

The unexpected need to attend a funeral in Trinidad rendered the claimant's decision not to immediately report back from vacation reasonable. However, the claimant is not eligible for benefits because she failed to make a reasonable effort to preserve her employment by calling, texting, or leaving a voicemail message for her manager about the anticipated absences.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 3955 10

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 separated from her position with the employer on January 17, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 6, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 11, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for urgent, compelling, and necessitous reasons, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain further evidence pertaining to the claimant's separation from employment. Only the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the findings after remand show that the claimant did not contact the employer to report her absences.

Findings of Fact

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

1. The claimant worked as a full-time Internet Sales person for the employer, an automobile dealership, from October 3, 2016 until becoming separated from employment on January 17, 2018.
2. The employer had an Employee Handbook. In the Employee Handbook there was a written policy indicating that "If an employee is absent for two (2) or more consecutive days, the employee may be required to bring a doctor's note for those days. If an employee has been absent for two consecutive days without contacting his/her supervisor to provide notice as required by the policy, the employee will be considered to have voluntarily resigned." The claimant signed for receipt of the Employee Handbook with a date of October 3, 2016.
3. The employees were required to notify the Manager prior to the start of their scheduled shift if they were going to be absent from work.
4. The claimant was aware that she was expected to contact the employer before the start of her scheduled shift, if she was unable to report to work as scheduled.
5. The claimant had properly reported her absence from work on some occasions prior to January 10, 2018. (The claimant had been disciplined by the employer on occasions when she failed to do so.)
6. The claimant worked a set schedule with the employer. The claimant was working Wednesday, Thursday, Friday and Saturday from 8:00 a.m. to 7:00 p.m. or 8:00 p.m.
7. The claimant requested to take vacation time with the employer. The claimant's request was granted. The claimant was on approved vacation from December 29, 2017 until January 9, 2018. The claimant understood that she was expected to return to work for the employer on Wednesday January 10, 2018.
8. The claimant took a cruise with friends to the Caribbean. While on that cruise, the claimant was able to send and receive text messages, but was unable to make phone calls using her cellular telephone.
9. On January 9, 2018, when returning from her cruise and landing in [City A], the claimant received numerous text messages, indicating that her father-in-law had passed away. (The claimant's father-in-law was residing in Trinidad. The claimant's husband had been with his father in Trinidad since November 2017, because his father was elderly and was seriously ill.)

10. When in [City A], the claimant called the employer's office telephone number to speak with the Manager. The Manager did not pick up the telephone and the claimant did not leave a voicemail message.
11. The Manager had a cellular telephone number for which she could receive calls and text messages. The claimant was aware of that telephone number. The claimant had contacted the Manager on her cellular telephone on prior occasions. The claimant did not call or text the Manager on her cellular telephone to inform her of what was taking place.
12. The claimant reached out to a coworker by message (text or Facebook), indicating that she would not be returning to work as scheduled and asking the coworker to inform the Manager. The exact date that the claimant reached out to the coworker is unknown.
13. The claimant traveled to Trinidad for her father-in-law's services on January 9, 2018.
14. The claimant did not report to work as scheduled on June [sic] 10, 2018 and did not contact the employer to report her intended absence.
15. The claimant did not report to work as scheduled on June [sic] 11, 2018 and did not contact the employer to report her intended absence.
16. On January 10th and January 11th, 2018, the Manager reached out to the claimant by text and voicemail message to inquire as to what was taking place, but did not receive a response.
17. The coworker informed the Manager, sometime after June [sic] 11, 2018, that the claimant had sent her a Facebook message indicating that she would not be returning to work as scheduled. The Manager asked when the coworker received the message, whereupon the coworker responded that she received it the other day. The Manager asked if the coworker had spoken to the claimant since then and the coworker responded no. The Manager instructed the coworker that if she were to hear from the claimant again, to inform the claimant that she needed to contact her directly.
18. The funeral services for the claimant's father-in-law were held in Trinidad on Friday January 12, 2018.
19. The claimant returned back to Massachusetts on January 16, 2018.
20. The claimant did not speak with the Manager or leave her a voicemail or text message, any time prior to January 17, 2018, to inform the Manager directly of what was taking place or to report her intended absence from work on January 10th and January 11th, 2018.

21. The claimant reported to work as scheduled on Wednesday January 17, 2018. At that time, the claimant was informed that she no longer had a position due to her failure to return to work as scheduled on January 10, 2018. The claimant informed the Manager that her children's grandfather had passed away. At no time did the claimant inform the employer that her telephone was broken, but simply stated that her telephone was inoperable when she was out of the country.
22. The claimant filed her claim for unemployment benefits on January 18, 2018. The effective date of the claim is January 14, 2018.

Credibility Assessment:

The employer's direct and consistent testimony was deemed to be more credible than the testimony presented by the claimant for the following reasons. At the initial hearing, the claimant testified that she had not been presented with any Employee Handbook from the employer, and as such there was no written attendance policy presented to her. However, the employer presented the Employee Handbook containing a specific attendance policy, which referenced being a no call/no show for two consecutive days, the policy under which the claimant was separated, and the employer presented the claimant's signed receipt for that Employee Handbook.

Additionally, the Manager presented direct and consistent testimony that the claimant was aware of not only the office telephone number, but the Manager's personal cellular telephone number, on which she had called the Manager before. Yet, inexplicably, the claimant did not contact the Manager at that number, when unable to reach her at the office telephone number.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. The reference to June, 2018, in Consolidated Findings ## 14, 15, and 17 appears to be a typographical error, as the rest of the consolidated findings show that all of the events at issue took place in January, 2018. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's original conclusion that the claimant is eligible for benefits.

The record shows that the employer terminated the claimant's employment because she was a no-call, no-show for work on January 10 and 11, 2018. *See* Consolidated Findings ## 14, 15, and 21; Remand Exhibit 6. The failure of an employee to notify her employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A,

§ 25(e)(1). *See Olechnicky v. Dir. of Division of Employment Security*, 325 Mass. 660, 661 (1950).

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

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established 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 explicit language in G.L. c. 151A, § 25(e)(1), places the burden of persuasion on the claimant. *Cantres v. Dir. of Division of Employment Security*, 396 Mass. 226, 230 (1985).

In her original decision, the review examiner concluded that the unexpected death of the claimant's father-in-law and the need to attend his funeral in Trinidad at the time the claimant was expected back at work rendered the claimant's separation involuntary for urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e). We agree that in deciding to attend the funeral rather than return to work, the claimant acted reasonably, based on pressing circumstances. *See Reep v. Comm'r of Department of Employment and Training*, 412 Mass. 845, 848, 851 (1992).

However, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve her employment' as would indicate the claimant's 'desire and willingness to continue her employment.'" *Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development*, 66 Mass. App. Ct. 759, 766 (2009), *quoting Raytheon Co. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597–98 (1974). In this case, the claimant did not make such efforts.

The claimant knew she was expected to contact the employer before the start of her shift, and the proper procedure for reporting her absence, if she could not report for work. Consolidated Findings ## 4 and 5. The consolidated findings further indicate that, on January 9, 2018, when the claimant learned of her father-in-law's death, she knew she would be traveling to Trinidad for the funeral and, therefore, absent from work in the coming days. *See Consolidated Findings ## 9 and 13.* The claimant did not lose her job because she was absent from work over the next two days. She lost it because she did not bother to let the employer know that she would be absent, and nothing in the record suggests that she was unable to provide that notice. Apparently, the claimant was able to use her cell phone on January 9th, after arriving in [City A], because she called the employer's office to speak with the manager. *See Consolidated Finding*

10. Yet, she did not leave a voicemail message at the office, nor text or call and leave a voicemail message on her manager's cell phone.¹ See Consolidated Findings ## 10, 11, and 20.

In sum, the claimant has failed to sustain her burden to show that she made a reasonable effort to preserve her employment. For this reason, the review examiner's conclusion that the claimant separated for urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e), is incorrect as a matter of law.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning January 14, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 19, 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:
www.mass.gov/courts/court-info/courthouses

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

¹ We attribute little weight to the finding that the claimant used text or Facebook to ask a coworker to inform the manager of her absences, because we do not know when this occurred. See Consolidated Findings ## 12 and 17.