Claimant is deemed to have abandoned his job and is disqualified under G.L. c. 151A, § 25(e)(1), because he failed to take the necessary steps to extend his medical leave of absence.

Board of Review
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Issue ID: 0024 3279 58

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on December 14, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 1, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 27, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the findings show that the claimant failed to take steps that he knew were needed in order to extend his leave of absence.

Findings of Fact

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

1. The claimant worked as an expense payable processing lead for the employer, a retail store company. The claimant began work for the employer in 2008.

2. The claimant worked Monday through Friday from 8 a.m. to 4 p.m. He earned approximately $23 per hour. The claimant last performed work for the employer on May 31, 2017.

3. In 2017, the claimant was diagnosed with Crohn's disease and anxiety.

4. On June 1, 2017, the claimant began an approved leave of absence in accordance with the employer's FMLA policy.

5. The claimant used all of his FMLA time at the end of August 2017.

6. The claimant applied for a medical leave of absence in accordance with the employer's policies. The claimant's leave application states his next appointment with his physician is November 14, 2017.

7. On September 11, 2017, the employer mailed the claimant a letter informing him his medical leave of absence was approved until November 14, 2017. The letter also states: "Please be aware that the maximum length of time allowed for a medical leave is 6 months (approximately 11/30/17 in your case). At the conclusion of the allowed period, each case is individually reviewed. In certain situations, the Company may grant an extension beyond the maximum if such [an] extension is warranted and of reasonable duration."

8. In September, 2017, the claimant spoke on the phone with the human resources business partner. She told the claimant that his job was filled but he would be eligible for reinstatement when he returned to work.

9. The claimant cancelled his November 14, 2017, appointment with his physician because he was giving his brother a ride to work. The claimant did not immediately reschedule the appointment.

10. The employer maintains a human resources department which has a call center.

11. The claimant called the call center. He told a representative he had not been cleared to return to work. He told the representative he was working on getting an appointment with his physician. The representative told the claimant he should see his physician as soon as possible.

12. The claimant scheduled an appointment with his physician for December 18, 2017.

13. The claimant did not think his job was in jeopardy because he had been allowed a leave of absence.

14. On December 12, 2017, the employer sent the claimant a letter informing him that his employment was ending effective December 14, 2017.

15. There was no further communication between the claimant and the employer.

16. On December 18, 2017, the claimant was cleared to return to work by his physician.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the employer terminated the claimant's employment, the review examiner analyzed the claimant's eligibility for unemployment benefits as an involuntary separation under G.L. c. 151A, § 25(e)(2). We conclude that this was an error of law.

The purpose of the unemployment compensation statute is to assist those who are "thrown out of work through no fault of their own." Leone v. Dir. of Division of Employment Security, 397 Mass. 728, 733 (1986), *citing* Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985). In the present case, the findings show that the employer had provided the claimant with six months leave of absence because of medical problems connected to his Crohn's disease. This leave, however, was not indefinite. The findings also indicate that the claimant needed to extend the leave in order to preserve his job. The Supreme Judicial Court has stated:

> Normally, a worker who anticipates a legitimate absence from work can take steps to preserve her employment. When a worker fails to take such steps and severance results, it is the worker's own inaction rather than compelling personal reasons that causes the leaving. . . We do not believe that the Legislature intended benefits to be paid to a claimant who, anticipating a necessary absence from work, fails to take reasonable means to preserve her job. In such an instance, the employee's separation need not be deemed involuntary, and disqualification under § 25(e)(1) is appropriate.

Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 336 (1979).

On September 11, 2017, the employer gave the claimant written notice that his leave and his employment would terminate two weeks after November 30, 2017, unless the claimant had his physician complete and submit an extension form to the employer's human resources department. *See* Finding of Fact # 7 and Exhibit # 6.[1] The findings further provide that upon

[1] Finding of Fact # 6 quotes from Exhibit # 6, a Medical Leave Status Update communication from the employer to the claimant, dated September 11, 2017. Additional text in this communication required that the employer receive the extension form within two weeks of November 14, 2017, to avoid severing employment: "Failure to return the Extension Form or return to work as required may be viewed as a voluntary resignation, effective immediately."

cancelling his medical appointment on November 14, 2017, the claimant did not immediately reschedule it. Finding of Fact # 9. At some point — we are not told when — the claimant obtained the rescheduled appointment for December 19, 2017. Finding of Fact # 12. The claimant knew enough to call the human resources department to say he was trying to get a new doctor's appointment. *See* Finding of Fact # 11. But, apparently, he did not think it necessary to notify the employer of the new appointment date. The review examiner concluded that the claimant's belief that he would be okay, that his job was not in jeopardy, was reasonable. We disagree. The employer's September 11, 2017, notice provided him with specific written instructions about the steps necessary to extend his leave and preserve his job. A simple telephone call back to the human resource department to seek guidance about extending his leave or preserving his job in light of the later medical appointment date would have been reasonable.

We, therefore, conclude as a matter of law that pursuant to the Court's ruling in Dohoney, the claimant is deemed to have abandoned his job because he failed to take reasonable steps to preserve his employment. His separation is voluntary and he is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending December 16, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:

While not explicitly incorporated into the review examiner's findings, the exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

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Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh