Because claimant failed to comply with the employer's reasonable request to provide an updated medical note to justify absences or a need for further accommodations under her FMLA, she did not take reasonable steps to preserve her employment. She is disqualified under G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0024 6653 76

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 affirm.

The claimant separated from her position with the employer on February 9, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 17, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 15, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was 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 claimant's appeal, we accepted the claimant's application for review. 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 is disqualified pursuant to G.L. c. 151A, § 25(e)(1), because she effectively quit her position after failing to return to work or contacting the employer's vendor to extend her leave, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact:

1. The claimant began working for the employer as a full time call center representative in July, 2016.

2. The claimant worked Monday through Friday 9:30 am – 6:00 pm. The claimant had the ability to work from home with approval from the supervisor.

3. The employer expects employees to notify the employer on each day they are going to be absent. Employees are directed to call a specific "call out line" to report absences. The employer generates a list of all employees who report their absence via the call out line.

4. The claimant had followed the employer's call out expectation throughout her employment.

5. The employer considers employees who fail to notify the employer of their absences for 3 consecutive shifts to have voluntarily abandoned their job.

6. The employer maintains a progressive disciplinary system. The steps of the employer's progressive disciplinary system include, verbal warning, written warning, final written warning and termination.

7. On October 2, 2016, the claimant received a verbal warning for unsatisfactory attendance.

8. The claimant suffered from anxiety, depression, urinary incontinence, H pylon and abdominal pain. The claimant sought medical treatment for such conditions since April 2017.

9. The claimant's symptoms began to worsen and she began to regularly miss work.

10. On June 13, 2017, the claimant received a written warning for unsatisfactory attendance, behavior and work performance.

11. On October 11, 2017, the claimant received a final written warning for unsatisfactory attendance. The warning indicated, "Any instances of unscheduled absences, tardiness or leaving early will result in further disciplinary action."

12. After the final warning, the claimant continued to call out of work on various occasions.

13. In or around November 2017, the employer advised the claimant to apply for a medical leave through its third party vendor (vendor A). The claimant's Family and Medical Leave Act (FMLA) application was approved and retroactively applied to cover previous unexcused absences.

14. The claimant's leave was approved on an intermittent basis from July 2017 until January 2, 2018.

15. Sometime thereafter, the claimant received a letter from the employer informing her that it changed third party vendors. The claimant received the information for the new third party vendor (vendor B).

16. On January 2, 2018, the claimant's approved FMLA leave expired. The claimant did not return to work.

17. As of January 2, 2018, the claimant had not exhausted all allowable leave time under the FMLA.

18. In or around January 2018, the claimant began to suffer from migraines and conjunctivitis.

19. On January 8, 2018, the claimant notified her supervisor that she was suffering from a migraine and could not report to work. The supervisor reminded the claimant that she had 56 hours of sick time and that her FMLA leave had expired. The supervisor advised the claimant to contact vendor A to get her FMLA leave extended.

20. The claimant replied, "They sent me a letter saying its [vendor B] now no more [vendor A]. Im [sic] confused will show you tomorrow." The claimant knew the employer's third party vendor had changed.

21. At no time did the claimant contact vendor B to attempt to extend her FMLA leave.

22. On January 9, 2018, the claimant informed her supervisor she woke up late and she would work from home. She also indicated that she "woke up w [sic] eyes full of junk" and after work she was going to check if she had conjunctivitis again. The claimant further indicated she believed her migraines and conjunctivitis were related.

23. In mid-January 2018, the supervisor notified the claimant that she needed to have a meeting with her. On the day of the meeting, the supervisor was not available due to personal reasons. The supervisor sent the claimant a text message stating, "You are not losing you [sic] job but we do have to talk please just do your best today."

24. The claimant was scheduled to have a coaching session with the supervisor on January 18, 2018.

25. On January 18, 2018, the claimant sent the supervisor a text message asking to work from home. The supervisor gave the claimant permission to work from home but informed her, "I need you to come in tomorrow no matter what." The supervisor later gave the claimant permission to work from [sic] on January 19, 2018.

26. The claimant's last day of work from the employer was on or around January 19, 2018.

27. The claimant called out of work from January 22nd through 26th, 2018. The claimant called out for various medical issues.

28. The claimant did not call out of work on January 29, 2018. The claimant was absent from work because she was suffering from gastrointestinal issues.

29. The claimant did not call out of work on January 30, 2018. The claimant was absent from work because she was suffering from gastrointestinal issues.

30. On January 30, 2018, the employer's human resources (HR) department asked the supervisor to contact the claimant regarding her continued employment.

31. At 10:06 am, on January 30, 2018, the supervisor sent a text message to the claimant stating, "I've been asked by HR to reach out to you. Are you planning on returning or will you be leaving he [sic] position?" The claimant responded, at 3:04 pm "Yes I am and no im [sic] not."

32. The claimant gave no indication as to when she would be returning to work.

33. The claimant did not call out of work on January 31, 2018. The claimant was absent from work because she was suffering from gastrointestinal issues.

34. During January 2018, the claimant was seen by medical professional on several [occasions] related to her gastrointestinal issues.

35. On February 2, 2018, the employer sent the claimant a letter stating, "Since January 1 of this year, you have twelve instances of unscheduled absence, including eight full day and two partial days unpaid due to lack of earned time. You have now been absent from work continuously since January 22, 2018. You failed to call out of work January 29, 30, and 31. These absences are currently unexcused and unapproved. In order for us to be able to consider any accommodations, we need to get a better understanding of your medical needs. Therefore, it is important that you provide [vendor B] with an updated medical note should you need accommodations. The note should indicate if and when you will be able to return to work and be able to perform the essential functions of your job. You may open a leave request with [vendor B] prior to seeing your medical provider by calling." "If you do not contact [vendor B] or return to work by February 9, 2018, your time away from work will be considered unapproved, and your employment will be terminated effective February 9, 2018. Further instances of failure to notify [the employer] of your absence by calling [phone number and extension] may also result in termination of employment."

36. The letter was sent via certified mail through the United States postal service and required a signature. The employer tracked the certified letter sent to the claimant.

37. The claimant used her sister's address as her mailing address. The claimant's sister typically alerted the claimant to any mail she received on the claimant's behalf.

38. The February 2nd letter was received and signed for on February 5, 2018. The exact date which the claimant received the February 2nd letter from the mailing address is unknown.

39. At no time did the claimant contact the employer regarding the February 2, 2018 letter. At no time did the claimant contact vendor B.

40. The claimant called out of work on February 5th, 6th, 7th, 8th, and 9th, 2018.

41. The claimant effectively quit her position after failing to return to work or contact vendor B as of February 9, 2018.

42. The claimant quit her employment because she felt it was medically necessary to remain away from work.

43. At the time the claimant initiated her separation, she was eligible for addition leave options.

44. On February 9, 2018, the employer sent the claimant a letter indicating, "You have not returned to [the employer] or contacted vendor B regarding your absences since January 22, 2018. As a result, your employment is terminated effective February 9, 2018.

45. The claimant's sister received the February 9th letter on February 12, 2018 and immediately informed the claimant of the content of the letter.

Credibility Assessment:

The claimant testified that on each day in question she contacted the employer via the call out line. During the hearing the claimant indicated that she could produce phone records to support her testimony. The claimant was ultimately unable to do so. While both parties offered direct testimony I find the employer's testimony regarding the claimant's failure to report her absences to be more credible. Given that the claimant had been absent from January 22nd through 26th and HR had not contacted the supervisor regarding these absences, it is logical to believe that there was a change (i.e. the claimant stopped reporting her absence) which then urged HR to ask the supervisor to contact the claimant. As such, the employer's testimony that the claimant failed to report her absence on January 29th, 30th, and 31st is more credible that [sic] the claimant's testimony.

Furthermore, while conflicting testimony was not offered regarding the date that the claimant received the February 2nd letter, I find the claimant's testimony that she did not receive it until February 10, 2018 to be not credible. The claimant

> testified that she received mail at her sister's mailing address and that her sister would notify her of any mail that was received. During the hearing, it was established that the February 2nd letter was received and signed for at the sister's address on February 5, 2018. I find it is unlikely that the claimant's sister would receive certified mail for the claimant and not notify her immediately. It is also unlikely given that claimant's testimony that when the February 9th letter arrived - also via certified mail - her sister immediately notified her of its arrival. As such, based on the above I conclude that the claimant received the February 2nd letter before February 9th, 2018, the date which the employer was requesting some action be taken by.
>
> Although the credibility assessments above relates to testimony which may support disqualification under Section 25(e)(2) of the law and that this case was initially determined to be a discharge, I find this case ultimately must be analyzed under Section 25(e)(1) of the law. The substantial and credible evidence in the record supports the conclusion that the claimant's actions initiated her separation. The claimant effectively quit her employment, after being continuingly absent from work without requesting an extension to a previously approved leave of absence.

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 with the exception of Finding # 16, which states that the claimant did not return to work after January 2, 2018. We believe this to be a typographical error, as the evidence shows the claimant's last day of work was on or around January 19, 2018. (See FF # 26).

The review examiner denied benefits after analyzing the claimant's separation under provisions of G.L. c. 151A, § 25(e), which provide, 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.

Under this section of the law, it is the claimant's burden to establish that she separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons.

The review examiner concluded in her decision that the claimant effectively quit her employment as a result of being continuously absent from work and failing to contact vendor B

in order to request an extension to a previously approved FMLA leave. In Scannevin v. Dir. of Division of Employment Security, the Massachusetts Supreme Judicial Court held that where an employer discharged a worker for refusing to comply with a company request to provide a doctor's note after several days of absence, the separation was to be analyzed under G.L. c. 151A, § 25(e)(1). 396 Mass. 1010 (1986) (rescript opinion).

Specifically, the findings show that the claimant's intermittent FMLA leave was approved from July 2017 to January 2, 2018. Finding of Fact # 14. The claimant was notified in writing that the employer's vendor, who handles FMLA, had changed to vendor B. Finding of Fact # 15. On January 8, 2018, the claimant called in sick due to a migraine. At that time, she was informed that she only had 56 hours of sick time remaining. Finding of Fact # 19. During the month of January, the claimant continued to call out of work for a variety of reasons, including migraines, conjunctivitis and gastrointestinal issues. The supervisor contacted the claimant on January 30th to inquire as to whether the claimant was returning to work. The claimant responded she was, but gave no indication as to when. On February 2, 2018, the employer notified the claimant, in writing, that she had been absent from work since January 22, 2018, and it was important for her to provide vendor B with an updated medical note indicating if and when she could return to work and what, if any, accommodations may be needed. The letter further informed the claimant that failure to return to work or contact vendor B before February 9, 2018, would result in termination. By February 9, 2018, the claimant failed to do either.

On appeal to the Board, the claimant, through counsel, alleges that the review examiner erred by: (1) failing to hold the record open after the hearing to allow the claimant to provide proof of her cellular phone records to show that she did, in fact, call-out of work on January 29, 30 and 31, 2018; (2) failing to recognize the employer's violation of FMLA; and, (3) discounting evidence that the claimant's actions were caused by the employer's confusing and arbitrary FMLA policies, which created good cause attributable to the employer for her separation.

With respect to the findings that the claimant failed to call out of work on January 29, 30, and 31, 2018, we believe this issue is immaterial to the reason for the claimant's separation.[1] The claimant was discharged for failing to return to work or contacting vendor B before February 9, 2018, not for any failure to call-out on any given day. Therefore, the review examiner's decision to not hold the record open to accept this additional evidence, at most, can be seen as harmless error.

Next, the claimant argues that the review examiner erred by not knowing that the employer likely violated the FMLA laws when it terminated the claimant's medical leave on January 2, 2018. We find this argument to be without merit. As previously stated, the claimant has the burden to establish that she separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. During the hearing, the claimant failed to produce any documentation with respect to her FMLA intermittent leave. While FMLA leave entitlement is limited to a total of 12 work weeks of leave during any 12 month period[2], we note that, when the claimant's leave was approved in November of 2017, it was given a retroactive effect to July of 2017. The claimant failed to produce any time sheets demonstrating that she had FMLA leave

[1] Referencing Findings of Fact ## 28, 29 and 33.
[2] 29 C.F.R. 825.200(a)

available to her after February 9, 2018. Even if FMLA leave remained available to the claimant as of February 9, 2018, such leave would be subject to the federal regulations governing FMLA. Specifically, 29 CFR 825.303(b), provides, in pertinent part, as follows:

> [w]hen an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

From January 8, 2018, to January 30, 2018, the claimant texted her supervisor on several occasions requesting to work from home or calling out due to transportation issues, migraines conjunctivitis and side-effects from prescription drugs.[3] On January 9, 2018, the supervisor responded to the claimant's text by saying "You should call [Vendor A] to get your leave extended bc it expired the other day."[4] Based on the varying reasons for the claimant's desire to work from home or call-out, as well as the possibility that the claimant's intermittent leave was exhausted, the employer was reasonable in requesting that the claimant provide medical documentation to determine whether the reasons for the claimant's absences were consistent with the reasons for her original FMLA. *See* 29 C.F.R. 825.300(b).[5]

Lastly, the claimant alleges that the employer's policies regarding FMLA were so confusing, opaque, and arbitrarily applied to her that is was sufficient to qualify as good cause attributable to the employer for her separation. Assuming, *arguendo*, that the employer's policies were confusing to the claimant, nothing in the record suggests the claimant made any attempt to seek advice or guidance from the employer on this issue. Relative to such an obligation on the part of claimants, 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.

[3] This information is contained in Exhibit 18. Because it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).
[4] Id.
[5] *See also* 29 C.F.R. 825.306(a)(7).

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

The findings show that the claimant had already applied for and been approved for FMLA in November of 2017, effective as of July, 2017. In addition, the employer forwarded the claimant a letter on February 2, 2018, giving her clear and unequivocal instructions on what she needed to do to extend her intermittent leave. Rather than call the employer or its vendor with questions about this process, the claimant took no action.

While we note that the claimant alleged not receiving the February 2, 2018, letter until February 10, 2018, the day after her separation, the evidence shows that the letter was delivered to the claimant's mailing address on February 5, 2018. The review examiner determined that the claimant's testimony that she did not receive it until February 10, 2018, was not credible. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Based on the record before us, we see no reason to disturb the review examiner's credibility assessment.

We, therefore, conclude as a matter of law that the claimant is deemed to have abandoned her job because she failed to take reasonable steps to preserve her employment. Her separation is voluntary and she is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending February 10, 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 - November 20, 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.

CAS/rh