



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Fax (617) 727-5874

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

JOANNE GOLDSTEIN
SECRETARY

MICHAEL TAYLOR
DIRECTOR

JOHN A. KING, ESQ.
CHAIRMAN

SANDOR J. ZAPOLIN
MEMBER

STEPHEN M. LINSKY, ESQ.
MEMBER

BOARD OF REVIEW DECISION

BR-111607 (Oct. 26, 2010) - When the claimant left her post unattended upon seeing her replacement in the parking lot, she did not do so knowingly in violation of her employer's policy within the meaning of G.L. c. 151A, sec. 25(e)(2). This was a spontaneous, emotional reaction to being assaulted by her boyfriend at work and, therefore, not disqualifying.

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 benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from her position with the employer on April 18, 2009. She filed a claim for unemployment benefits with the DUA and was awarded benefits in a determination issued on June 26, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, a review examiner reversed the agency's initial determination and denied benefits in a decision rendered on October 6, 2009.

Benefits were denied after the review examiner determined that the claimant violated a rule or policy of the employer and, thus, was subject to disqualification, pursuant to 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 back to the review examiner to take additional evidence and make additional findings. Only the claimant 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, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer when she left the workplace unattended for a few minutes on seeing that her replacement had arrived in the parking lot.

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 part time Photographer for the employer, a photography studio, from 10/29/07 until she became separated on 04/18/09.
2. The claimant was discharged for leaving the studio unattended in violation of company policy.
3. The employer maintains a policy prohibiting an employee from leaving the studio unattended without getting coverage or getting prior authorization from a Manager.
4. This policy is necessary to keep the business operations running smoothly in order to protect the employer's customers and the host store.
5. The claimant was aware of the policy. The claimant had been informed on the day of the incident, by her Manager, of the policy.
6. The employer has terminated other employees who were in violation of this policy.
7. On 04/18/09, the claimant came into work as a favor for her Manager. The claimant only worked Mondays through Fridays and volunteered to work that Saturday for her Manager who worked every weekend.
8. Approximately one hour after the claimant arrived at work her ex boyfriend showed up at her place of employment. The claimant and [her ex-boyfriend] had a discussion and the ex boyfriend began arguing and yelling at the claimant. In order to calm him down and to not draw attention to the matter the claimant went into the back room.
9. The claimant's ex boyfriend followed the claimant to the back room where he pushed the claimant against the wall. The claimant hit her back against a point on a mirror that hung on the wall.
10. The claimant began crying and became scared and was very nervous.

11. An associate from the host store in which the photo studio is located came into the studio because the associate could hear the claimant's ex boyfriend verbally abusing the claimant. The claimant looked at the associate scared. The associate told the ex boyfriend that he needed to leave. The assistant manager of that store also came into the studio and instructed the ex boyfriend that if he came back again she would call the police.
12. The Manager received a call from the claimant informing her that her boyfriend came into the store yelling and arguing with her and that she needed to leave.
13. The Manager told the claimant to stay at the store until she could find someone to replace her because she was 2 ½ hours away and she told the claimant she was going to call the District Manager as well.
14. In the meantime, the claimant called the District Manager and left a voice mail informing her of what had happened.
15. The Manager then called the claimant back and informed her that she had spoken to the District Manager and she said that the claimant could not leave until her coverage arrived or she would be fired. The claimant told the manager that she could not stay [as] she was extremely nervous scared and upset and not in the right state of mind to be there. The manager told the claimant to let her find a replacement employee and she would call her back.
16. The claimant's ex boyfriend then began calling the claimant's cell phone arguing with her again.
17. The Manager called the claimant back to tell her that she had found an employee to cover the store and that she had notified security about the incident. The claimant was told that she would need to stay at the store for about a half hour until the covering employee arrived.
18. The claimant called the District Manager and left her a voice message again apologizing for what had happened. The District Manager never called the claimant back.
19. At approximately 1:30 PM a customer came into the studio. The claimant asked the customer to complete a customer questionnaire. The claimant informed the customer that she would not be able to take the customers photos but that another employee was coming in and they would do so. That was no problem with the customer.

20. The claimant could see the parking lot from the studio and saw the employee that was coming in to cover for her. The claimant punched out, grabbed her belongings and walked out towards the other employee.
21. The claimant and covering employee spoke briefly as they passed each other in the parking lot. The employee went into the studio to cover and the claimant left.
22. While in her car the claimant called the Manager and informed her that the covering employee was in the studio and that she had left. The Manager told the claimant okay and told her to take it easy.
23. On 4/19/09, the claimant called the Manager and the Manager told the claimant that she had spoken to Terri and because the time clock showed that the claimant clocked out 3 to 4 minutes before the covering employee clocked in that the claimant left the studio unattended and therefore the claimant was discharged.
24. The claimant left the District Manager another message on 4/19/09 apologizing and informing her that she did not want to lose her job.
25. The claimant never received a verbal or written warning prior to her discharge and her job was not in jeopardy.

Ruling of the Board

The Board adopts the review examiner's consolidated 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 ... 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 review examiner concluded at the initial hearing that the employer's discharge of the claimant was attributable to a knowing violation of a reasonable and uniformly enforced policy or rule of the employer. Only the employer attended the initial hearing. We remanded the case to allow the claimant to testify.

In light of the consolidated findings of fact, we conclude that the claimant did not knowingly violate a reasonable and uniformly enforced policy or rule of the employer. The review examiner made consolidated findings that the claimant left her shift a few minutes before her shift replacement arrived, because she saw her replacement in the parking lot and exchanged words with him as he was entering and she was leaving. Given that the claimant's ex-boyfriend had physically and verbally assaulted the claimant at the business, the claimant's actions in leaving the workplace after her replacement had arrived on-site but three or four minutes before he had actually checked in are in the nature of "spontaneous, emotional reaction rather than culpable conscious action performed with an awareness of its character, circumstances and consequences." Still v. Commissioner of Employment and Training, 423 Mass. 805, 814-815 (1996)(citation omitted).

We, therefore, conclude as a matter of law that the employer did not sustain its burden to prove that the claimant's discharge was attributable to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The review examiner's decision is reversed. The claimant is entitled to benefits under G.L. c. 151A, § 25(e)(2), for the week ending April 25, 2009 and for subsequent weeks if otherwise eligible.

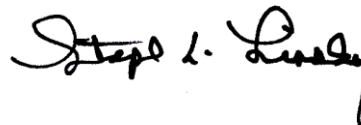
BOSTON, MASSACHUSETTS
DATE OF MAILING - October 26, 2010



John A. King, Esq.
Chairman



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
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 – November 25, 2010