

The employer asked the claimant to return his work equipment and canceled his health insurance when the claimant went out on short term disability. It effectively terminated the claimant's employment. The claimant was in total unemployment under G.L. c. 151A, §§ 29(a) and 1(r). Since there was no misconduct, he is not disqualified pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0024 4938 00

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

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

The claimant separated from his position with the employer on or about November 1, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 7, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on May 15, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to provide notice to the parties of G.L. c. 151A, §§ 25(e)(1) and 25(e)(2), and to obtain additional testimony and other evidence pertaining to the claimant's employment status. Only the claimant 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 decision, which concluded that the claimant was on a leave of absence and not in total unemployment under G.L. c. 151A, §§ 29(a) and 1(r), is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the employer asked the claimant to return all of his work equipment and canceled his health insurance.

Findings of Fact

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

1. The claimant worked as a HVAC Installer/Technician for the employer, a Heating & Air-conditioning Company.
2. The claimant began working for the employer on January 6, 2013.
3. The claimant has osteoarthritis in both feet, but it is particularly bad in the claimant's right foot.
4. The claimant's problem in his right foot got so bad that he was unable to walk well or work in mid-October 2017.
5. The claimant worked on October 13, 2017.
6. The claimant went to see his doctor on October 13, 2017.
7. On October 13, 2017, the claimant's doctor faxed the office manager a medical note. The note indicated that the claimant was currently unable to perform his work.
8. On October 13, 2017, the office manager sent the claimant a text message. The text message informed the claimant that he needed to clean out his work truck, bring the truck back to the employer, and bring back all company credit cards and tools.
9. The claimant brought all company property back to the employer after receiving the text message on October 13, 2017.
10. The claimant assumed the employer had let him go because of the demands made by the office manager in the October 13, 2017 text message.
11. The claimant and the employer did not discuss a return-to-work date.
12. The claimant went on short-term disability. The claimant's short-term disability began on October 21, 2017. The claimant's last payment was on January 20, 2018.
13. On November 1, 2017, the office manager e-mailed the claimant and informed him that he needed to pay for his health insurance in full and that they were not going to pay for his short-term disability.
14. At that time, the claimant and the employer did not discuss the claimant's employment status.
15. The employer covered the claimant's health insurance for November 2017, but cancelled it in December 2017.

16. In December 2017, the claimant got Medicaid.
17. After December 2017, the claimant did not speak to his supervisor, human resources, or anyone else in a managerial position with the employer about the claimant's medical condition and his employment status.
18. The claimant went to the emergency room on January 18, 2018. The claimant found out that he had a blood clot and that he could not work with sheet metal at that time.
19. Nothing happened between the claimant and the employer on January 20, 2018.
20. Prior to filing for benefits on January 27, 2018, the last verbal conversation the claimant had with the employer was on October 13, 2017.
21. The claimant realized he would not be able to return to his job when he found out about his blood clot on January 18, 2018.
22. It is unknown what the office manager means when she stated in the letter that the claimant's last day of work was on October 13, 2017.
23. The claimant filed for unemployment benefits and received an effective date of January 21, 2018.
24. As of January 21, 2018, the claimant has been able to perform HVAC sales, maintenance work, and working as a truck driver. The claimant has applied for jobs in these fields.
25. The claimant has prior experience in the jobs for which he has applied.
26. Since January 21, 2018, the claimant looks for work daily. The claimant looks for work by searching for jobs online, sending out resumes, networking, and interviewing.
27. As of October 13, 2017, it is unknown if the employer had any other work that the claimant could perform. The claimant did not ask for other work. The employer did not offer other work to the claimant.

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. Upon such review, the Board adopts the review examiner's consolidated 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 initial legal conclusion that the claimant was

not in unemployment, as the consolidated findings establish that the claimant separated from the employer in the fall of 2017.

The review examiner originally concluded that the claimant was on a leave of absence and, therefore, pursuant G.L. c. 151A, §§ 29(a) and 1(r), not in total unemployment when he filed for unemployment benefits in January of 2017, and thereafter. G.L. c. 151A, § 29, authorizes benefits be paid only to those in “total unemployment” or “partial unemployment.” These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week

(2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

As noted above, we remanded this case for additional evidence and findings as to the claimant’s employment status at the time he applied for benefits. After remand, the review examiner found that, when the claimant provided a doctor’s note to the employer on October 13, 2017, stating that the claimant was unable to perform his work duties at that time, the employer asked the claimant to return all of his work equipment. The review examiner further found that, on November 1st, the employer notified the claimant that it would no longer cover his health insurance, and the insurance was ultimately canceled in December of 2017. The findings also show that there was no communication between the claimant and the employer regarding either the claimant’s health condition or his employment status. In light of these findings, we conclude that the employer discharged the claimant on or about November 1st. Thus, the claimant was not on a leave of absence at the time he sought benefits but rather was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r).

Because the claimant was terminated from his employment, we next consider his qualification for benefits under G.L. c. 151A, § 25(e)(2), which 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 . . . (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, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence

It appears that the employer discharged the claimant simply because he had to take some time off to take care of a medical condition. There is nothing in the record to indicate that the claimant

was terminated for any type of misconduct or violation of an employer rule or policy. We, therefore, conclude as a matter of law that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced policy of the employer, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 4, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 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.

SVL/rh