

Following an accident outside of work and his recuperation, claimant failed to respond to employer inquiries about when he would return to work. Held he left voluntarily without good cause or urgent, compelling, and necessitous reasons, and he is disqualified under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0027 1242 37

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 the claimant benefits following his separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On October 20, 2018, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on February 27, 2019, the review examiner affirmed the agency determination, concluding that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). The Board accepts the claimant's application for review.

Findings of Fact

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

1. The claimant worked full time as a general manager for the employer, a gift store, from November 30, 2016 until July 31, 2018, when he left employment.
2. The claimant was paid an annual salary of \$67,500.00.
3. The claimant worked 45 to 55 hours a week during the busy season, which extended from Memorial Day to Labor Day.
4. The store is located on Cape Cod.
5. The claimant's immediate supervisor was the Owner.
6. On the evening of September 16, 2018, the claimant fell from the second story of a house. The claimant was airlifted to a hospital in [City A], MA.

7. On the morning of September 17, 2018, one of the claimant's friends notified the employer that the claimant had an accident and was in the hospital.
8. The claimant's father kept the employer updated with his recovery and prognosis. The claimant fractured bones in his face. He broke his wrist and fractured his hip. The claimant's jaw was wired shut. He had to use a walker and his arm was in a cast.
9. The employer hired part time employees to assist her at the store while the claimant recovered from his injuries during the summer months.
10. The employer held the claimant's position open for him.
11. The employer did not pay the claimant his salary while he was absent from work.
12. On July 2, 2018, the claimant was released home from the hospital.
13. On July 20, 2018, the claimant met with the employer's Owner to discuss his return to work.
14. The claimant asked the Owner, if she could pay him cash for his work because his eligibility for state funded medical insurance was contingent upon his income.
15. The Owner told the claimant she would not pay him cash.
16. The Owner asked the claimant, if he wanted to return to work on a part time basis while he continued to recover.
17. The claimant told the Owner he had several doctor's appointments and he would look at his schedule of appointments to determine when he could work.
18. On or about July 30, 2018, the Owner sent the claimant a text message because she had not heard from him about if he was returning to work.
19. The claimant responded to the Owner's text message. The claimant told her he has been busy with appointments and was on his way to the doctor's in [City A]. The claimant did not address work.
20. On July 31, 2018, the Owner send the claimant a text message that read: "Hope your apt went well! I'm really struggling here & need to figure stuff out. I'm drowning on covering with the work at" the store "& doing my own job. I'm not sure where ur at but for my own sanity I am posting an ad as my own safety net for BOTH a sales person & general manager. Please know this

- is NOT my terminating you, or NOT wanting you back. This is just a safety net so I have a cushion and a back up plan should something with your return Not go as planned. I wanted to let u know up front in case u see it. I am going to leave my name & Company name out so that people won't assume that your not returning or ask u questions about your return. I just need a back up plan in place so I can sleep at night! I'm sure you will understand my needing a back up plan."
21. The claimant responded to the Owner's text message. The message read: "Ok...got...and I think I understand where you are coming from...was ready to return...but was the bling that you wanted me back after the summer help left? I guess I was wrong? The other issue is the health care...I would assume that this is something that you cannot help with?"
 22. On August 13, 2018, the Owner sent the claimant a text message. The message read: "I hope your recovering well & feel great after getting rid of elastics! I want to touch base about how your doing? When we talked Last u we're going to figure out what work related to insurance with mass health is. I'm really struggling and need to know about your returning capabilities are. I've been able to cover thus far, but really need to get another employee if your not able/planning to return. Can you let me know what your thinking?"
 23. The claimant did not respond to the employer's August 13, 2018 text message.
 24. The Owner received a response in the claimant's work email regarding a job the claimant inquired about with another employer.
 25. The claimant's separation from employment occurred because he failed to return to work.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record, except for portions of Findings of Fact ## 1, 6, and 7. In Finding of Fact # 1, the review examiner found that the claimant "left employment" on July 31, 2018. However, her subsequent findings about what occurred on July 31, 2018, do not indicate that the separation occurred that date. After the claimant failed to respond to the owner's last text message on August 13, 2018, it can be reasonably concluded that the claimant separated at that time. Indeed, in Part IV of the decision, the review examiner made the disqualification effective the week beginning August 12, 2018. The record does not support that the claimant separated on July 31, 2018, but rather sometime later, in mid-August of 2018. As to Findings of Fact ## 6 and 7, the review examiner found that the claimant's accident occurred in September of 2018. This is clearly an error. Testimony from the parties and documentary evidence in the record indicate that the incident happened in June of 2018, not September.

These minor issues with the review examiner's findings of fact do not affect the outcome of this decision. The review examiner concluded that the claimant was not reasonable or credible in asserting that he thought that he had been discharged by the employer. Such a conclusion is reasonable and supported by the record, especially the text messages submitted into the record. The review examiner clearly did not credit the claimant's testimony that he was trying to return to work, but the owner would not let him or not confirm a plan for his return. Again, the documentary evidence supplied indicates that the claimant was delaying his return, possibly due to issues with maintaining health insurance.

Although the claimant had serious injuries after his fall in June of 2018, he did not assert during the hearing that he had to separate from the job involuntarily. To the contrary, he testified that he was willing and able to return to work on or about July 17, 2018, when the wiring in his jaw was removed. He suggested that he was trying to return to work, but the employer initiated the separation by posting his job, replacing him, and not giving him a return to work date. The review examiner did not believe this to be the case. In any event, such testimony does not support a conclusion that the claimant had to separate from his job involuntarily for urgent, compelling, and necessitous reasons.

The review examiner's decision is affirmed, as it is supported by substantial and credible evidence and free from error of law. The claimant is denied benefits pursuant to G.L. c. 151A, § 25(e)(2), for the week beginning August 12, 2018, 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 – March 25, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

SF/rh