

DIVISION OF  
UNEMPLOYMENT ASSISTANCE  
BOARD OF REVIEW

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COMMONWEALTH OF MASSACHUSETTS  
DIVISION OF UNEMPLOYMENT ASSISTANCE  
INTER-OFFICE MEMORANDUM

TO: Anne C. Berlin  
Chief Counsel

FROM: Robert K. Ganong *RLG*  
Chief Counsel

RE: Request for Comments

DATE: October 29, 2010

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The following are comments of the Legal Department regarding the impact of developments in the law of disability on the Shepherd case:

In Shepherd v. Director of the Division of Employment Security, 399 Mass. 737 (1987), the reasons for the claimant's discharge were excessive absenteeism, lateness and failure to notify his employer of the reason for his absence. Id. at 738. Unemployment benefits were denied on the basis that the claimant was discharged for deliberate misconduct within the meaning of G.L. c. 151A, §25(e)(2). Id. at 739. The claimant appealed and the case made its way through the appeals process to the Massachusetts Supreme Judicial Court (SJC).

The SJC remanded this case to the Division of Employment Security "because the review examiner failed to make specific findings on the issue of the employee's state of mind at the time of his alleged misconduct." Id. The SJC also commented on the claimant's argument that he suffers from the disease of alcoholism and that his misconduct and discharge were attributable to this disease. Id. at 740. The SJC stated that if these arguments are accepted he would not be disqualified from benefits as his discharge would not be solely<sup>1</sup> due to deliberate misconduct in wilful disregard of his employer's interest. Id.

In its request for comments, the Board of Review stated that it is considering what effect to give to the more recent case of Mammone v. President and Fellows of Harvard College, 446 Mass. 657 (2006), in relation to Shepherd. We suggest that Mammone should have no effect on the court's ruling in Shepherd for the reasons stated below.

In Garrity v. United Airlines, Inc., 421 Mass. 55 (1995), a case involving an individual who suffered from the disease of alcoholism, the SJC stated that, "[n]othing in c. 151B suggests a legislative intent that a lower standard of qualifying conduct should apply to handicapped

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<sup>1</sup> In 1992 the Legislature deleted the word "solely" from G.L. c. 151A, §25(e). St. 1992, c. 26, § 19.

employees than applies to those without a handicap." Id at 63. An employee who engages in violation of the employer's rules is not an "otherwise qualified" person entitled to c. 151B's protection. Id.

Mammone did not create a new rule of law but merely clarified that the SJC's ruling in Garrity was not limited to cases involving misconduct resulting from drug or alcohol dependence. The court stated that, "...the reasoning of the Garrity decision is applicable to employment discrimination based on disability-related workplace misconduct regardless of the type of handicap underlying the misconduct." Mammone at 679. An employer may discharge a handicapped employee for violations of its work rules without breaching the provisions of c. 151B if such rule violation would have resulted in termination of a non-handicapped employee.

Although an employer may be justified in dismissing a disabled employee for workplace misconduct, this does not necessarily result in a denial of unemployment benefits. In Goodridge v. Division of Employment Security, 375 Mass. 434, 436 (1978), the SJC stated:

"The issue here is not whether Goodridge was discharged for good cause or whether he was discriminated against. It is whether the Legislature intended that certain unemployment benefits should be denied in the circumstances of a case such as this. Deliberate misconduct alone is not enough. Such misconduct must also be in "willful disregard" of the employer's interest. Deliberate misconduct in willful disregard of the employer's interest suggests intentional conduct or inaction which the employee knew was contrary to the employer's interest. See Annot., 58 A.L.R. 3d 674, 685 (1974)."

See also Still v. Commissioner of the Department of Employment and Training, 423 Mass. 805, 809 (1996).

Mammone did not alter this overriding principle upon which discharge cases are adjudicated. The adjudicator and the Review Examiner must still apply the "state of mind" or "knowing violation" principles in adjudicating a discharge case. Mitigating circumstances and conscious awareness still remain essential elements of the discharge analysis.

Thank you for the opportunity to comment on this important topic. Please let me know if you have any questions about this memorandum.

cc: Brenda M. Kronberg  
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