Where the claimant was discharged for a no-call, no-show, she brought her unemployment on herself and her separation is analyzed pursuant to G.L. c. 151A, § 25(e)(1). In this case, the claimant established that she failed to report for work or call-in due to a relapse of her alcoholism. She was unable to preserve her employment by contacting the employer because she did not have access to a phone while hospitalized or in the detox facility. Held she separated due to urgent, compelling, and necessitous reasons, and she is eligible for benefits.

Board of Review
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Issue ID: 0076 7151 22

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 affirm on different grounds.

The claimant was discharged from her position with the employer on May 5, 2022. She filed a claim for unemployment benefits with the DUA, effective May 8, 2022, which was denied in a determination issued on June 7, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 22, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and thus, she was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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's hospitalization for an alcoholism relapse and inability to communicate with the employer constituted mitigating circumstances for her failure to attend work or notify the employer of her absences, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a part time cleaning supervisor for the employer, a cleaning business, from 2018, until May 5, 2022, when she separated.

2. The claimant's supervisor was the owner.

3. The employer does not have an attendance policy.

4. The employer expected employees to work as scheduled and to notify the employer if they cannot work. The purpose of this expectation is to ensure that work is performed for as scheduled for customers.

5. The claimant was aware of this expectation as she worked as a supervisor.

6. The claimant was diagnosed with alcoholism in 2019.

7. On April 30, 2022, the claimant's fiancée took the claimant to the hospital because she was drinking heavily.

8. On May 1, 2022, the claimant was discharged from the hospital and admitted to a detox facility.

9. The claimant did not have access to her phone while hospitalized and while in the detox facility.

10. On May 2, 2022, the owner spoke to the claimant's fiancée who informed the employer that the claimant was in a detox facility for alcoholism as of May 1, 2022.

11. On May 4, 2022, the claimant was discharged from the detox center.

12. On May 5, 2022, the employer terminated the claimant's employment for not appearing for work on April 29, 2022, and April 30, 2022.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's 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. As discussed more fully below, while we agree that the claimant is eligible for benefit, we do so under a different section of G.L. c. 151A, § 25(e).

We presume that because the employer terminated the claimant's employment, the review examiner decided to analyze her eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(2). However, it was undisputed that the reason for her discharge was her failure to come to work or notify the employer of her inability to work on the weekend of April 29 and 30, 2022. *See* Finding

of Fact # 12.[1] In Olechnicky v. Dir. of Division of Employment Security, the Supreme Judicial Court upheld the Board's conclusion that the failure of an employee to notify the 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). 325 Mass. 660, 661 (1950). Thus, this case is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1), which provides, in relevant 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 . . .
>
> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

The express language in both of these provisions places the burden of proof on the claimant.

As there is no suggestion in the record that the employer did anything to cause the claimant to not report for work or call in, there is no basis to conclude that the claimant's separation was for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (in order to show good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

Alternatively, we consider whether there were urgent, compelling, and necessitous reasons for the claimant abandoning her job. "[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). Medical conditions are recognized as one such reason. *See* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 335–336 (1979) (pregnancy or a pregnancy-related disability, not unlike other disabilities, may legitimately require involuntary departure from work).

In this case, the findings show that the claimant was diagnosed with alcoholism in 2019. Finding of Fact # 6. Further, they show that, on the weekend that she was to perform her cleaning work for the employer's clients, she had been drinking heavily since Friday and had to be hospitalized for this reason. Finding of Fact # 7.[2] In Board of Review Decision 0026 2284 78 (Mar. 28, 2019), we stated that to render a separation involuntary due to urgent, compelling, and necessitous circumstances related to alcoholism, a claimant must show that before the incident that caused the

[1] 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).

[2] *See* also Exhibit 6, a letter from the claimant's clinician, dated June 15, 2022, which confirms that the claimant went to the hospital emergency department due to alcohol intoxication on April 30, 2022. This exhibit is also part of the unchallenged evidence in the record.

claimant to lose a job, the claimant knew that he or she was an alcoholic and had tried but was not successful at controlling the disease. We further stated that claimants who can meet this burden will have shown that they lost the job due to circumstances beyond their control and may not be disqualified under G.L. c. 151A, § 25(e)(1). Id. at p. 5–6.

Although not in the findings, during the hearing the review examiner questioned the claimant about her prior efforts at treatment. The claimant testified that she had gone through treatment in 2019 at the [Recovery Center A], which the employer did not dispute. Both parties also testified that the claimant had been arrested for Driving Under the Influence in March or April, 2022, which is just before the incident before us. Given this evidence, we believe the claimant has met her burden to show that, at the time she was a no-call, no-show for her cleaning jobs, she had already been diagnosed with alcoholism, and she had tried but was not successful at controlling the disease. Her separation was due to urgent, compelling, and necessitous circumstances.

However, our analysis does not stop here. Even if the claimant has carried her burden to show that circumstances beyond her control were forcing her to resign, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve her employment' as would indicate the claimant's 'desire and willingness to continue her employment.'" Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–98 (1974).

In this case, it is apparent that a reasonable step to preserve her employment would have been to notify the employer of her absences. The findings show that she was unable to do so due to her relapse with alcoholism and subsequent hospitalization and treatment. She had been drinking heavily and did not have access to her phone while in the hospital or detox facility. *See* Findings of Fact ## 7–9.

We, therefore, conclude as a matter of law that, because the claimant's separation due to a no-call, no-show was due to urgent, compelling, and necessitous reasons, she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

Charges from the employer's account should be removed consistent with G.L. c. 151A, § 14(d)(3).

The review examiner's decision is affirmed on different grounds. The claimant is entitled to receive benefits for the week beginning May 8, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 2023

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
(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.

AB/rh