



EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

MICHAEL TAYLOR
DIRECTOR

**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-109814

CLAIMANT APPELLANT:

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

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

The claimant separated from employment on January 16, 2009. He filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on March 4, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits a review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on April 3, 2009.

Benefits were denied after the review examiner determined that the claimant was disqualified, under G.L. c. 151A, § 25(e)(1), because he left employment voluntarily. After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision and the employer's appeal, we remanded the case back to the DUA review examiner to make subsidiary findings from the record. Thereafter, the review examiner issued consolidated findings of fact on January 25, 2010. Our decision is based on our review of the entire record, including the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal.

PAGE 2**BR-109814**

The issue on appeal is whether the claimant quit because he reasonably believed that he was going to be fired for poor performance.

Findings of Fact

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

1. The claimant worked as a supply and equipment coordinator for the employer, a hospital, from 3/6/06 until he quit his job on 1/15/09. His last day of work was 1/16/09.
2. The claimant resigned because he believed he was going to be fired.
3. The Clinical Manager of Surgical Services approached the claimant on 1/15/09 to tell him there was a patient care issue. She proceeded to tell the claimant that he had failed to order 'Alloderm' which was needed for a surgical procedure being performed that day. She told the claimant that this did not look good. After the Clinical Manager's brief discussion with the claimant, she confirmed with staff that the product box did not leave the unit, and the log book showed the product, 'Alloderm', had been used. The claimant is supposed to check his book to see what needs to be ordered.
4. Later that day, there was a meeting in the claimant's office. The claimant, direct supervisor, Clinical Manager Surgical Service, and two other members of Management attended the meeting. The failure to order the medical product in question was discussed. During this discussion, the claimant asked if it is better to quit than to be fired. The Clinical Manager told him that she would personally resign rather than be fired. She told the claimant that he was not there yet, meaning he was not going to be fired at this point. The next step in disciplinary process was a three days suspension.
5. The usual disciplinary procedure for performance is a verbal discussion, a documented verbal warning, a written warning, a one day suspension, a three day suspension followed by termination.
6. The claimant offered the Clinical Director his notice of resignation. The Clinical Manager told the claimant she did not think that he should act on that today and suggested he think about it.
7. The claimant had several other warnings for performance issues. The claimant was dealing with intense personal issues. He lost his son several years ago and he was struggling to find a way to deal with this matter. He was going through a divorce. The claimant is the sole provider for his 87 year old mother. The claimant has, off and on, attended counseling for depression. He could not take medication for depression because he is allergic to it.

PAGE 3

BR-109814

8. As a result of his personal problems, the claimant was having a great deal of difficulty remembering and focusing. He was forgetful which was adversely affecting his job.
9. Along with a warning that included a one day suspension, a check list was issued to the claimant as a tool to help him remember what to do each day at work. When the claimant realized he was not meeting the expectations of his job because he was preoccupied with trying to deal with the personal issues in his life, he did not ask the employer for a leave of absence so he could seek out the help he needed to cope with the situations in his life. Nor did the claimant go to the Human Resources Department for help and possibility getting information on the employee assistance program. The warning/suspension was issued to the claimant on 9/29/08. At the time this warning/suspension was issued to the claimant, the HR Manager did tell the claimant to start looking of another job because "things really needed to improve" regarding his performance. If things did not improve, the next time they talked about the above issues he "would not be happy".
10. The claimant's direct supervisor did not know if the claimant would have been eligible for a leave of absences prior to 1/16/09. The claimant did believe he would be ineligible for a leave of absence because of his performance problems.
11. On 1/16/09, the claimant returned to work and tendered his notice of leaving. The Director of Surgical Service offered to allow the claimant to continue to work for three to four weeks but the claimant decided to leave on 1/16/08 because of stress in his life and his poor performance.

Ruling of the Board

The Board adopts the review examiner's findings of fact. 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.

G.L. c. 151A, § 25(e), 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....

PAGE 4

BR-109814

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 ... (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, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence....

Separation is not voluntary if an employee leaves work because of an objectively reasonable belief that he is about to be fired. Malone-Campagna v. Director of Div. of Employment Sec., 391 Mass. 399, 401-402 (1984). The belief need not be demonstrably true, so long as it is objectively reasonable. Fergione v. Director of Div. of Employment Sec., 396 Mass. 281, 284 (1985).

When a claimant resigns because he reasonably anticipates discharge, his separation is then analyzed as if he had in fact been discharged, and the inquiry shifts to determining whether the anticipated discharge would have been for non-disqualifying reasons. The review examiner found that the HR Manager told the claimant to start looking for another job, and that he would not be happy at the next meeting if he did not improve. The findings in this case are sufficient to show that the employer had serious concerns about the claimant's performance and had discussed separation with the claimant.

The claimant reasonably saw that his performance deficiencies were not improving and discharge was forthcoming. Although the employer might not have fired the claimant on January 15, 2009, the claimant was in a position to judge his ability to conform his conduct to performance standards. The review examiner's findings on the claimant's personal difficulties are sufficient to support a conclusion that the claimant had tried and failed to meet his employer's expectations. Consequently, any anticipated discharge would appear to be for a non-disqualifying reason.

We conclude that as a matter of law, claimant is entitled to benefits because his separation from employment was not voluntarily, within the meaning of G.L. c. 151A § 25(e)(1).

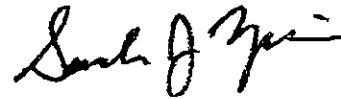
PAGE 5**BR-109814**

The review examiner's decision is reversed. The claimant is allowed benefits for the week ending January 24, 2009 and for subsequent weeks if otherwise eligible.

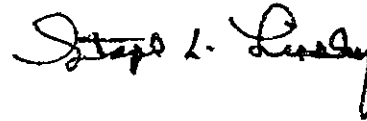


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 17, 2010



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

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

LH/rh