



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

BR-106310 (July 16, 2008) -- Claimant's failure to check a patient's IV catheter was caused by negligence; it was not an intentional act. Therefore, regardless of the gravity of her error, she is entitled to benefits under G.L. c. 151A, sec. 25(e)(2).

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.

Benefits were denied after the review examiner determined that the employer showed the claimant had engaged in deliberate misconduct and, thus, had met its burden under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to make further findings from the record. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The claimant was separated from employment on October 19, 2007. She filed a claim for unemployment benefits with the DUA and was approved in a determination issued by the agency on November 15, 2007. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner overturned the agency's initial determination and disqualified the claimant from receiving benefits in a decision rendered on March 6, 2008.

The issue on appeal is whether the claimant, a medical technician at an acute care hospital who was terminated for a series of violations of medical protocols, was discharged for a knowing violation of a reasonable and uniformly enforced policy of the employer or for engaging in deliberate misconduct in wilful disregard of the employer's interest.

Findings of Fact

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

1. The claimant worked full-time for the employer from February of 2004 to October 19, 2007 as a nuclear medicine technician ("technician").
2. The employer is a hospital.
3. The claimant holds an Associate in Science degree in nuclear medicine technology and is a certified nuclear medicine technologist.
4. The employer discharged the claimant for failing to remove an intravenous ("IV") needle/catheter from a patient's arm before discharge.
5. The employer had a policy that prohibited "negligence or disregard for Medical Center or department safety or patient care rules that could be seriously detrimental to the best interest of patients, other employees, or the Medical Center itself."
6. The employer's imaging department – nuclear medicine department had its own specific policy, which consisted of a step-by-step procedure regarding renal glomerular filtration rate evaluations of patients; the procedure called for the removal of the IV before dismissing the patient after the technician checks the images with the radiologist, the purpose of which is noted as being that "sometimes delayed images are required."
7. The purpose of leaving an IV catheter in a patient up to the point of release was to be able to administer medicine easily should a need arise during the treatment of the patient.
8. The general purpose of removing the catheter before patient release was to prevent injury and/or infection to the catheter site.
9. The claimant knew the general policy concerning negligence due to receiving and being briefed on it, while she did not unequivocally know the departmental procedure as she did not receive it, nor was it posted in the workplace; the claimant, however, knew that other technicians performed procedural steps differently than she and had a general knowledge of departmental procedures due to monthly policy meetings.

10. The employer had a progressive, but discretionary, system of discipline, which consisted of a verbal or written warning depending on the severity of the infraction, a suspension/final warning and discharge; the policy also stated that it was the sole discretion of the employer to implement the appropriate level of discipline according to the offense.
11. The employer's policy stated that discipline (verbal and written warnings) will become inactive after two years provided that no further disciplinary action was given.
12. The claimant received a written warning on September 22, 2005 for failing to verify the identification of a patient.
13. The claimant received a written warning on July 7, 2006 for administering the wrong radiopharmaceutical to a patient.
14. The claimant received a suspension on August 7, 2007 for improper handling of a leaked radiological material; the suspension notice stated that "any infraction or failure to abide by medical center rules and regulations and to fully meet the duties and responsibilities of your job will result in your termination of employment."
15. In general, the claimant followed her own procedure of removing a radioactive IV catheter from a patient, which was different than what the department expected in its procedures and what other technicians did.
16. The claimant consistently removed the IV from the patient prior to checking the images with the radiologist.
17. The purpose for the claimant's procedure was to make the patient more comfortable and due to her belief that no additional radiopharmaceutical would be injected into the patient due to the maximum dosage already injected.
18. The claimant also believed that any adverse reaction to the radiopharmaceutical would be instantaneous and not delayed for any reason and thus, the catheter would no longer be needed for the purposes of injecting the patient with a medication necessary to further treat the patient during an unforeseen reaction or medical condition.
19. On October 16, 2007, the claimant took over a patient, who was at a step in the imaging process where the final images were being taken and prior to checking with the radiologist; and who was handled up to that point by another technician, who was going on break.
20. The other technologist stated to the claimant on the following day, that on October 16, 2007, she told the patient two times not to leave with the IV catheter in her arm.

21. The patient still had an IV catheter in her arm at the time of the claimant taking over.
22. The claimant released the patient without first observing the patient or attempting to remove the IV catheter.
23. The claimant wantonly neglected to observe the IV catheter in the patient's arm due to an assumption that it was removed by someone else.
24. The claimant admitted that it is wrong to make assumptions in the workplace.
25. The claimant was not distracted from performing her duties.
26. The patient did not inform the claimant that she still had the IV catheter in her arm.
27. The claimant admittedly assumed sole responsibility for the event.
28. Later that day, the patient called the employer to complain about [sic] IV catheter still in her arm.
29. The employer instructed the patient to come to the hospital for removal.
30. The employer then suspended the claimant with pay effective immediately and pending the outcome of a decision.
31. On October 19, 2007, the employer discharged the claimant for releasing a patient without removing an IV catheter used for radiopharmaceutical injection.
32. The employer's radiology manager stated first that he did "not believe it (meaning the claimant's act) was deliberate" and soon after stated that "it (meaning the claimant's omission) was deliberate."
33. The claimant deliberately allowed (or grossly neglected in her allowance for) the patient to leave with the catheter in her arm.
34. On October 16, 2007, the claimant (constructively and/or manifestly) intended to violate the employer's expectation by discharging the patient without removing the catheter.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact, with the exception of findings 33 and 34, for reasons stated below. 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, 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, . . .

We do not adopt the review examiner's conclusions in findings 33 and 34. While they are characterized as findings of fact, they are in reality legal conclusions and legal theories. In the present procedural posture of this case, we believe that such conclusions and theories are the Board's responsibility, not the DUA review examiner's. Fingerman v. Dir. of Division of Employment Security, 378 Mass. 461 (1979)(in appeals to the Board of Review, DUA review examiners serve as finders of fact, but the Board decides questions of law.)

In analyzing this case, we start with the fact that the claimant did not know her department's specific policy for removal of an IV. Since she did not know the specific policy, the employer cannot demonstrate that the claimant engaged in a knowing violation of this IV removal policy.

Nor can we reach a conclusion that she engaged in deliberate misconduct in wilful disregard of the employer's interest. The Supreme Judicial Court has ruled that in order to constitute "deliberate misconduct" and "wilful disregard," the worker must intend to disregard standards of behavior which the employer has a right to expect. Still v. Comm'r. of Employment and Training, 423 Mass. 805, 810 (1996). Nothing in the findings suggests that the claimant intended to leave the IV in the patient's arm. Rather, the review examiner found that the claimant negligently failed to observe the patient's IV catheter because she assumed someone else had removed it.

The review examiner concluded that the claimant's negligence was so great as to take on the character of what was, in effect, "constructively intentional" misconduct. We disagree. The proper inquiry in awarding unemployment benefits is not the level of harm caused by the employee's conduct, but the employee's state of mind at the time. Id. Although the claimant admitted that it was wrong to make assumptions in the workplace and admitted that she was solely responsible for the incident, nothing in the facts suggests that she intended to harm or otherwise jeopardize the patient's safety.

We are aware of no appellate level decision in Massachusetts which has found negligence, however great, to be a sufficient basis by itself to support a benefit disqualification *qua* "intentional misconduct" under G.L. c. 151A, § 25(e)(2).

Whether the employer was justified in discharging this employee is not before us. The issue is “[W]hether the Legislature intended to deny benefits in the circumstances presented by the case.” Id. at 809. Disqualification under § 25(e)(2) requires that the employee have the requisite state of mind at the time of the dischargeable offense. Finding none, this claimant is entitled to receive benefits.

We, therefore, conclude as a matter of law that the claimant’s failure to follow hospital procedure for the removal of a patient’s IV prior to discharge on October 19, 2007, was neither a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer’s interests within the meaning of § 25(e)(2).

The DUA review examiner’s decision is reversed. The claimant is eligible to receive benefits for the week ending October 27, 2007, and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 16, 2008



Donna A. Freni
Member

Member Sandor J. Zapolin did not participate in this decision.

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- August 15, 2008