

Where the claimant needed to travel out of the country because her father passed away while she was on medical leave, but failed to notify or maintain contact with the employer after her medical leave ended, she is deemed to have abandoned her job and is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0032 6888 06

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. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 26, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties in the first session, but only by the employer in the second session, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on February 17, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined 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). 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 allow the claimant to testify and afford both parties an opportunity to present additional evidence. Both parties attended the remand hearing, which took place over two separate sessions. 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 abandoned her job after failing to return to work from a previously approved medical leave, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant was employed as a full time home health aide for the employer, a home healthcare agency, between 8/10/2013 and 9/09/2019, when she separated.
2. The claimant's immediate supervisor was the president.
3. On 08/24/2019, the claimant visited her doctor and was medically excused from work due to right lower extremity pain and swelling until 09/09/2019.
4. The claimant's last physical day of work was 08/25/2019. The claimant worked her shift on 08/25/2109, contrary to her doctor's orders.
5. On 08/26/2019 or 08/27/2019, the claimant delivered the doctor's note excusing her from work until 09/09/2019 to the employer. Upon arrival in the office, the claimant was limping. The claimant informed the president that she was in a car accident and had leg pain. The claimant showed the president an incident report. When leaving the office, the president's assistant observed that the claimant was not limping.
6. The employer granted the claimant time off work until 09/09/2019 in accordance with the doctor's note.
7. The president contacted the police department in the town of the alleged car accident. The police department informed the president that there was a domestic incident, not a car accident.
8. The claimant's father died on 08/27/2019. The claimant learned about her father's death at 11:00 p.m. on 08/27/2019.
9. On the morning of 08/28/2019, the president called the claimant to request additional documentation. The president was not calling the claimant to require her to work a shift that day or to fire her because she had a doctor's note excusing her from work until 09/09/2019. Doing so would have been "horrible business practices."
10. During the call, the president did not inform the claimant that she would be fired or that she was fired. The claimant was at the airport to travel to Haiti. The claimant was not in her home. Flight numbers were being called on the loudspeakers in the airport, which the president could hear through the phone. The president asked the claimant if she was at the airport. The claimant did not reply and the phone call ended.
11. The president contacted the doctor's office. The doctor did not authorize the claimant to travel with her injuries.
12. The claimant did not return to work on or after 09/09/2019.

13. The employer attempted to contact the claimant over twenty (20) times by phone and text message after 08/28/2019. The claimant's phone was shut off on 08/28/2019 for a few months. The claimant did not respond in any way. The employer did not receive any call, text messages, or voicemail messages from the claimant or on the claimant's behalf until 11/19/2019.
14. At no point did the employer indicate to the claimant that she was fired, discharged, or terminated from her employment.
15. The claimant quit her job by abandoning her employment when she did not return to work on or after 09/09/2019 or maintain contact with the employer.
16. At no point did the claimant report to the employer any death of her father or any need to travel to Haiti.
17. On prior occasions, the claimant took one (1) to two (2) months off work to travel. The claimant provided the employer with one (1) to two (2) weeks['] notice of such travel, and her time off was granted without issue.
18. The claimant did not request a leave of absence. Time off would have been available for the claimant, had she communicated a need to be absent from work to travel to Haiti following her father's death.
19. No remote work was available.
20. The employer did not have any locations or clients outside of Massachusetts.
21. The claimant filed an unemployment claim effective 11/10/2019.
22. On 11/19/2019, the claimant called the office, reported that she returned from Haiti, and questioned whether any money was owed to her.

Credibility Assessment:

In this case, there was a dispute between the parties as to whether the claimant quit or was fired. It was undisputed that there was one telephone conversation between the president and the claimant following the meeting where the claimant dropped off the 08/24/2019 doctor's note. The review examiner has determined that the call occurred on the morning of 08/28/2019. The claimant alleged that during the call, she was at home and the president was requiring her to work another shift and told her that she would be fired or that she was fired. The claimant's allegations are not credible. First, the president denied that this was the purpose of the call. The president's testimony on this point is credible, given that claimant was medically excused from working until 09/09/2019, and the president testified about what a "horrible business practice" it would be to fire an employee while medically excused from work, or to make employees work while medically excused from doing so. While there was a discrepancy in the president's testimony as to whether

he was calling to obtain another copy of a misplaced doctor's note or obtain a copy of the police incident report, the review examiner finds this discrepancy negligible in light of the president's consistent testimony that the call was to request documentation of some sort. The review examiner finds it plausible and reasonable for the president to be requesting such documentation at that time, given the president's hearsay testimony about his assistant's observations that the claimant was not limping when leaving the building following a car accident that the claimant disclosed during the 08/26/2019 or 08/27/2019 meeting. During the hearing, the claimant denied ever telling the president about a car accident. Again, this testimony from the claimant is not credible, given the claimant's own written reporting to the DUA referencing a car accident and the president's detailed testimony about the claimant's own actions and comments during that meeting. It also makes no logical sense that the president would contact the local police department to inquire further about a car accident, if the claimant did not report being in a car accident to the employer. Second, the president offered detailed direct testimony about his interaction with the claimant during the call, including that he could hear flight numbers being called out in the background, he questioned whether the claimant was at the airport, and the call ended without the claimant answering his question. It is not likely that such background noise would be audible within the claimant's home. Moreover, the claimant's fact-finding documentation admits traveling to Haiti on 08/28/2019, which is corroborated by the burial certificate establishing the father's date of death as 08/27/2019. The claimant admittedly learned of her father's death at 11:00 p.m., making it more likely than not that the claimant was at the airport traveling during the call on 08/28/2019, and not at home.

It was undisputed that the claimant did not return to work on or after 09/09/2019, following the medical excusal from work. There was a dispute, however, between the parties about attempts to communicate with each other after 08/28/2019. The president offered direct testimony about attempts to contact the claimant over twenty (20) times by phone and text message after 08/28/2019, that the claimant's phone was shut off on 08/28/2019 for a few months, that the claimant did not respond in any way, and that the employer did not receive any call, text messages, or voicemail messages from the claimant or on the claimant's behalf until 11/19/2019. The president's testimony is more credible than that of the claimant on this point as well. The claimant alleged that while she was in Haiti she tried to call the employer on 08/27/2019, 08/28/2019 and 08/29/2019 but no one answered. Yet this timeline is nonsensical given the burial certificate establishing that the claimant's father died on 08/27/2019, the claimant's admission that she learned of his death that evening at 11:00 p.m., and the claimant's own admission that she began her travel to Haiti the following day, which was 08/28/2019. It does not make sense that the claimant was allegedly trying to contact the employer from Haiti on 08/27/2019, prior to her knowledge of her father's death and in light of her allegations that she was in [City A] for three (3) days before arriving in Haiti. It would stand to reason that the claimant's phone would still be operational during the time she remained in the U.S.A., yet the president was adamant in his testimony that the employer received no communication from the claimant until 11/19/2019.

The claimant also alleged that her daughter tried to contact the employer from Haiti on 09/11/2019 and 09/12/2019. The daughter did not testify as to any alleged attempts to contact the employer, the claimant had no documentation of any attempts to contact the employer prior to 11/19/2019, and the president was adamant that they received no communication from the claimant after the 08/28/2019 call and before 11/19/2019. It is reasonable that someone making such contact could produce some corroborating documentation. As a result, the review examiner finds that the claimant's testimony of alleged attempts to contact the employer is not credible, and therefore finds that the claimant did not make such attempts.

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, except the portion of Finding of Fact # 15, inasmuch as it is not a fact but a legal conclusion that the claimant quit her job by abandoning her employment. "Application 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 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 record. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question we must decide is whether the claimant separated voluntarily or was discharged. The parties disputed the nature of the claimant's separation. The employer maintained that the claimant abandoned her job when she did not return to work or maintain contact with the employer during her medical leave, or after her medical leave ended on September 9, 2019. The claimant alleged that, at some point during the August 28, 2019, telephone conversation, the president told her that she was fired.¹

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Here, the review examiner made a credibility assessment in favor of the employer. 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). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts

¹ We note the claimant also testified that, during the August 28, 2019, telephone conversation, the president told her she would be fired if she did not work a shift.

from its weight.” *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). As stated previously, we believe the review examiner’s credibility assessment was reasonable in relation to the evidence presented.

The review examiner found that the claimant did not show up for work at the end of her leave of absence on September 9, 2019, and she had no contact with the employer until November 19, 2019. *See Consolidated Findings ## 6, 12, and 13.* Where an employee fails to show up for work or report the reasons for an absence, the no-call, no-show is considered a voluntary resignation. *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)). Given these findings, we agree that the claimant voluntarily resigned, effectively abandoning her job.

Because the claimant quit her job, we analyze the claimant’s separation under 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 for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under the above provision, it is the claimant’s burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

When a claimant contends that the separation was for good cause attributable to the employer, 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). The record does not suggest that the employer acted unreasonably towards the claimant at any time. Thus, we cannot conclude that the claimant left her employment for good cause attributable to the employer.

The claimant also failed to establish that she left her employment for urgent, compelling, and necessitous reasons. Our standard for determining whether a claimant’s reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case and evaluate “the strength and effect of the compulsive pressure of external and objective forces” on the claimant to ascertain whether the claimant “acted reasonably, based on pressing circumstances, in leaving employment.” *Reep v. Comm’r of Department of Employment and Training*, 412 Mass. 845, 848, 851 (1992).

At the hearing, the claimant testified that she travelled to Haiti because her father had passed away there. *See Consolidated Findings of Fact ## 8 and 10.* A death in the family may constitute urgent, compelling, and necessitous circumstances. However, to qualify for benefits, the claimant must further show that she made a reasonable attempt to preserve her job before leaving such that it

indicates her “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). Here, the review examiner found that the claimant’s phone was shut off. *See* Consolidated Finding # 13. Yet nothing in the record indicates that she made any effort to borrow a phone or otherwise stay in touch with her employer in order to keep her job. This does not constitute a reasonable effort to preserve her employment. Therefore, the claimant did not establish that she acted reasonably based on pressing circumstances in leaving her position with the employer.

We, therefore, conclude as a matter of law that the review examiner’s original conclusion that the claimant’s separation from employment was disqualifying under G.L. c. 151A, § 25(e)(1), is supported by substantial evidence and free from error of law.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning September 8, 2019, 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 - July 29, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT 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.

JMO/rh