

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

SANDOR J. ZAPOLIN
MEMBER

STEPHEN M. LINSKY, ESQ.
MEMBER

In the matter of:

Appeal number:

BR-109541

CLAIMANT APPELLANT: _____

EMPLOYING UNIT: _____

Introduction and Procedural History of this Appeal

The claimant appeals a decision by M. K. Block, a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant became separated from employment on October 14, 2008. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued by the agency on December 3, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on April 2, 2009.

Benefits were denied after the review examiner determined that the claimant's separation was neither for good cause attributable to the employer nor for urgent, compelling, and necessitous reasons and, thus, was subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the DUA hearing, the DUA review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence. Thereafter, the review examiner conducted a remand hearing, which both parties attended, and issued his consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record, including the decision below, the consolidated findings, and the review examiner's credibility assessment.

The issue before the Board is whether the claimant became separated for good cause attributable to the employer or for urgent, compelling, and necessitous reasons, or rather voluntarily left his employment, when he failed to report to work after being medically cleared to return from a leave of absence on October 2, 2008.

Findings of Fact

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

1. The claimant reopened a claim for benefits on October 17, 2008. The Division disqualified the claimant on December 3, 2008 for the week ending October 18, 2008. The claimant appealed on December 6, 2008.
2. The claimant worked for the instant employer from April 21, 1993 to August 1, 2008. The claimant went on medical leave after August 1, 2008. The claimant used up all paid time off by September 12, 2008.
3. The claimant quit his employment when he failed to return to work from a leave of absence.
4. On October 2, 2008, the claimant had medical clearance to return to work.
5. The claimant did not return to work. A police department arrested the claimant based upon a warrant. The claimant was incarcerated on October 2, 2008.
6. The claimant was incarcerated based upon a charge of rape. The claimant's incarceration continued, because he could not raise bail.
7. The claimant could not raise bail until October 14, 2008. The superior court had established bail at \$5,000.00 cash.
8. The employer's governing board knew of the claimant's situation. It decided to give the claimant seven business days to return to work.
9. The claimant's wife informed the employer of the claimant's situation on October 2, 2008. She advised the employer about her efforts in obtaining the bail. She spoke to the employer once during the week ending October 11, 2008 and on October 14, 2008.
10. On October 14, 2008, the claimant's wife informed the employer that she had raised enough money to meet the claimant's bail. She advised the employer that she expected that the claimant would be released on October 16, 2008.

11. By a letter dated October 14, 2008, the employer informed the claimant that his employment had ended, "Since you have not returned to work and for other reasons, [Employer] has determined that the employment relationship is terminated, effective immediately." The employer specifically terminated the claimant, because he did not return to work on October 2, 2009. The employer knew of the charges against the claimant at the time of termination.
12. Had the claimant had the ability to return to work on October 2, 2008, the employer would have allowed the claimant to return to work. The employer would have allowed the claimant to return to work on October 2, 2008, because he would have done so free and clear. The rape charge influenced the period in which the employer allowed the claimant to raise bail and return to work.
13. The employer would have addressed the use of its telephone by the claimant in September 2008 after he returned to work.
14. During the claimant's leave and after his separation, the employer did not replace the claimant.
15. The employer did not replace the claimant due to financial considerations. The employer had budget concerns and had a new budget year occurring as of January 1, 2009. The employer consolidated the claimant's work into four remaining employees and seasonal workers. The claimant would have more than likely continued employment, but the employer would have discontinued any overtime work.
16. Credibility Assessment: The employer's testimony established that the claimant would have been allowed to return to work anytime up to October 10, 2008 and not just October 2, 2008. The employer's board allowed the claimant seven business days to raise the bail and return to work after his arrest. The employer's letter occurred on Tuesday, October 14, 2008. This was after the claimant had failed to return to work by October 10, 2008 and the Columbus Day Holiday resulted in the date of the letter occurring on October 14, 2008. The timing of events gives credence to the employer's testimony that the separation occurred, because the claimant did not return to work as expected from his medical leave.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact and credibility assessment. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner denied benefits after analyzing the claimant's separation, under 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 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....

The review examiner's analysis also considered G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

... 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.

Under both G.L. c. 151A, §§ 25(e) and 25(e)(1), it is the claimant's burden to establish that his separation was for urgent, compelling, and necessitous reason, or for good cause attributable to the employer. At the initial hearing, the review examiner concluded that the claimant did not meet his burden. We remanded the case to take additional evidence regarding further details surrounding the claimant's incarceration and separation. Following remand, we conclude that the claimant has not met his burden.

The claimant had been expected to return to work from his medical leave of absence on October 2, 2008. Instead of returning to work, the claimant was arrested and incarcerated that day. Although the claimant did not return to work as scheduled, the employer gave him an additional week to resolve his problems with bail and return to work. While the employer was aware of the circumstances of the claimant's arrest and detention, the review examiner specifically found that it did not discharge him because of these reasons. The claimant was unable to return to work within the time prescribed by the employer, prompting the employer to notify him by letter of his separation for job abandonment. Under such circumstances, the claimant's separation is neither for urgent, compelling, and necessitous reason nor for good cause attributable to the employer.

A claimant whose separation results from circumstances brought on by his own actions is deemed to have left his employment voluntarily. See Olmeda v. Dir. of the Division of Employment Sec., 394 Mass. 1002 (1985) (rescript); Rivard v. Dir. of the Division of Employment Sec., 387 Mass. 528 (1982). The claimant's incarceration was brought about by his arrest on a warrant for outstanding charges.¹

We, therefore, conclude as a matter of law that the claimant's separation was neither for urgent, compelling, and necessitous reason nor for good cause attributable to the employer.

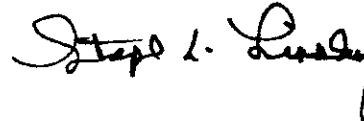
¹ While this fact is not alluded to in the review examiner's findings, the administrative records of the Middlesex Superior Court show that the claimant was ultimately convicted of the rape charges, following a jury trial.

The review examiner's decision is affirmed. The claimant is ineligible to receive benefits for the week ending October 18, 2008, and for subsequent weeks, until he has had eight weeks of work and in each week has earned an amount that is equal to or greater than his benefit amount.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 17, 2010



Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – March 19, 2010