

While on a medical leave of absence and after separating from employment, the claimant was not actively seeking employment. Held his failure to search for work rendered him ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r). Whether viewed as a resignation due to a misbelief that the employer did not want him to return, or a discharge for declining suitable light duty work by falsely claiming he was medically unable to accept it, his separation also rendered him ineligible for benefits pursuant to 151A, §§ 25(e)(1) and (2).

**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: 0081 0646 71

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. Benefits were denied pursuant to G.L. c. 151A, § 25(e)(1), on the grounds that the claimant failed to show that he separated from employment for good cause attributable to the employer or due to urgent, compelling, and necessitous reasons.

The claimant had filed a claim for unemployment benefits with the DUA, effective September 3, 2023, which was approved in a determination issued on September 28, 2023. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner reversed the agency's initial determination and denied benefits in a decision rendered on December 2, 2023. The claimant sought review by the Board, which affirmed, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On July 16, 2024, in a response to a request from the DUA, the Board issued an order to rescind its decision and remand the case for additional evidence pertaining to the claimant's employment status under G.L. c. 151A, §§ 29(a), (b), and 1(r). Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's decision to deny benefits beginning September 3, 2023, which includes the periods before and after the claimant's separation from employment, is supported by substantial and credible evidence and is free from error of law pursuant to G.L. c. 151A, §§ 25(e), 29(a), (b), and 1(r).

Findings of Fact

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

1. The claimant began working part-time as a casual employee road truck helper for the employer, an alcohol distributor, on April 19, 2022.
2. The claimant's supervisor was the warehouse manager.
3. The claimant's job duties included riding in trucks and unloading trucks.
4. The claimant's last physical day of work for the employer was July 14, 2023.
5. On July 14, 2023, the claimant was injured pulling a ramp from a truck.
6. On July 14, 2023, the claimant began an indefinite leave of absence due to his injury. The claimant's leave of absence was paid through workers' compensation from July 20, 2023, through September 4, 2023.
7. On July 19, 2023, the claimant saw an occupational therapist, affiliated with the employer's workers' compensation insurer, who told the claimant to stay out of work until medically cleared.
8. On August 2, 2023, the claimant saw an occupational therapist who cleared the claimant to return to light duty work. The occupational therapist told the employer the claimant could return to light duty work.
9. The claimant did not believe he was ready to return to work until he was cleared by an orthopedist.
10. The employer had light duty work available to the claimant. The light duty work included assembling packaging for deliveries.
11. The claimant was physically capable of returning to light duty work.
12. On August 8, 2023, the employer contacted the claimant to return to light duty work on August 9, 2023. The employer emailed the claimant that light duty work was available. The claimant told the employer that he was not ready to return to work.
13. On August 9, 2023, the claimant saw his own personal orthopedic nurse practitioner (the NP), not affiliated with the employer, who recommended that the claimant stay out of work until his pain was gone. The NP gave the claimant a note for his employer excusing him from work.
14. On August 9, 2023, the employer contacted the NP about the note. The employer informed the NP that the claimant had been cleared for light duty work by an occupational therapist. The NP amended her note to clear the claimant to return to light duty work beginning August 10, 2023.
15. On August 10, 2023, the claimant did not return to work.

16. The employer did not request additional updates from the NP or the claimant's physicians because the claimant had been cleared for light duty work.
17. On August 21, 2023, the claimant saw his own different personal orthopedic nurse practitioner who recommended that the claimant stay out of work indefinitely.
18. On August 23 and August 24, 2023, the employer's private investigator took pictures of the claimant playing basketball at a park.
19. On September 4, 2023, the claimant was disqualified from his workers' compensation claim because he had been observed to be playing basketball. The claimant appealed the disqualification.
20. In approximately September 2023, the claimant's workers' compensation lawyer told the claimant that the employer was not interested in the claimant returning to work. Following this statement, the claimant did not contact the employer to return to work until November 27, 2023.
21. As of September 4, 2023, the employer was no longer interested in the claimant returning to work due to the claimant not returning to work prior to that date and the employer's belief that the claimant had made false statements regarding his workers' compensation claim.
22. On September 13, 2023, the claimant saw an orthopedic nurse practitioner who recommended that the claimant stay out of work until October 11, 2023. The recommendation was extended to December 6, 2023.
23. In approximately October 2023, the claimant felt that his injury had subsided to the point that he could return to work. The claimant did not contact the employer to return to work.
24. On November 27, 2023, following the initial hearing, the claimant emailed the employer that he was cleared to return to work. The claimant did not provide the employer with any documentation clearing his return. The employer did not accept the claimant's return to work because his workers' compensation claim was pending.
25. On December 26, 2023, the claimant and the employer settled the claimant's workers' compensation claim. As a result of the settlement, the parties agreed that the claimant was no longer employed by the employer.
26. As of August 6, 2024, the remand hearing date, the claimant had not returned to work in any capacity.

27. On approximately July 23, 2024, the claimant began looking for employment with a different employer. The claimant did not begin looking for new employment prior to that date because he was intending to collect unemployment benefits or workers' compensation from the instant employer. The claimant was willing to accept full-time or part-time work offered to him at that time.

Credibility Assessment:

The claimant attended the initial hearings and the remand hearing. The vice president of human resources and an agent attended the initial hearings and the remand hearing on behalf of the employer.

The parties agreed that the claimant was on workers' compensation from July 20, 2023, until September 4, 2023.

The claimant contended in both the initial and remand hearings that he did not return to work because he was not physically capable of returning to work. The claimant admitted that he was cleared by the occupational therapist and the NP to return to light duty work and that the employer offered him light duty work.

The employer presented photograph evidence showing a person playing basketball dated August 23, 2023, and August 24, 2023. The employer credibly testified that the pictures were taken by a private investigator in relation to the claimant's workers' compensation claim. The employer credibly testified that the claimant was the person in the photographs. The claimant refused to look at the photographs during the remand hearing and refused to answer any questions about the photographs. Based on the testimony presented, the claimant was the person in the photographs and was playing basketball during a time he contended he was not physically capable of working.

The claimant admitted that he was able to return to light duty work as of August 10, 2023, when he was cleared by the orthopedic therapist and by the NP. The claimant testified that he did not return to work because he felt that the employer did not want him to return. The claimant admitted that the employer did offer him light duty work to return on August 10, 2023.

The claimant contended in the remand hearing that he was cleared to return to full-duty work in October 2023 by an orthopedic specialist. The claimant did not provide documentary evidence of this clearance as requested in the remand order. The claimant had contended in the initial hearings, held on October 26, 2023, and November 27, 2023, that he had not been cleared to return to full-duty work. Based on the claimant's inconsistent testimony and lack of documentation, the claimant's testimony that he was cleared for full-duty work in October 2023 is not credible.

The claimant admitted that he was not seeking new employment until approximately July 23, 2024, because he was dealing with his unemployment benefits claim and workers' compensation claim with the instant employer.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 1, insofar as it states the claimant worked part-time, as the undisputed evidence was that the claimant worked full-time as a casual employee.¹ We also reject Consolidated Finding # 9, because the claimant's belief that he was not ready to return to work was contradicted by his own testimony, as noted in the review examiner's credibility assessment. 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.

In this case, the claimant began an indefinite leave of absence due to a work injury on July 14, 2023, and it appears that he formally separated from his employment on December 26, 2023, when the parties settled his workers' compensation claim. *See Consolidated Findings ## 6 and 25.* We begin our analysis with the period preceding the claimant's date of separation from the employer.

G.L. c. 151A, § 29, authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(2) "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.

Thus, to be in "total unemployment" for purposes of the above cited statutes, claimants must be capable of, available for, and actively seeking full-time work, and they may not turn down suitable work.

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).

We further note that an employee is not disqualified from receiving benefits if he is temporarily disabled from doing the employer's work while capable of and available to do other work, and he makes serious efforts to find other work. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163-164 (1980).

The findings show that upon beginning his leave of absence, the claimant was instructed to remain out of work until he was medically cleared to return to work. *See Consolidated Finding # 7*. He was diagnosed with a left shoulder sprain and left shoulder pain. *See Remand Exhibit # 8*.² As early as August 2, 2023, the claimant was medically cleared to return to light duty work. *See Consolidated Findings ## 8, 13, and 14*. As such, the review examiner found that the claimant was physically capable of returning to light duty work. *See Consolidated Finding # 11*. Moreover, we can reasonably infer from the record that the claimant's injuries did not prevent him from performing other suitable light-duty work.

However, to be eligible for benefits, G.L. c. 151A, §§ 29 and 1(r), require that a claimant be actively searching for full-time work. In this case, the claimant did not perform any work search activities until July 23, 2024, ten months after he filed a claim for benefits. He was not willing to accept part-time or full-time work until that date. *See Consolidated Finding # 27*. Because the claimant was not actively seeking employment, he was not in unemployment as defined under G.L. c. 151A, §§ 29 and 1(r), until that week.

Since the claimant permanently separated from the employer, we must also analyze his eligibility for benefits under G.L. c. 151A, § 25(e).

The record indicates that the claimant did not return to work because he believed that the employer did not want him to return. *See Consolidated Findings ## 20, 23, and the claimant's testimony referenced in the credibility assessment*. The employer asserts that the separation occurred because the claimant gave false statements regarding his workers' compensation claim and failed to return to work after he was medically cleared to do so. *See Consolidated Findings ## 21 and 25*. Whether we analyze this separation as a resignation or as a discharge, the claimant is not eligible for benefits.

If viewed as a resignation, we analyze his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1), which provides, 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. . . .

² The claimant's medical diagnosis of a left shoulder sprain and left shoulder pain is referenced in a medical record marked as Remand Exhibit 8. While not explicitly incorporated into the review examiner's findings, it is also part of the unchallenged evidence introduced at the hearing and placed in the record.

The express language of these provisions assigns the burden of proof to the claimant. The review examiner concluded that the claimant did not meet his burden. We agree.

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 review examiner found that the claimant was released to perform light duty work by the workers' compensation medical provider on August 2, 2023, and again, on August 9th by his own orthopedic nurse practitioner. *See Consolidated Findings ## 8, 11, 13, and 14.* Upon notification of the claimant's medical clearance to return to work, the employer had light duty work available and offered it to him. *See Consolidated Findings ## 10 and 12.* Because the claimant was capable of working light duty, and the employer offered it to him, it is evident that the employer wanted the employment relationship to continue. Thus, the claimant's belief that the employer did not want him to return is not supported by substantial evidence, and he has not shown that he left for good cause attributable to the employer.

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). "[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*, 412 Mass. at 847. Medical reasons may constitute such reasons. 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).

Although the claimant had a left shoulder sprain, the review examiner's credibility assessment notes that the claimant admitted that he was physically capable of performing light duty work as early as August 10, 2023. *See also Consolidated Finding # 11.* Because the claimant did not show the presence of any other personal circumstances beyond his control that necessitated departing from his employment, he has failed to show that he left his employment for urgent, compelling, and necessitous reasons.

Even if we were to assume, *arguendo*, that the claimant's separation was a discharge, he is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Here, the findings indicate that the employer did not want the claimant to return because the claimant refused the light duty work offered to him and made false statements regarding the extent of his injury on his workers' compensation claim. *See Consolidated Finding # 21.* In this regard, the separation may be viewed as a discharge.

Where a claimant is discharged from employment, his eligibility for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest. . . .

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). We believe that the employer has met its burden.

The employer offered the claimant work. His refusal to return to work is the misconduct. This was a deliberate act, as the claimant explicitly told the employer he would not be returning. *See Consolidated Finding # 12.*

As for falsifying statements, it is self-evident that the employer expected the claimant to be truthful about the extent of his injuries. On August 8, 2023, the claimant refused to return to work, contending his medical condition prevented him from returning. *See Consolidated Findings ## 12 and 17.* Two weeks later, the claimant was seen playing basketball at a local park by the employer's private investigator. *See Consolidated Finding # 18.* Because there is nothing in the record to indicate that the claimant was incorrectly identified as the person in the picture or that his statements were made by mistake, we can reasonably infer that he deliberately misrepresented his medical condition.

However, deliberate misconduct alone is not enough to disqualify a claimant from receiving benefits. Such misconduct must also be in wilful disregard of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must “take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted). Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987).

There is no dispute that the claimant was expected to return to work after he was medically cleared to do so. *See Consolidated Findings ## 8, 12, 13, and 14.* Because the claimant was cleared to return to light duty work and light duty work was available, the employer's expectation for the claimant to return to work was reasonable.

Furthermore, there is nothing in the record that explains the claimant's reason for providing false statements about the extent of his injury to the employer. Although Consolidated Finding # 27 does allude to the fact that the claimant's preference would have been to receive unemployment

or workers' compensation benefits rather than return to work, this does not amount to a mitigating circumstance.

With no evidence indicating that circumstances beyond his control warranted the misconduct, the claimant's actions are deemed to have been in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant was not in unemployment during his leave of absence or for a period of time after separating from employment pursuant to G.L. c. 151A, §§ 29 and 1(r). We further conclude that the claimant's separation from employment rendered him ineligible for benefits pursuant to G.L. c. 151A, §§ 25(e)(1) and (2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 9, 2023, 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 - September 27, 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.

DY/rh