

The claimant brought about her own statutory impediment to continued employment and is disqualified under G.L. c. 151A, § 25(e)(1), because she did not take the last available exam to obtain her nursing license by the deadline.

**Board of Review
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Issue ID: 0082 5141 57

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 on April 1, 2024. She filed a claim for unemployment benefits with the DUA, effective March 31, 2024, which was approved in a determination issued on April 26, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on May 31, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, 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. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision that the claimant was eligible for benefits under G.L. c. 151A, § 25(e)(2), after being discharged for failing to obtain her nursing license, 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 full-time as a charge nurse for the employer, a skilled nursing facility, from March 2, 2023, until March 31, 2024.
2. The claimant's supervisor was the director of nursing.

3. The employer expected the claimant to obtain a valid nursing license (the License) by April 1, 2024. The License ensured the claimant was in compliance with the state's requirements for a licensed practical nurse.
4. At the time the claimant was hired, the state allowed unlicensed graduate nurses to practice prior to passing the licensing exam (the Exam) as part of the COVID-19 response. The state ended the waiver effective April 1, 2024.
5. In approximately February, 2024, the claimant was informed she was required to pass the Exam to obtain the License to continue her employment.
6. The claimant most recently took the Exam on October 4, 2023. The claimant did not pass the Exam. The claimant did not intend to fail the Exam.
7. The claimant took a review course between December, 2023 and February, 2024 in order to prepare for the Exam.
8. The claimant did not take the Exam again prior to April 1, 2024, because she was still studying and was not prepared to pass the Exam.
9. The claimant was unable to obtain the License by April 1, 2024, because she failed the Exam.
10. On April 1, 2024, the employer discharged the claimant for failing to obtain the License by the deadline because she failed the Exam.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that this case is controlled by G.L. c. 151A, § 25(e)(2), and that the claimant is eligible for benefits. Rather, we conclude that the claimant is ineligible pursuant to G.L. c. 151A, § 25(e)(1).

The DUA initially applied G.L. c. 151A, § 25(e)(1), in deciding that the claimant was eligible to receive unemployment benefits. The review examiner affirmed the agency's initial determination but applied a different statutory provision, G.L. c. 151A, § 25(e)(2). We must first decide which section of law controls the claimant's separation.

Although the claimant's employment ended because the employer did not allow her to continue working after April 1, 2024, G.L. c. 151A, § 25(e)(2), is not applicable in the circumstances presented by this case. The Supreme Judicial Court has stated the following:

The language of G.L. c. 151A, § 25, and our cases interpreting that language, demonstrate that the word ‘voluntarily,’ as used in § 25(e)(1), is a term of art that must be read in light of the statutory purpose of ‘provid[ing] compensation for those who ‘are thrown out of work through no fault of their own.’ . . . Thus, for example, in Rivard v. Dir. of Division of Employment Security, . . . we concluded that ‘a person who causes the statutory impediment that bars his employment leaves his employment ‘voluntarily’ within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment.’ As Rivard demonstrates, in determining whether an employee left work ‘voluntarily’ for purposes of § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, . . . but whether the employee brought his unemployment on himself.

Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002 (1985) (rescript opinion) (the Court upheld the denial of unemployment benefits to a claimant who was unable to work, because his driver’s license was suspended for a year following a conviction for driving while intoxicated) (citations omitted). *See also* Borroni v. Dir. of Division of Unemployment Assistance, No. 13-P-442, 2014 WL 2861755 (Mass. App. Ct. June 25, 2014), *summary decision pursuant to rule 1:28* (upholding disqualification under G.L. c. 151A, § 25(e)(1), for teacher who failed to take action toward obtaining standard educator certificate when she knew that her provision certificate would soon lapse).

As discussed below, in this case, the claimant failed to obtain the required nursing license. Because of this, the employer was not able to retain her as a charge nurse. The claimant, therefore, brought her unemployment upon herself.¹ Consequently, the claimant’s eligibility for benefits is governed by 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.

Under this section of law, the claimant has the burden to show that she is entitled to benefits. Crane v. Comm’r of Department of Employment and Training, 414 Mass. 658, 661 (1993).

More specifically, when a claimant becomes separated due to the loss of a license required for the performance of her job duties, including failing to maintain a license or not undertaking efforts to obtain a license, the claimant’s fault with respect to the loss or failure must be considered. This is

¹ We have applied G.L. c. 151A, § 25(e)(1), in similar cases, where the claimant has failed to make continuous progress towards obtaining a teaching license and, thus, was unable to obtain a waiver for the following school year. *See* Board of Review Decision 0031 4188 32 (Dec. 30, 2019); Board of Review Decision 0031 2994 69 (Nov. 25, 2019); and Board of Review Decision 0031 6661 27 (Nov. 22, 2019). Although a nursing, rather than a teaching, license is at issue in the instant case, we do not believe that this case is different from our prior decisions. The DUA takes a similar approach in cases where a claimant loses a license needed for a job. *See* DUA Adjudication Handbook, Chapter 6, Section 1(A)(9).

so because unemployment benefits are intended for persons who are out of work and unable to secure work through no fault of their own. Connolly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24, 25 (2011) (further citations omitted). If a claimant makes diligent efforts to obtain or retain her license but nonetheless cannot, the claimant is not at fault and is eligible for benefits. On the other hand, if a claimant makes little or token efforts to fulfill the licensure requirements, and the employer must end the claimant's employment due to a lack of a license, then the claimant is subject to disqualification.

The claimant was hired as a charge nurse on March 2, 2023. Finding of Fact # 1. The employer was able to hire the claimant even though she did not have a nursing license at the time, because the Commonwealth of Massachusetts waived the licensing requirement for graduate nurses as part of the COVID-19 response. This waiver was effective through April 1, 2024. Finding of Fact # 4. The claimant was aware of the waiver and the requirement that she obtain her nursing license by April 1st in order to remain employed. Finding of Fact # 5. She could obtain the license by taking and passing the licensing exam.

Prior to separating from employment on April 1, 2024, the claimant last took the licensing exam on October 4, 2023, but failed that exam. Finding of Fact # 6. The claimant subsequently took a review course between December, 2023, and February, 2024, in order to prepare for taking the licensing exam once again. Finding of Fact # 7. She had the opportunity to take the exam again prior to April 1, 2024, but chose not to take it because she did not feel prepared to pass the exam. Finding of Fact # 8. More precisely, the claimant testified that she was scared to take the exam.²

The question before us is whether the claimant's failure to take the exam again prior to April 1, 2024, was due to her own lack of effort and diligence, thereby bringing her unemployment upon herself. Although the claimant made an effort to obtain her nursing license in that she had previously taken the licensing exam and a course to help her prepare for taking the exam again, she chose not to take the exam once more prior to the April 1st deadline. Taking the exam once more prior to April 1st was the claimant's only remaining chance to obtain her nursing license and remain employed. Despite this knowledge, the claimant did not take the exam again because she was afraid of failing. The claimant's fear of failing the exam again was understandable. However, nothing in the record indicates that she was diagnosed with anxiety or another condition that precluded taking and possibly failing the exam once again. Thus, her fear does not constitute a personal circumstance that prevented her from taking the exam.

In short, the claimant did not take the necessary step to obtain her nursing license during her final chance to do so, and the employer could not continue her employment without said license. Under these circumstances, we cannot conclude that the claimant was without fault in causing her separation from employment.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free

² 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).

from error of law. The claimant is disqualified under G.L. c. 151A, § 25(e)(1), because she caused the statutory impediment to her continued employment.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 31, 2024, 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 - October 28, 2024



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

SVL/rh