

Board of Review
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Issue ID: 0002 3706 54

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joseph Tyman, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer on February 5, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 15, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 15, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had voluntarily left his employment under disqualifying circumstances, as defined in G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we reverse. Our decision is based upon our review of the entire record.

The issue before the board is whether the review examiner's conclusion that the claimant had voluntarily quit without proper efforts to preserve his job is based on substantial evidence and without error of law.

Findings of Fact

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

1. The claimant began working for the employer, a private hospital and health care provider, in 2002.
2. At the time of his separation, the claimant was working full time as a Patient Care Representative for forty (40) hours per week at the pay rate of \$22.75 per hour.

3. At the beginning of the year 2013, the claimant and his then-wife, now his ex-wife (“Ex- Wife”), were in the process of separating and repeatedly engaged in arguments with each other.
4. During that same month (the exact date is unknown), the Ex-Wife made a criminal complaint to the police that the claimant had committed a sexual assault on her daughter, the claimant’s stepdaughter (“Stepdaughter”).
5. At no time did the claimant in fact assault or mistreat the Stepdaughter.
6. On January 13, 2013, police officers arrived at the claimant’s home to investigate the complaint.
7. The claimant denied the allegation to the officers, but, based on the nature of the alleged crime, the officers arrested the claimant.
8. The claimant was then held in jail on \$50,000 bail; as he could not afford such high bail, he remained incarcerated.
9. The claimant was only allowed to make collect calls from the jail he was housed in; the employer, as a rule, does not accept collect calls, and the claimant was thus unable to reach the employer directly to inform anyone of his situation.
10. The claimant then contacted one of his cousins (“Cousin”) and asked if he could call the employer on the claimant’s behalf.
11. The Cousin agreed to make the call, at which time the claimant instructed him not to tell the employer that the claimant was incarcerated, but instead to say that the claimant was sick and would have to miss work for that reason.
12. Beginning on January 14, 2013, the Cousin made a series of calls to the claimant’s supervisor, the employer’s Call Center Manager (“Manager”).
13. The Cousin did not speak to the Manager directly, but left voicemail messages, which were then later returned by the Manager.
14. The Cousin and Manager persisted in trading messages for multiple days.
15. The Cousin’s final call to the Manager regarding the claimant being out sick occurred on January 16, 2013.
16. The employer did not receive any further contact from the claimant or his relatives between January 5, 2013, and January 31, 2013, during which time the claimant continued to be unable to report for work as previously scheduled.

17. On January 31, the employer sent a letter to the claimant's home indicating that if he was ill, he was able to take time away from work under the terms of the Family Medical Leave Act ("FMLA").
18. The same envelope included a FMLA application form.
19. The employer's letter stated that any FMLA request had to be in by February 5, 2013.
20. As the claimant was still incarcerated, he did not receive the employer's letter when it arrived to his home.
21. The employer judged the claimant to have abandoned his job when he did not report for work, contact them, or return the FMLA form by February 5.
22. In April 2010, the claimant's bail was adjusted and he was able to obtain release on April 10.
23. Later the same day, a co-worker of the claimant's at the hospital ("Co-Worker") contacted him via Facebook and inquired as to where the claimant had been.
24. The claimant informed the Co-Worker that he had been in jail for three months due to being falsely accused, and as a result could not reach out to the employer.
25. The claimant did not ask the Co-Worker to inform anyone else of his situation during the Facebook conversation.
26. The claimant did not contact the Manager, his former department, or the employer directly to inform them of what had happened to him and why he had been out of work after being released on April 10, due to his desire to have affirmative proof of his innocence prior to speaking to the employer.
27. On June 5, 2013, the claimant attended a hearing in court where the prosecutor in his case filed to drop the charges against him via a document known as a Nolle Prosequi ("NP").
28. After receiving the NP, the claimant then contacted the Human Resources ("HR") Department at the employer's main office on June 7, 2013, to discuss his situation and attempt to return to work.
29. The claimant was contacted by a member of the Employee Relations ("ER") department, who informed the claimant that his former position was not available, but he could apply to open positions in other departments of the hospital.

30. The claimant has not worked for the employer since his initial incarceration in January and his official separation on February 5.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine (1) whether his findings of fact are supported by substantial and credible evidence, and (2) whether his ultimate conclusion that the claimant is disqualified from benefits is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact, as we deem to them to be supported by substantial and credible evidence. However, as discussed below, his conclusion is erroneous as a matter of law, because the unusual circumstances present in this case show that the proximate cause of the claimant's quitting was his incarceration on a false allegation of criminal conduct, thus rendering his separation involuntarily.

G.L. c. 151A, § 25(e)(1), 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 . . . [T]he 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.

At the outset, we note that the exhibits in this include a copy of the *nolle prosequi* entered by the Commonwealth, stating that the prosecutor would not be able to meet its burden of proof in the matter. The review examiner found that, based on credible evidence in the record, the claimant did not engage in any criminal conduct.

The claimant's separation occurred on February 5, 2013, when the employer processed a termination decision based on the claimant's failure to report for work or cooperate with the employer in seeking a medical leave of absence. The employer's actions were reasonable, since the claimant had caused a relative to inform the employer that he was sick and was then absent for some weeks without providing medical documentation or taking steps to report the truth. The review examiner determined that in these circumstances, the claimant's separation was governed by G.L. c. 151A, § 25(e)(1): a termination which is the result of failure on the employee's part to explain his absence to the employing unit is tantamount to a voluntary leaving of employment within the meaning of the law. Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 663 (1950).

In deciding that the claimant's incarceration was insufficient to render claimant's separation involuntary, however, the review examiner focused narrowly on the claimant's actions after his release on April 10, 2013. The claimant did not approach the employer to inquire about his job until June 7, 2013, when he had copies of records demonstrating that the criminal process was fully resolved, without an adverse finding. The review examiner interpreted this to mean that the

claimant had failed to make preservation efforts as required. "Prominent 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 v. Director of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765-766 (2006) (internal quotations and citations omitted).

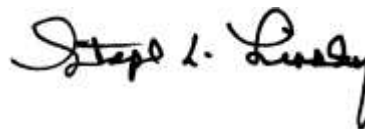
If the claimant had still been employed on April 10, 2013, we might concur in the review examiner's reasoning. But in this case, the claimant's employment had ended in February. The claimant knew that communication with the employer could not preserve his job. He was already separated and hoping to be re-hired. Under these circumstances, it was prudent for the claimant to wait for the documents that proved his lack of criminal culpability and a clean "CORI" record.

The claimant's initial decision to tell the employer he was sick was understandable if ill-considered. More importantly, it did not lead to the claimant's separation. The claimant did not lose his job because he failed to tell the employer the truth right away, or because he failed to meet with the employer immediately upon his release, but rather because he was detained on a false allegation of criminal conduct.

Unemployment benefits are intended to provide compensation for those who are thrown out of work through no fault of their own. Olmeda v. Director of the Div. of Employment Security, 394 Mass. 1002, 1003 (1985). When unemployment results from a worker's failure to notify the employer of the reason for an absence, it may fairly be said that he is at fault. Olechnicky, 325 Mass. at 663. In this case, however, we are persuaded that the claimant's separation did not arise from a failure to report his absence, but from his detention on a false charge.

We therefore conclude, as a matter of law, that the claimant's separation from employment was not voluntary, but for urgent, compelling and necessitous reasons, as defined in G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 13, 2013, and for subsequent weeks if otherwise eligible. Pursuant to G.L. c. 151A, § 14(d)(3), the employer's account shall not be charged for this award of benefits.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 4, 2014



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

LH/rh