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October 29, 2010

Anne C. Berlin, Esq.  
Chief Counsel  
Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114

Re: Request for Comments

Dear Attorney Berlin:

Please accept the following from the Disability Law Center in response to the Notice and Request for Comments of the Board of Review concerning the continued applicability of *Shepherd v. Director of the Dep't of Employment Security*, 399 Mass. 737 (1983).

Disability Law Center (DLC) is a statewide, private, non-profit legal services organization and is the federally designated Protection and Advocacy agency for the Commonwealth of Massachusetts. Since 1978, the Law Center has provided a full range of legal assistance to people with disabilities in Massachusetts, including legal representation, regulatory and legislative advocacy, and education and training on the legal rights of people with disabilities.

The Law Center has a particular concern with the Board's proposition that the SJC's decision in *Mammone v. President and Fellows of Harvard College*, 446 Mass. 657 (2006) may require a different interpretation of *Shepherd*, which held correctly that UI claimants who are alcoholics are entitled to the same standard of review as all other claimants who are accused of misconduct. In fact, treating claimants who are alcoholics differently than others accused of misconduct in determining UI eligibility may violate Title II of the Americans with Disabilities Act.

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DIVISION OF  
UNEMPLOYMENT  
BOSTON, MA

The Protection and Advocacy System for Massachusetts



### Alcoholism is a disability

Alcoholism, also called dependence on alcohol, is a chronic relapsing disorder that is progressive and has serious detrimental health outcomes. The development of alcoholism is characterized by frequent episodes of intoxication, preoccupation with alcohol, use of alcohol despite adverse consequences, compulsion to seek and consume alcohol, loss of control in limiting alcohol intake, and emergence of a negative emotional state in the absence of the drug. Neurobiology of Alcohol Dependence: Focus on Motivational Mechanisms, Nicholas W. Gilpin, Ph.D., and George F. Koob, Ph.D. (available at <http://pubs.niaaa.nih.gov/publications/arh313/185-195.htm>) (citing American Psychiatric Association 1994).

Alcohol interacts with several neurotransmitter systems in the brain's reward and stress circuits. These interactions produce alcohol's acute reinforcing effects. Following chronic exposure, these interactions result in changes in neuronal function that underlie the development of sensitization, tolerance, withdrawal, and dependence. Chronic exposure to high doses of alcohol can result in profound changes in the morphology, proliferation, and survival of neurons. Accordingly, deficits in these brain areas may impact motivational circuits, impairing the ability of the organism to inhibit impulsive behavior and thereby further contributing to pathological drug-seeking behavior. *Id.* (citing Jentsch and Taylor 1999).

Alcoholism is recognized as a disability under the Americans with Disabilities Act. See ADA Title II Technical Assistance Manual, II-2.3000 (available at <http://www.ada.gov/taman2.html>); 28 CFR 35.104 ("The phrase *physical or mental impairment* includes, but is not limited to ... alcoholism.") (available at <http://www.ada.gov/reg2.html#35.104>). Furthermore, in 2008, the ADA's definition of "disability" was amended by the ADA Amendments Act of 2008 (P.L. 110-325). The term "major life activity" now includes "the operation of a major bodily function, including but not limited to ... neurological and brain ... functions." 42 U.S.C. 126, § 12102(2)(B). The effects described above of alcoholism on a person's neurological and brain functioning plainly meets this definition.

### What effect should the Board give to the *Mammone* decision?

The *Mammone* decision should not effect the Board's continuing interpretation of *Shepherd*. *Mammone v. President and Fellows of Harvard College*, 446 Mass. 657 (2006), was a case of employment discrimination brought under M.G.L. c. 151B, which prohibits discrimination on the basis of an employee's disability. The plaintiff was an individual with bipolar disorder and major recurrent depression who was terminated after he engaged in workplace misconduct. In a decision in the lawsuit he brought against his former employer for disability discrimination, the SJC held that an employee who engages in egregious workplace misconduct is not a qualified person with a disability entitled to the protections of chapter 151B, regardless of the nature of his disability. In other words, having a disability alone does not necessarily give rise to a claim of discrimination, unless the employee can first show that s/he was qualified to do

the job in the first place. An analogy can be drawn to the "blind bus driver." Clearly, an individual who is blind cannot drive a bus, and although she is a person with a disability, cannot show that she has been discriminated against based on disability if she is denied such a job.

*Shepherd*, on the other hand, was a case decided under M.G.L. c. 151A, § 25(e)(2). The appropriate standard is not whether an employee is a "qualified person with a disability," but rather whether a claimant is entitled to unemployment benefits where there is an allegation of discharge based on deliberate misconduct in willful disregard of the employing unit's interest. The holding in *Shepherd*, that in determining deliberate misconduct, a review examiner "must also make subsidiary findings regarding the employee's willful disregard of his employer's interest, including findings regarding the employee's state of mind at the time of the misconduct" is therefore not impacted by the *Mammone* decision.

In fact, *Mammone* lends support to *Shepherd's* underlying premise that all 25(e)(2) cases should be evaluated uniformly, and that a "different standard of review under G.L. c. 151A, § 25(e)" for claimants who are alcoholics, as stated in the Notice and Request for Comments, is not required. Rather, *Shepherd* supports the proposition that claimants who are alcoholics are entitled to the same standard of review as all other claimants who are accused of misconduct; i.e. findings of fact should be made on the issues of willful disregard and state of mind. In *Mammone*, the SJC stated in footnote 28 that "all handicaps should be treated the same," and goes on to make clear that "alcoholism is a handicap," and cases involving individuals who are alcoholics "are analyzed in the same way as other handicap discrimination cases." 446 Mass. at 671. Similarly, in determining eligibility for unemployment benefits, inquiry should be made into the claimant's state of mind at the time of the misconduct, whether the alleged misconduct stems from alcoholism or from any other cause.

Furthermore, the specific language used in the decisions implies two different reference points of inquiry. In *Mammone*, the SJC uses the term "egregious" to describe the type of workplace misconduct which would render an employee not qualified. In other words, the fact-finder should look at the consequences of the actions, not the cause or motivation. On the other hand, in *Shepherd*, the Court uses the term "deliberate" to describe the type of misconduct to be examined by the fact-finder. This term implies looking at a person's state of mind at the time of their actions to determine whether the act was done consciously or knowingly.

If the claimant first acknowledges his or her alcoholism after the separation, is the employer still required to prove that the claimant had the ability to control the claimant's behavior at the time of the incident?

Public policy, the right to privacy, and disability law all support such a requirement. Individuals with disabilities are not required to disclose their disability unless seeking a reasonable accommodation, and employers are prohibited from making disability-related inquiries in most instances. Forcing an employee to disclose their alcoholism or

any disability prior to separation in order to be entitled to benefits would contravene public policy and subject individuals with disabilities to potential discrimination and/or retaliation.

Furthermore, the issue of "control" is no longer relevant to an analysis of whether a person has a disability, both under Massachusetts and federal law. Following the SJC's decision in *Dahill v. Police Dep't of Boston*, 434 Mass. 233 (2001) and the ADA Amendments Act of 2008 (P.L. 110-325), courts must now examine whether a person has a disability without consideration of corrective devices, medication or other mitigating measures the individual may take to alleviate the effects of their physical or mental impairment.

Are certain types of misconduct beyond the protection of *Shepherd*, e.g. acts of violence?

No, the question of whether the alleged misconduct was deliberate and in willful disregard of the employing unit's interest should always be a question of fact. Again, support can be found in the *Mammone* decision, where the SJC stated that "it is appropriate for a jury to decide the nature and extent of the employee's misconduct, where those issues are in dispute." 446 Mass. at 680.

What steps does a claimant need to take to prove that the claimant is seeking to control his or her alcoholism?

As stated above, the issue of "control" is no longer relevant to the analysis of whether an individual has a disability under Massachusetts and federal law. It is also important to note that Title II of the Americans with Disabilities Act, which applies to departments of a state or local government such as the DUA, prohibits the denial of benefits based on an individual's disability. A person is a "qualified" individual with a disability under Title II if they meet the essential eligibility requirements for receipt of DUA's services or benefits. As discussed above, eligibility for UI in the context of a discharge case requires "deliberate misconduct," which in turn requires findings of fact regarding state of mind and willful disregard of the employer's interest. To hold individuals with the disability of alcoholism to a different standard contravenes Title II's mandate to provide equality of benefits and to refrain from imposing additional barriers or criteria for individuals with disabilities. Requiring a different or higher standard of proof for a claimant with alcoholism would therefore not be consistent with Title II of the ADA.

Respectfully submitted,



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