



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 • Office Hours: 8:45 a.m. to 5:00 p.m.

JOHN A. KING, ESQ.  
CHAIRMAN

SANDOR J. ZAPOLIN  
MEMBER

STEPHEN M. LINSKY, ESQ.  
MEMBER

DEVAL L. PATRICK  
GOVERNOR

TIMOTHY P. MURRAY  
LT. GOVERNOR

JOANNE F. GOLDSTEIN  
SECRETARY

MICHAEL TAYLOR  
DIRECTOR

## BOARD OF REVIEW DECISION

BR-109435 (Mar. 15, 2010) -- Where medical evidence showed that claimant's difficulty concentrating was due to an allergic reaction to mold in the work environment, claimant's errors were not deliberate. A claimant who is discharged for poor performance is entitled to benefits.

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

The claimant was discharged on October 7, 2008 and filed a claim for unemployment benefits with the DUA. The claimant was initially denied benefits in a determination issued on January 22, 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 the claimant benefits in a decision rendered on February 19, 2009. Benefits were denied after the review examiner determined that the claimant was disqualified under G.L. c. 151A, § 25(e)(2), because she had refused to perform work as directed.

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision and the claimant's appeal, we remanded the case back to the DUA review examiner to hold another hearing to take evidence and make findings on the claimant's argument that an allergy to mold in the workplace impaired her ability to perform her job properly. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based on our review of the entire record, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant's failure to perform her job properly, which was the reason for her discharge, was deliberate.

Findings of Fact

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

1. The claimant was employed full-time by the employer from 11/28/06 through 10/7/08 as a travel agent by the employer, an automobile club.
2. The employer's main office is in [main location]. The claimant's most recent work location was the employer's leased office in [satellite location].
3. The employer has a progressive disciplinary policy for continuing similar performance issues. Discipline starts at verbal counseling, followed by written warning, rising to suspension or final written warning for a third incident and ultimately termination for a fourth occurrence.
4. The employer has the policy so that employees have the opportunity to correct behavior which is not acceptable to the employer and preserve their employment.
5. The employer informs employees of this policy through issuance of a handbook, a copy of which the claimant acknowledged receipt of on 11/28/06.
6. The employer has discharged all employees that have risen through progressive discipline to the level of termination.
7. The claimant began complaining of health issues at the [satellite location] in May or June 2008. She believed that there was a mold issue at the location which was affecting her breathing.
8. The claimant requested FMLA and on 7/17/08 presented a certification signed by her doctor stating the claimant had an allergic reaction to mold caused by contamination at work. He requested that the claimant be allowed to work part time until the mold contamination was corrected and because she was receiving immunotherapy.
9. The doctor further stated that the claimant was not required to be absent from work as she can work in a different office.
10. The employer, which initially did not feel the mold issue was as critical or severe as claimed by the claimant, responded that work was not available at other locations. The claimant thereafter continued to work in [satellite location] while pursuing both worker's compensation and a transfer.

11. The local Board of Health ultimately did find a mold problem in the building that housed the employer's [satellite location] office.
12. On 7/25/08, the employer issued the claimant a written warning based on a customer complaint from 7/18/08 that the claimant had informed the customer on a Friday that she was too tired to accommodate a requested change in meal arrangements for a booking.
13. Thereafter the customer requested a credit regarding the meal arrangements to which the claimant responded she was unable to process the credit. The employer determined that the claimant had entered the incorrect credit card number which was the only reason she could [not] process the credit.
14. The warning stated that the claimant's actions could directly deter the customer from doing business with the employer and potentially harm the employer's reputation with other customers.
15. On 8/22/08, the employer issued the claimant a final written warning dated 8/4/08 for another reservation issue that was caused by the claimant failing to follow up, which could have resulted in the loss of business and harm to its reputation.
16. The warning stated the claimant was expected to communicate with [designated] employees any reservation that she could not complete in a timely manner to the employer's expectations.
17. The claimant had attended a worker's compensation meeting on her claim. The claimant was awarded worker's compensation for a short period. The determination was made known at this meeting.
18. The physician who completed the Independent Medical Examination presented to workers compensation stated that the claimant was diagnosed "...difficulty concentrating and fatigue due to a reaction...to an undetermined substance in the environment at the [employer] Office." The prognosis was for "complete recovery by avoiding the work environment..." at that office.
19. Other physicians seen by the claimant since the onset of the medical issue have all stated the symptoms appear to be the result of mold in the [satellite location], further stating she shows improvement when out of that location for any period, such as being home over the weekend.
20. On 10/6/08, the claimant was terminated as the final action in progressive discipline.

21. The claimant worked at the employer's [main location] office on Saturday, 9/27/08 with other employees. The claimant serviced the client of a co-worker agent who was not in that day. She serviced the client as her scheduled shift was nearing an end. She accepted the customer's payment for trip cancellation insurance but she was not able to process the insurance policy, because of a computer glitch.
22. The customer left the office believing that such insurance was in place. This could have exposed the employer to the cost of the trip if the customer had cancelled while the policy was not in effect.
23. The claimant was instantly aware that the trip insurance had not processed but she did not notify her supervisor of the problem as her final warning had directed. Although the claimant intended to leave a note for the other agent who would next be in on Monday of the following week, the claimant forgot to leave the note.
24. The issue went undetected until discovered by the other agent when she returned. She observed the problem as the computer system generates a flashing icon on the monitor indicating that an unresolved insurance problem exists.
25. The termination notice dated 10/6/08 cited counseling/verbal warnings having been issued on 4/11/08, 5/21/08, and 7/1/08 along with the written warning on 7/25/08 and a suspension/final warning on 8/4/08 prior to the incident of 9/27/08.

### 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 . . . .

Deficiencies in work performance, even when repeated and cumulative, do not disqualify a claimant from benefits. Nantucket Cottage Hosp. v. Director of Div. of Employment Sec., 388 Mass. 1006 (1983). The review examiner found that the claimant knew that she should have left a note about the computer problem that prevented processing the payment for trip insurance. Her

failure to leave the note was not intentional. Moreover, the review examiner found that the claimant's physician determined that there was medical basis for the claimant's difficulty concentrating and fatigue at the employer's worksite environment.

We conclude as a matter of law that the claimant is entitled to benefits because the employer has not shown that her discharge was for deliberate misconduct in willful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending October 11, 2008 and for subsequent weeks if otherwise eligible.

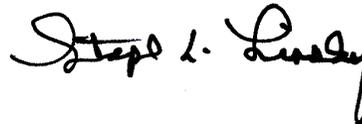


John A. King, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - March 15, 2010**



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 – April 14, 2010**