

0031 3310 49 (Oct. 30, 2019) – After initially notifying the employer of his father’s death and the possibility that he was going to travel outside the country, the claimant did not confirm that he would be absent from work. Since he was a no-call, no-show for four consecutive shifts, his separation constitutes job abandonment and he is disqualified under § 25(e)(1).

Board of Review
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Issue ID: 0031 3310 49

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 review examiner’s conclusion that the claimant is disqualified from receiving benefits, but we do so under a different section of law.

The claimant separated from his position with the employer on June 7, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 27, 2019.¹ The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency’s initial determination and denied benefits in a decision rendered on August 30, 2019.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). 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 and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 to deny 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 claimant’s separation resulted from his failure to go to work, or call out from work, for four consecutive shifts in June of 2019.

¹ The DUA’s initial determination cited G.L. c. 151A, § 25(e)(2).

Findings of Fact

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

1. The claimant worked full-time for the instant employer as a Floor Operator from 1/28/2013 until his last physical day of employment on 5/28/2019.
2. The employer has an attendance policy which states that employees who are absent for three consecutive scheduled workdays without providing notice are considered to have voluntarily resigned, unless providing such notice was not practical.
3. The claimant was provided this policy in writing at the time of hire.
4. The claimant signed an acknowledgement form indicating her receipt of the employer's policies in their handbook.
5. The claimant's father who lived in the Dominican Republic passed away on 5/30/2019.
6. On 5/31/2019, the claimant called the HR Manager prior to his shift stating his father died and that he might be travelling to the Dominican Republic.
7. The claimant asked about funeral pay and the HR Manager informed him that he was entitled to three days of bereavement leave however he would need to provide an obituary or death certificate to support any travel outside of the country.
8. The claimant stated that he understood and would call back. The claimant spoke in English.
9. Later that same day, the claimant's son called the HR Manager with the claimant in the background.
10. The claimant's son asked about bereavement pay and the HR Manager again explained the bereavement process with the claimant's friend translating to the claimant in Spanish.
11. The HR Manager informed the claimant's son that the claimant needed to call her back himself to discuss his plans for any time out and that he must call out if absent.
12. The claimant was aware that he needed to call out each day to report his absence.
13. The claimant's son said that the claimant would call back.

14. The claimant's failure to report to work negatively impacts the employer's manufacturing operations.
15. The claimant was scheduled to work 6/1/2019, 6/2/2019, 6/5/2019 and 6/6/2019 however he did not report to work or notify the employer of his absence.
16. The employer did not know when the claimant was returning and pulled employees from other departments to perform the claimant's job duties.
17. On 6/7/2019, the claimant called the HR Manager and asked if he was fired.
18. The claimant stated that he never went to the Dominican Republic and that he did not call out for his shifts because he was sad.
19. The claimant believed that since he did not have proof that he traveled outside the country that he would be fired.
20. Prior to 6/7/2019, the claimant had not called the HR Manager back to inform her of his plans to travel or not travel to the Dominican Republic.
21. In turn, the HR Manager informed the claimant that he had a responsibility to let the employer know what was happening and that he was terminated for being a no call, no show for three workdays.

[Credibility Assessment:]

The HR Manager's testimony is accepted as credible in all contested areas since the [sic] she was forthright in giving detailed and consistent testimony with her version of the events making logical sense. The claimant's testimony was vague and inconsistent regarding dates and lacked logical sense thus causing the claimant's testimony to be less credible in all contested areas. Specifically, the claimant initially testified that he called the HR Manager to report each absence and later testified that he did not call which further diminished his credibility.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the claimant is not eligible to receive unemployment benefits.

As an initial matter, we must determine the applicable section of law to apply to the claimant's separation. The claimant last worked on May 28, 2019. Consolidated Finding of Fact # 1. He was scheduled to work on May 31, 2019, and he notified the employer about the death of his father. Consolidated Finding of Fact # 6. However, he did not tell the employer that he was going to be absent subsequently. Prior to June 7, 2019, the claimant did not tell the employer his plans regarding traveling out of the country or reporting to work. Consolidated Finding of Fact # 20. As a result, the claimant was absent without notice or explanation on June 1, June 2, June 5, and June 6, 2019. Consolidated Finding of Fact # 15. The employer was unaware of the claimant's whereabouts. Consolidated Finding of Fact # 16. Finally, on June 7, 2019, the claimant contacted the Human Resources Manager to ask about his job status, whereupon he was told that "he was terminated for being a no call, no show for three workdays." Consolidated Findings of Fact ## 17 and 21.

The DUA and the review examiner both applied G.L. c. 151A, § 25(e)(2), which is the statutory section applicable to discharges, or employer-initiated separations. Although the employer ultimately told the claimant that his employment was severed, we believe that the claimant brought his separation upon himself by not informing the employer of his plans and not calling out from work for four shifts. While it is up to the review examiner to determine the facts, "[a]pplication of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In light of the facts as outlined as above, we conclude as a matter of law that the claimant effectively quit by abandoning his employment. See Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his 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)).

Because the separation was initiated by the claimant, his eligibility for benefits is governed by G.L. c. 151A, §§ 25(e) and (e)(1), 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 of such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under these provisions, the claimant has the burden to show that he is eligible to receive unemployment benefits. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993). We conclude that he has not carried his burden.

Under the good cause standard, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Here, the consolidated findings of fact do not support a conclusion that the employer created good cause for the claimant to leave his job. The Human Resources Manager spoke with both the claimant and the claimant's son on May 31, 2019, and explained to both men what needed to be done. The claimant understood her instructions. Consolidated

Finding of Fact # 8. After both calls, “[t]he claimant was aware that he needed to call out each day to report his absence.” Consolidated Finding of Fact # 12.² The employer did not act unreasonably toward the claimant. He has not carried his burden to show that he separated for good cause attributable to the employing unit.³

The urgent, compelling, and necessitous standard focuses more on the claimant’s personal reasons for separating from employment, and “a ‘wide variety of personal circumstances’ have been recognized as constituting ‘urgent, compelling and necessitous’ reasons under” G.L. c. 151A, § 25(e), “which may render involuntary a claimant’s departure from work.” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm’r of Department of Employment and Training, 412 Mass. 845, 847 (1992). In this case, the claimant told the Human Resources Manager on June 7, 2019, that he did not call out for his shifts, because he was sad. Consolidated Finding of Fact # 18.⁴ There is insufficient evidence in the record to show that being sad prevented the claimant from calling out of work for four straight days. Generalized sadness, without more, does not constitute an urgent, compelling, and necessitous reason for failing to report to work or call out of work. In this way, the claimant has also failed to show that he separated from his job involuntarily.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits is supported by substantial and credible evidence and free from error of law. However, the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), rather than G.L. c. 151A, § 25(e)(2), because he effectively abandoned his job by not reporting to work for four shifts after his father passed away.

² The review examiner found that the claimant knew that he needed to call out each day he was going to be absent. It appears that he was entitled to bereavement leave, *see* Consolidated Finding of Fact # 7, but he needed to inform the employer when he was going to be out. He failed to do so.

³ The review examiner found that the claimant thought that he could be fired, because “he did not have proof that he traveled outside the country.” Consolidated Finding of Fact # 19. However, the claimant testified during the remand hearing that he never traveled to the Dominican Republic. Since he never traveled anywhere, his belief that he could be discharged for not providing documentation to support such travel was illogical and unreasonable. In any event, the issue was not his failure to supply documentation of his father’s passing. The issue involved his failure to inform the employer of his plans to stay out of work and his failure to notify the employer of his absences on June 1, 2, 5, and 6, 2019.

⁴ Again, it is important to note that the claimant did not testify that he failed to call out, because he already thought that he had been approved for bereavement leave or that he had already notified the employer of his ongoing absences due to this father’s passing.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 2, 2019, 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 – October 30, 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