

After remand, the record no longer supported a conclusion that the claimant was on an employer-approved leave of absence and in unemployment within the meaning of §§ 29(a) and 1(r). Instead, the totality of the evidence established that the claimant effectively abandoned her job when she stopped communicating with the employer and failed to provide medical documentation or any other information regarding her return to work. Therefore, the claimant is disqualified from receiving benefits under § 25(e)(1).

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0069 2943 28

Introduction and Procedural History of this Appeal

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

The claimant separated from her position with the employer and filed a claim for unemployment benefits with the DUA, effective May 16, 2021, which was denied in a determination issued on January 26, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 28, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in unemployment because she was available for, capable of, and seeking full-time work while on a medical leave of absence, and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to provide testimony and allow the claimant to provide additional information about the circumstances leading up to her separation from employment. Only the employer 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, which concluded that the claimant was in unemployment pursuant to G.L. c. 151A, §§ 29(a) and 1(r), because she was available for, capable of, and seeking full-time work while on a medical leave of absence, 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 hired and began as a part-time bartender for the employer, a restaurant, on July 15, 2018.
2. The claimant's direct report was the general manager. The claimant's upper-level direct report was the owner.
3. The claimant's last physical day of employment was October 24, 2020.
4. The claimant did not fall while at work on October 24, 2020, or the days prior.
5. The claimant was scheduled to work on October 28, 2020, but was a no call no show.
6. The claimant was scheduled to work on October 30, 2020, and October 31, 2020.
7. On the morning of October 30, 2020, prior to her scheduled shift, the claimant sent a text message to the general manager indicating she was in the hospital and was unable to work her October 30, 2020, and October 31, 2020, scheduled shifts.
8. Following the receipt of the claimant's text message, the general manager sent a text message to the owner stating, "Just a heads up, (claimant), just text [sic] me she's not coming in today apparently she [sic] still in the hospital. Also, I won't be in until about 9:15."
9. The claimant was next in communication with the employer approximately three weeks later, when the general manager sent a text message to the claimant requesting information on her status. The claimant responded that she could not previously get in touch with the employer because she did not have her phone while she was in the hospital. The general manger [sic] requested the claimant provide information on when she would return to her employment, along with medical documentation, but the claimant did not respond back.
10. The claimant next communicated with the employer on May 16, 2021, when she sent a text message to the owner that stated, "Hey (owner)!! Just checking in. Finish 2nd round of testing with still no result. Starting 3rd round this week. Praying for answers. Congrats on the ball-park spot. Such an amazing opportunity for you and your brand. Hope you and your family are well (heart emoji) miss you and everyone!"
11. The owner responded, "Hi (claimant), ty."
12. On June 15, 2021, the [Name] Health Center of [City] created a medical document that stated, "(claimant) is currently undergoing medical work up for neurologic impairment and may not return to work at this time. Whether and

when she may return to work will depend on her work up and treatment.” The employer was not provided this medical documentation.

13. The claimant next communicated with the employer on September 28, 2021, when she sent a text message to the owner stating, “Hi (owner), just touching base. I had surgery a couple weeks ago. Scheduled for another next month. Miss you guys! Hope things are well! So many regulars reach out all the time, it’s really nice. How’s hockey going?”
14. The owner responded, “Hi (claimant)!! Hope you are doing well, we miss u too! Ya hockey is good keeping him.”
15. The claimant did not request to take a leave of absence from the employer.
16. The employer did not approve the claimant to take a leave of absence or extended time away from her employment.
17. The employer allowed employees to request a leave of absence.
18. The employer required employees to request a leave of absence by speaking to the general manager or owner, and if a leave of absence would be for an extended period, the employer required documentation supporting the request.
19. The claimant did not provide medical documentation to the employer following her October 24, 2020, last physical day of employment.
20. The claimant abandoned her employment in the middle to late November 2020, when she did not respond to the general manager’s text message that requested medical documentation and information on when the claimant would return to work.

Credibility Assessment:

It is undisputed that the claimant was dealing with a medical issue at the end of October 2020, as she called out of work on October 30, 2020, due to being in the hospital. During the initial hearing, the claimant asserted that on October 30, 2020, she fell while at work, began an approved leave of absence the following day, and requested to return to her employment in April 2021, but the employer denied her request. During the remand hearing, the employer witnesses provided credible sequestered and detailed testimony that the claimant did not request a leave of absence, was not approved [sic] a leave of absence, and that the claimant did not fall while at work in October 2020, including October 30, 2020, as she called out that day, which is supported by the October 30, 2020, text message from the general manager to the owner. Furthermore, it is not logical, if as the claimant alleged, she attempted to return to her employment in April 2021, that she would send a text message to the owner on May 16, 2021, that stated, “Finish 2nd round of testing with still no result”, as well as provide a medical document dated June 15, 2021,

from the [Name] Health Center of [City] that stated, “(claimant) may not return to work at this time.”

The claimant was not present during the remand hearing to offer additional testimony or evidence such as medical records, leave of absence paperwork, or text messages with the employer to demonstrate that she began an approved leave of absence on October 30, 2020.

Taken as a whole, it is concluded the employer’s testimony and evidence is more credible than that of the claimant’s.

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. After such review, the Board adopts the review examiner’s consolidated findings of fact, except that portion of Consolidated Finding # 2 which states the general manager and owner are “direct reports” of the claimant, where the unrefuted evidence in the record establishes that they were her direct supervisor and upper-level supervisor, respectively. We also reject that portion of Consolidated Finding # 20 which states a legal conclusion that the claimant abandoned her employment. At this stage of the proceedings, that is for the Board to decide. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) (“Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.”). 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 evidence presented. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant is eligible for benefits.

In his decision, the review examiner analyzed the claimant’s separation as a leave of absence and concluded that she was in unemployment as a result of that leave of absence. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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.

After remand, the consolidated findings and credibility assessment no longer support the review examiner’s conclusion. Specifically, the review examiner does not find credible the claimant’s testimony that she began an approved leave of absence on October 30, 2020, since she did not attend the remand hearing or offer additional testimony or evidence, such as medical records, documentation pertaining to a leave of absence request, or communications between her and 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). This credibility assessment is reasonable in relation to the evidence presented. We agree that it is not logical that if the claimant had unsuccessfully attempted to return to her employment in April, 2021, as she contended during the initial hearing, she would send an unprompted text message to the owner one month later, in May 2021, to merely state that she was still awaiting test results, and then provide the DUA with a medical document dated June 15, 2021, that indicates that the claimant had been unable to work.¹

The review examiner initially found that the claimant began an unpaid leave of absence that was approved by the owner.² However, the consolidated findings now support a conclusion that the claimant left work voluntarily. The review examiner found that the claimant had not requested or received approval for any leave of absence or extended time away from the employer. Consolidated Findings ## 15 and 16. The review examiner also found that the claimant did not meaningfully communicate with the employer after October 30, 2020, and had no contact with the employer again until three weeks later, when the employer initiated contact by sending the claimant a text message. *See* Consolidated Findings ## 7 and 9. Moreover, the claimant did not respond to the employer's request for medical documentation or provide the employer with any information about when she would return to work. *See* Consolidated Findings ## 9, 19, and 20. Although Consolidated Findings ## 10 and 13 indicate that the claimant contacted the owner several months later on May 16, 2021, and again on September 28, 2021, nothing in those text messages suggests that the claimant maintained an employment relationship with the employer.³

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 Olecknick 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)); *see also* Board of Review Decision 0015 6411 71 (November 23, 2015) (claimant who failed to inform employer of absence and then does not contact employer for several weeks regarding employment voluntarily abandoned job). Given the findings in this case, we agree that the claimant voluntarily resigned, effectively abandoning her job.

Voluntary separations from employment are analyzed pursuant to the following provisions under G.L. c. 151A, §§ 25(e), which state:

[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

¹ The text message and medical document have both been entered into the record as Remand Exhibit 5 and Exhibit 1, respectively.

² The hearing decision, dated October 28, 2022, was entered into the record as Remand Exhibit 2.

³ We note that during the initial hearing, the claimant testified that she never returned to work for the employer, and that her last physical date working for the employer was in October 2020. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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 provisions, 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 initial hearing, the claimant testified that, in October, 2020, she had been diagnosed with neuropathy, a medical condition, that prevented her from performing her job duties as a bartender. *See Consolidated Finding # 7*. A medical condition such as this 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).

Nothing in the record suggests that the claimant made such efforts or shows that such efforts would have been futile. Here, the review examiner found that the claimant failed to communicate with the employer for three-weeks, then again failed to communicate with the employer until May, 2021. *See Consolidated Findings ## 9 and 10*. Nothing in the record indicates that she made any effort to maintain contact with her employer to keep her job. The claimant's text messages to the owner in May, 2021, and September, 2021, do not constitute reasonable efforts to preserve her employment. In addition, the employer would have allowed the claimant to take a leave of absence or extended time away from work if she had requested it, but she did not. *See Consolidated Finding # 17*. Therefore, the claimant did not establish that she made reasonable efforts to preserve her job.

We, therefore, conclude as a matter of law that G.L. c. 151A, §§ 29(a) and 1(r), do not apply to this case, as the claimant voluntarily resigned when she stopped reporting for work. We further conclude that the claimant has not demonstrated good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving. Therefore, she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning November 1, 2020, 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 - March 28, 2024



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
(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