THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

BOARD OF REVIEW DECISION

BR-110349 (June 6, 2010) -- Prior to a planned termination date for poor performance, the claimant engaged in deliberate misconduct and was fired immediately. Because the deliberate misconduct, and not an inability to perform, severed her employment, a majority of the Board denied benefits under G.L. c. 151A, sec. 25(e)(2). One member filed a dissenting opinion.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to deny unemployment benefits following the claimant's separation from employment. 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 November 26, 2008. She filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on February 3, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 29, 2009.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). The claimant appealed to this Board, and we accepted the case for review. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether a discharge for misconduct prior to a planned termination for poor performance disqualifies the claimant from receiving benefits, under G.L. c. 151A, § 25(e)(2), which she would otherwise have been entitled to receive as a result of the planned termination.

Findings of Fact

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

1. The claimant applied for benefits on December 5, 2008. The Division disqualified the claimant on February 3, 2009. The claimant appealed on February 8, 2009.

2. The claimant worked for the employer from June 15, 2004 to November 26, 2008. The claimant worked as a full time associate in the employer's law firm.

3. The employer discharged the claimant for violating the firm's policies and expectations concerning the use of its information. The employer expected the claimant to know that she could not use confidential firm information for other than business related purposes.

4. The employer expected the claimant to know that she could not use the firm's information for other than business related purposes from her offer letter. The offer letter required the claimant to accept the employer's confidentiality policy and its electronic acceptable use policy. The employer also expected the claimant's awareness from her obligations under the rules of the Board of Bar Overseers concerning the Canons of Ethics.

5. The Confidentiality Policy that the claimant signed states in part, "Information about the Firm. Similarly, it is presumed that all non-public information regarding the firm itself is confidential." This section also states, "Accordingly, disclosure of any such information is prohibited absent specific authorization from the firm, unless such information, including all details you may wish to disclose, already is public as a result of disclosure by others and has been publicly confirmed by the firm."

6. The employer's Electronic Information Systems Acceptable Use Policy starts with a summary that states in part, "Access to Electronic Information Systems is a privilege provided to all Attorneys … as needed for use in furtherance of the firm's business."

7. This policy also states, "9. The EIS should be used, with limited exceptions only, for job-related communications. Although limited personal use is permitted, employees should do so with full understanding that nothing is private." This section also has a statement that "In addition non-business use should be kept to a minimum and generally restricted to non-working time and when such use is less likely to interfere with productive business use by others."

8. The employer has these provisions in order to provide confidentiality for its clients and for the employer's use in the furtherance of the employer's business.

9. The claimant received, read and understood these policies and expectations.

10. In 2007, the claimant filed a complaint against the firm with the Massachusetts Commission on Discrimination (MCAD) against the employer [sic].

11. Subsequently, the claimant withdrew the complaint in order to pursue its merits in court.

12. The claimant took maternity leave from February 7, 2008 to September 3, 2008.

13. Sometime after her return to work, the employer informed the claimant that it would release her in January 2009 due to a lack of productivity concerning billable hours.

14. In November 2008, the claimant accessed the employer's computer system. She searched for documents that would support her case against the employer. She sent multiple documents to her home email and then shared those documents with her counsel.

15. The claimant sent these documents to her home email, because she did not believe that the employer would produce them as part of a discovery request.

16. The employer had made the claimant an offer of $700,000.00 to settle her claims and leave the firm.

17. The claimant found one particular document concerning another employee's personal opinion about one of the firm's attorneys. The claimant spoke to a principal of the firm. The claimant informed this attorney that she wanted the conduct (the alleged harassment) to stop, wanted the firm to take the issue

seriously, and would not settle her claim for less than seven figures meaning at least one million ($1,000,000.00) dollars. The claimant also advised this attorney that she had additional documents.

18. The employer conducted an investigation, tracked the claimant's searches and the documents that she had taken. It then discharged her.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(2), 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 … (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 … provided that such violation is not shown to be as a result of the employee's incompetence….

The purpose of the unemployment compensation statute is to assist those who are involuntarily "thrown out of work through no fault of their own." Leone v. Director of the Div. of Employment Security, 397 Mass. 728, 733 (1986), *citing* Olmeda v. Director of the Div. of Employment Security, 394 Mass. 1002, 1003 (1985). The Supreme Judicial Court has held that unsatisfactory work performance is not deliberate misconduct, and, therefore, that it is not disqualifying within the meaning of G.L. c. 151A, § 25(e)(2). Trustees of Deerfield Academy v. Director of the Div. of Employment Security, 382 Mass. 26, 31-33 (1980).

In the present case, the review examiner's findings show that the claimant was to be terminated in January, 2009 due to lack of productivity. Since the record lacks evidence of any wilful lack of productivity, the claimant's separation for this reason would not have disqualified her from receiving benefits. Had the claimant not also removed employer documents without permission, this would be a straightforward award of benefits. However, we must decide whether the claimant's discharge on November 26, 2008 for this conduct disqualified her from the benefits she would otherwise have been entitled to upon her termination in January.

First, we examine the nature of the November 26, 2008, separation. Accessing the employer's confidential electronic documents without its knowledge or permission for use in her own discrimination lawsuit against the firm triggered this discharge. In the decision below, the review examiner concluded that the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2). This conclusion is supported by sufficient facts in the record and is free of any error of law.

Next, we decide the impact of the November discharge on the claimant's eligibility for benefits. 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. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). Here, the claimant's deliberate misconduct and not her inability to perform severed her employment. In light of the overall purpose of the unemployment statute and the legislative intent behind G.L. c. 151A, § 25(e)(2), in particular, we believe the Legislature intended that she be denied benefits.

This case is one of first impression in Massachusetts. However, other jurisdictions that have addressed a similar sequence of events have reached the conclusion that a disqualifying act that occurs after the announcement, but before the occurrence, of a non-disqualifying separation disqualifies the worker from benefits. *See* Simpson Sheet Metal, Inc. v. DES, Nos. 19880 and 19781, Mo. ¶ 1970 (Mo. Ct. App. Jun. 22, 1995) (CCH) (disqualified claimant who, after being told that he would be laid off, was insubordinate and fired on the spot); Matter of Ferdinand J. Strozewski, No. 50469, N.Y. ¶ 1970.935 (N.Y. App. Div. Oct. 31, 1985) (CCH) (denied benefits to claimant who was fired for leaving work without permission, even though he was scheduled to be laid off at the end of the shift); Martin L. Landes, Jr. v. Equity Resource Environmental, No. 02-44834-AE, Mich. ¶ 1970.32 (Mich. Cir. Ct. May 22, 2003) (CCH) (denied benefits when the claimant was discharged for misconduct prior to a planned reduction from 40 to 30 hours).

We are persuaded by these cases, and we, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and that this disqualifies her from receiving benefits under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending December 6, 2008, 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.

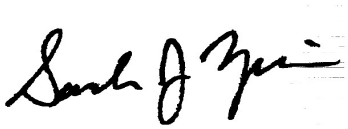
John A. King, Esq.
Chairman

Stephen M. Linksy, Esq.
Member

*** DISSENT ***

The majority has determined that the claimant should be denied unemployment insurance benefits because she "brought her unemployment on herself through intentional disregard of behavior which his employer has a right to expect." Garfield, 377 Mass. at 97. This conflicts with the findings of fact of the review examiner, who serves as the finder of fact in this case. The review examiner found that the employer informed the claimant that it would release her in January 2009 due to a lack of productivity, a reason which would not support disqualification from unemployment insurance benefits. The majority is unable to cite any Massachusetts statute or case law to support the proposition that activities occurring post-notification of termination can alter the reason for said termination. Instead, the majority simply assumes that such is what the Legislature intended. As an administrative tribunal with limited jurisdiction, the board lacks the ability or authority to make such an assumption.

For the foregoing reasons, I respectfully dissent.



BOSTON, MASSACHUSETTS Sandor J. Zapolin
DATE OF MAILING - June 6, 2010 Member

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

LAST DAY TO FILE AN APPEAL IN COURT – July 9, 2010

AB/rh