Employer knew that the claimant could not report for work because he was in jail. Although charges were continued without a finding and he was released, the claimant was fired because of an unauthorized leave. Since his absence was not due to deliberate misconduct, nor due to a conviction of a crime, claimant was entitled to benefits.

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCEDEVELOPMENT

BOARD OF REVIEW

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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 claimant constructively quit his job without good cause attributable to the employer or its agent and, thus, was subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(1). 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 subsidiary 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 23, 2008. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued by the agency on March 11, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner affirmed, denying benefits, in a decision rendered on June 16, 2009.

The issue on appeal is whether the claimant's failure to report to work due to his incarceration constituted either a constructive voluntary quit, a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or deliberate misconduct in wilful disregard of the employer's interest, so as to disqualify the claimant from receiving benefits under the law.

Findings of Fact

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

1. The claimant worked as a certified nursing assistant for the employer, a health care provider, from 08/26/03 until 10/23/08, when he became separated.

2. The claimant was discharged due to his extended absence.

3. On 09/27/08 the claimant was arrested and charged with assault and battery.

4. The claimant was not able to immediately contact the employer due to his incarceration.

5. On 10/04/08 the claimant called his supervisor and informed her that he was incarcerated. The supervisor told him that she would report his circumstances to the administrator and the director of nursing and they would talk about holding his job for him.

6. On 10/22/08 the claimant was granted bail and released.

7. On 10/23/08 the claimant called the employer and spoke with the administrator. The administrator told the claimant that he was discharged.

8. On 10/24/08 the administrator sent the claimant a letter informing him that he was discharged because he was not eligible for any kind of a leave of absence.

9. On 12/31/08 the claimant agreed to a continuance without a finding to the assault and battery charge.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated 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.

The review examiner initially determined this matter under G.L. c. 151A, § 25(e)(1).

G.L. c. 151A, § 25 (e)(1), provides, in pertinent part, as follows:

> ... An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The review examiner, however, made a finding that the claimant was discharged. Therefore, G.L. c. 151A, § 25(e)(2), is the relevant section of law.

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, ... provided that such violation is not shown to be as a result of the employee's incompetence....

We also have occasion in this decision to refer to G.L. c. 151A, § 25(e)(3), which provides 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 ... (3) because of conviction of a felony or misdemeanor....

The employer had a reasonable expectation that the claimant not be absent from work for extended periods of time when leave is exhausted. The claimant, however, was unable to arrive at the employer's workplace because he was incarcerated. After the claimant was released, he agreed to a continuance without a finding on the assault and battery charge that initially caused his incarceration. It is well established that if a separation occurs because of a conviction of a felony or misdemeanor, G.L. c. 151A, § 25(e)(3), requires that the claimant be denied benefits. *See* Wardell v. Director of DES, 397 Mass. 433, 435-436 (1986). However, admission to sufficient facts or a continuance without a finding in a criminal proceeding is not the same as a conviction, and, by itself, does not constitute sufficient evidence to deny benefits under either G.L. c. 151A, §§ 25(e)(2) or (e)(3). Id. at 436-437.

Nor is this a case of a constructive voluntary quit, in the sense of Olechnicky v. Director, DES, 325 Mass. 660 (1950). In the present case, unlike Olechnicky, the claimant was not discharged for no show/no call absences. The review examiner found that the employer here knew that the claimant was absent and knew the reason for his absence. The employer discharged the claimant because he was not eligible for any leave and, therefore, did not consider the claimant's absence to be authorized.

On these facts, we must conclude as a matter of law that the employer did not sustain its burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest.

The DUA review examiner's decision is reversed. The claimant is entitled to benefits, under G.L. c. 151A, § 25(e)(2), for the week ending January 10, 2009, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - December 2, 2009

/s/
John A. King, Esq.
Chairman

/s/
Sandor J. Zapolin
Member

Member Stephen M. Linsky, Esq. 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 – January 4, 2010

MS/rh