored rehabilitation agreement under the supervision of the Employee Assistance Program. Where it is determined that an employee should not return to the workforce, (company name) will make treatment options available through the Employee Assistance Program.
- Violation of this policy is grounds for disciplinary action up to and including termination.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we affirm the review examiner's decision to award the claimant unemployment benefits, but we do so under different legal grounds, as the consolidated findings of fact do not support the review examiner's conclusion that the claimant quit her employment for urgent, compelling, or necessitous reasons.

The review examiner concluded in her original decision that the claimant had quit her employment. The review examiner therefore applied G.L. c. 151A, § 25(e)(1), 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 . . . the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . No disqualification shall be imposed if such individual establishes . . . that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Following the additional evidence and testimony presented at the remand hearing, the review examiner found that the claimant was discharged from her employment after she tested positive for alcohol. While this determination is more in the nature of a legal conclusion than a finding of

fact, to the extent it depends upon underlying facts, those underlying facts are supported by the overwhelming evidence in the record, including the testimony of both parties at the original and remand hearings, as well as documentary evidence included in the record as exhibits. We conclude from the overall record that the claimant was discharged, as a matter of law, and, as such, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides in pertinent part:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the 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

The legislative intent behind G.L. c. 151A, § 25(e)(2) is “to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect.” Garfield v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). In order to determine whether an employee's misconduct was deliberate, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Director of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must “take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors.” Garfield, 377 Mass. at 97.

In Shepherd v. Director of Division of Employment Security, the Supreme Judicial Court considered whether alcoholism mitigated the wilfulness of the misconduct for which the claimant was discharged. 399 Mass. 737, 740 (1987)(remanded to obtain evidence of the claimant's state of mind). Shepherd does not stand for the proposition that alcoholism is an absolute defense to disqualification under G.L. c. 151A, § 25(e)(2). If the employer can prove that the claimant either had control of her alcoholism, or that she deliberately and wilfully refused to accept help in controlling it at the time of the misconduct, then the employer may meet its burden of proof as to the claimant's state of mind under G.L. c. 151A, § 25(e)(2). Id. at 740.

The employer has not met its burden here. The review examiner found that the claimant is an alcoholic, and her alcoholism directly caused her to test positive for alcohol in violation of her Last Chance Agreement with the employer. The consolidated findings of fact reflect that, between the time that the claimant signed the Last Chance Agreement and her subsequent positive test for alcohol, the claimant had stopped using drugs and had been making good faith efforts to control her alcoholism by attending daily substance abuse meetings and regularly seeing a therapist. The review examiner found that the claimant was able to get sober several times, but she had difficulty maintaining her sobriety. The review examiner further found that at the time of her random drug and alcohol test on March 19, 2013, the claimant was not in control of her alcoholism, despite her sincere efforts. There are no findings of fact establishing that the

claimant violated the Last Chance Agreement knowingly or deliberately. Under these circumstances, we conclude that the claimant's alcoholism mitigated the wilfulness of her misconduct, within the meaning of Shepherd, and she is therefore entitled to unemployment benefits.

We, therefore, conclude as a matter of law that the claimant was discharged, and she did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed on different legal grounds. The correct section of law is G.L. c.151A, § 25(e)(2). The claimant is entitled to receive benefits for the week ending March 23, 2013, and for subsequent weeks if otherwise eligible.

DATE OF DECISION: September 29, 2014



Paul T. Fitzgerald, Esq.
Chairman



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.

A.M./jv