



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BR-122588-A (Mar. 29, 2013) – The Board ruled that the claimant's alcoholism did not mitigate his unexcused absences and render him eligible for benefits. The employer sustained its burden under the Supreme Judicial Court's Shepherd decision to show that the claimant deliberately and wilfully refused to accept help controlling his alcoholism at the time of the misconduct. Even though the claimant was on a last chance agreement and his job was on the line, he was binge drinking and had to be involuntarily committed to a detoxification facility by a court order.

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 reverse.

The claimant was discharged from his position with the employer on January 5, 2012. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 2, 2012. The employer 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 awarded benefits in a decision rendered on March 23, 2012. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had involuntarily left employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). 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 employer's appeal. This case involves a complex question of law and fact.

The issue on appeal is whether the employer has sustained its burden to show that the claimant's violation of the employer's attendance policy was attributable to the claimant's deliberate and wilful refusal to accept help in controlling his alcoholism.

Findings of Fact

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

1. The claimant worked full-time as a union Laborer for this employer's city from 10/27/97 until he involuntarily left employment effective 01/05/12.
2. The claimant is also a tenured civil service worker.
3. The claimant is an alcoholic.
4. The reason for the separation from employment "the final incident" was unauthorized absences from 11/01/11 through 11/10/11. These absences were related to the claimant's alcoholism.
5. The claimant was absent in November 2011 when he had no vacation, sick or personal days available to him. The claimant used his last sick day on 10/29/11.
6. The union on 10/28/11 asked the employer if sick days could be gifted to the claimant due to his illness as this had been done in the past for other employees suffering from illnesses such as cancer. The employer did not allow the gifting of sick days in this case.
7. The claimant's problems with alcohol are chronic and are well known to employer management. The claimant is viewed as a good worker when sober and the employer wanted the claimant to remain sober and remain as an employee.
8. Due to earlier alcohol related incidents, on 06/23/10 the claimant signed a "last chance" agreement with the union and the employer that notes, amongst other things, that any attendance policy violation will result in termination from employment.
9. In December of 2010 the claimant admitted himself in to an alcohol treatment facility but after leaving the facility the claimant relapsed into a pattern of binge drinking.
10. After his initial detoxification treatment the claimant was attending AA meetings three times a week but he still struggled with his illness.

11. On 10/31/11 the claimant was hospitalized and then, following a petition to the courts by his mother, a Judge ordered that the claimant be transferred from the hospital directly to a locked down alcohol treatment facility for a period of approximately 16 days. The claimant had no access to a telephone during this time but the claimant's mother met with the employer's Time Keeper and other managers to keep them fully informed of the situation.
12. On 11/16/11 after leaving the alcohol treatment facility the claimant returned to work and was given a five day unpaid suspension which is the maximum under the civil service rules. The claimant then returned to work while the employer contemplated what to do next.
13. An internal hearing was conducted by the employer on 11/30/11 and the Mayor followed the recommendation of the employer's Hearing Officer and ended the employment relationship. The Mayor wrote and mailed a termination letter on 01/03/12 and the claimant was paid through 01/05/12.
14. On 01/09/12 the claimant filed a claim for unemployment benefits. The claimant was initially determined to be eligible under Section 25(e) (2) of the law because the employer condoned the behavior by allowing the claimant to continue to work for more than a month after the final attendance incident.
15. The employer requested a DUA hearing.

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 . . . [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

As the review examiner found, the claimant had used up all of his paid sick, vacation, and personal time when he was absent without authorization from November 1 – 10, 2011. The employer fired him because this violated the employer's attendance policy and his last chance agreement.

In order to determine whether an employee's actions constitute deliberate misconduct, 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 v. Director of Division of Employment Security, 377 Mass. 94, 97 (1979). Since the review examiner found that these absences were related to the claimant's alcoholism, we consider whether the alcoholism constituted a mitigating factor.

There is no question that the claimant was aware that he could be discharged for further alcohol-related attendance problems. He had signed a last chance agreement the prior year after he had been suspended for failing a random alcohol test. His last chance agreement provided for immediate termination for violating any of the employer's attendance or sick day policies. He knew his job was in jeopardy.

In Shepherd v. Director of Division of Employment Security, the Supreme Judicial Court considered whether alcoholism mitigated the willfulness 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). We do not read Shepherd to mean 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 his alcoholism or that he deliberately and wilfully refused to accept help in controlling it at the time of the misconduct, then the employer has met its burden of proof as to the claimant's state of mind under G.L. c. 151A, § 25(e)(2). Id. at 740.

The findings provide that the claimant admitted himself into an alcoholic treatment facility in December, 2010, but that he relapsed into a pattern of binge drinking during the course of the following year. They also provide that his subsequent choice of treatment, attending AA meetings, was not enough. Finally, following a petition to court by the claimant's mother, a Judge ordered that the claimant be placed into a locked down alcohol treatment facility for approximately 16 days. As the claimant testified, he was "sectioned 35" to a detox facility.¹ Section 35 of G.L. c. 123 provides for the *involuntary* commitment of an alcoholic or substance abuser to an inpatient facility for the care and treatment of alcoholism or substance abuse for up to 30 days.

Nothing about these facts suggests that the claimant was making a sincere effort to wilfully control his alcoholism. The claimant was engaged in a pattern of binge drinking, and his job was on the line. Yet, he ultimately had to be forced into treatment by a court order. In our view, the employer has satisfied its burden under Shepherd to prove that the claimant deliberately and wilfully refused to accept help with controlling his alcoholism.

¹ The claimant's testimony concerning the Court's order of commitment to a detoxification facility, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

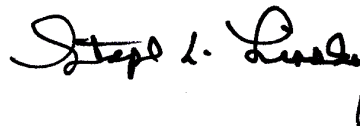
We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 14, 2012, and for subsequent weeks until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 29, 2013



John A. King, Esq.
Chairman



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- April 29, 2013

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.

ab/jv