COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-486

ROLAND M. CONSTANTINEAU

vs.

DIRECTOR OF THE DEPARTMENT OF UNEMPLOYMENT ASSISTANCE & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff (employee) worked as a driver for T. Jepson & Son, LLC (employer), a timber-harvesting and land-clearing company. His job required that he hold a valid commercial driver's license (CDL). The employee's license was suspended after an incident where he apparently had driven under the influence of alcohol. He therefore lost his job. The Department of Unemployment Assistance (DUA) denied the employee unemployment benefits on the grounds that he had not taken steps to manage his alcoholism before the incident. We affirm the District Court judgment upholding that denial.

Background. 1. Statutory background. Generally, an employee is not entitled to unemployment benefits if he leaves a

[1] T. Jepson & Son, LLC.

job "voluntarily." G. L. c. 151A, § 25 (e) (1). Where, as here, an employee's own actions cause him to be disqualified from holding his position, the termination is considered voluntary. See Rivard v. Director of Div. of Employment Sec., 387 Mass. 528, 528-529 (1982). Cf. Olmeda v. Director of Div. of Employment Sec., 394 Mass. 1002, 1003 (1985). However, a statutory exception provides that even an employee who left his job voluntarily can obtain unemployment benefits if he can establish "to the satisfaction of the commissioner that his reasons for leaving were of such an urgent, compelling and necessitous nature as to make his separation involuntary." G. L. c. 151, § 25 (e). The case before us turns on whether DUA improperly declined to give the employee the benefit of that exception.

2. The employee's history. We briefly summarize the findings of the DUA review examiner, which the board of review adopted wholesale, and which the employee does not contest.[2]

For over forty years, the employee has suffered from alcoholism. His alcohol consumption escalated after his father died in or around 2015. In the last seven months of his

[2] Although he complains that the board of review adopted the review examiner's findings "[w]ithout a single edit or record citation," he has not challenged any particular finding. Nor did he do so when appealing from the review examiner to the board.

employment, he typically consumed "two to three beers, and two to three pints of brandy each day, after work." In February of 2018, he was arrested and charged with operating under the influence ("OUI") while driving his personal vehicle. As a result, his license was suspended for thirty days. He continued drinking alcohol after that arrest.

One day in June of 2018, the defendant drove in his personal vehicle outside of work hours while drinking a pint of brandy and two or three beers. He drove erratically, ignored one police officer's instruction to stop, and stopped only when a different police officer used his vehicle to block the road the employee was driving down. After exiting his vehicle, he "started a physical altercation with" the police officers, precluding the administration of field sobriety tests.

The officers arrested the employee and transported him to a local police station, where he agreed to take a breathalyzer test. Although he appeared to be blowing air out of his mouth, no air was entering the breathalyzer's mouthpiece. The officer administering the test determined that the employee was refusing to submit to the test, and suspended the employee's driver's license for 180 days pursuant to G. L. c. 90, § 24 (1) (f) (1).[3]

[3] It appears that the employee took issue with the administration of the breathalyzer test in the administrative proceedings, but he has not raised any such issue in this appeal.

The next day, the employee told his employer that, due to the suspension of his license, he could no longer work as a driver.[4] The employee entered an alcohol detoxification program that same day, and was discharged two weeks later. At the time of the evidentiary hearing before DUA, he was attending Alcoholics Anonymous meetings on a weekly basis.

3. Proceedings before DUA. The employee filed an unemployment insurance claim on June 29, 2018, claiming that he had been terminated due to a lack of work. Upon inquiry from DUA, the employer explained the circumstances of the employee's departure. As a result, DUA concluded that the employee was not entitled to benefits and sent him a notice to that effect. According to the notice, the employee's separation from the employer was "considered voluntary and without good cause attributable to the" employer, because "[t]he loss of your drivers [sic] license due to fault on your part concerning a breathalyzer test resulted in your separation from work."

The employee timely appealed his disqualification. A DUA review examiner held a two-day evidentiary hearing. The

[4] The record suggests that the employee also worked at times as a mechanic, but that there was not enough work available for him to be employed full-time in this capacity. However, the review examiner's findings did not address this question, and the employee does not press any argument based on them in this appeal.

employee was represented by counsel. After the hearing, the review examiner affirmed the denial of benefits.

The employee appealed again, this time to DUA's board of review. In March, the board affirmed the review examiner's decision that the employee had left his job voluntarily and was not entitled to benefits. In relevant part, the board held that "to render the separation involuntary due to urgent, compelling necessitous circumstances, the claimant would have to show that before the incident that caused him to lose his job, he knew he was an alcoholic and had tried, but was not successful at controlling the disease." Specifically, the board ruled that the employee had failed to show that he had made "sincere efforts to treat or otherwise control his alcohol consumption so that it would not adversely affect his employment."

Then, pursuant to G. L. c. 151A, § 42, the employee appealed the board's decision to the District Court. In December of 2019, a District Court judge affirmed the board of review. This appeal followed.

Standard of review. "We do not act as a fact finder in employment security cases, because it remains 'the agency's responsibility to weigh the evidence, find the facts, and decide the issues.'" Norfolk County Ret. Sys. v. Director of Dep't of Labor & Workforce Dev., 66 Mass. App. Ct. 759, 764 (2006), quoting Manias v. Director of Div. of Employment Sec., 388 Mass.

201, 205 (1983). "Our limited function is to determine whether the board of review applied correct legal principles in reaching its decision, whether the decision contains sufficient findings to demonstrate that the correct legal principles were applied, and whether those findings were supported by substantial evidence within the meaning of G. L. c. 30A, § 14 (7) (e)." Norfolk County Ret. Sys., supra at 764, quoting Guarino v. Director of Div. of Employment Sec., 393 Mass. 89, 92-93 (1984).

Discussion. Once the employee lost his CDL license, he became disqualified from his position as a driver. Where he lost his CDL license as a result of his own actions, his termination is considered "voluntary" under the case law.[5] See Olmeda, 394 Mass. at 1003; Rivard, 387 Mass. at 528-529. The employee effectively acknowledged this point at oral argument.[6] Thus, the employee is disqualified from receiving unemployment

[5] We appreciate the employee's argument that alcohol abuse may have a compulsive component. In the unemployment benefits context, however, "the word 'voluntarily' . . . is a term of art." Olmeda, 394 Mass. at 1003, quoting Moen v. Director of Div. of Employment Sec., 324 Mass. 246, 250 (1949). In concluding that the employee's conduct was "voluntary," we are applying that term of art, not pronouncing a moral judgment.

[6] The employee also argued at oral argument that some other applicable category of involuntarily leaving exists (or should exist) which is neither a discharge nor an urgent, compelling, and necessitous departure. We decline to address this argument, raised for the first time at oral argument, without reference to statute or case law. Trustees of Beechwood Village Condominium Trust v. USAlliance Fed. Credit Union, 95 Mass. App. Ct. 278, 287 n.20 (2019).

benefits unless he can show that his alcoholism rendered his departure from work so "urgent, compelling and necessitous . . . as to make his separation involuntary."[7] G. L. c. 151A, § 25 (e). DUA determined that his departure was not so urgent, compelling, and necessitous. We agree.

"Normally, a worker who anticipates a legitimate absence from work can take steps to preserve her employment. When a worker fails to take such steps and severance results, it is the worker's own inaction rather than compelling personal reasons that causes the leaving." Dohoney v. Director of Div. of Employment Sec., 377 Mass. 333, 336 (1979). Thus, a "[p]rominent" factor in whether an employee's "personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the [employee] had taken such 'reasonable

[7] The employee does not contend that he was discharged for "deliberate misconduct in wilful disregard of the employing unit's interest, or . . . a knowing violation of a reasonable and uniformly enforced rule or policy of the employer." G. L. c. 151A, § 25 (e) (2). Were he discharged for such reasons, his case would come under G. L. c. 151A, § 25 (e) (2), and the employer would have the burden of proof. See Shepherd v. Director of Div. of Employment Sec., 399 Mass. 737, 740 (1987). Shepherd also lays out a specific standard for assessing the impact of alcoholism on an employee's entitlement to unemployment benefits. Id. at 740 (employer must prove "what the claimant's state of mind was at the time of his misconduct," including "that the employee had control of his alcoholism or that he deliberately and wilfully refused to accept help in controlling it"). The employee does not contend that DUA should have applied this standard, and instead argues that DUA improperly imported this standard's focus on the employee's state of mind "at the time of his misconduct."

means to preserve her employment' as would indicate the [employee's] 'desire and willingness to continue her employment.'" Norfolk County Ret. Sys., 66 Mass. App. Ct. at 766, quoting Raytheon Co. v. Director of Div. of Employment Sec., 364 Mass. 593, 596-598 (1974). This analysis applies in cases of medical conditions "that legitimately require absence from work," Dohoney, supra at 335-336, such as alcoholism.

Here, the employee was arrested for an OUI in February, months before the incident that led to his license suspension. Nonetheless, the review examiner found no evidence that the employee took any steps to manage his alcoholism between the February OUI and the June incident. Given these unchallenged factual findings, we conclude that the employee has not shown that he took "such 'reasonable means to preserve h[is] employment' as would indicate [his] 'desire and willingness to continue h[is] employment.'" Norfolk County Ret. Sys., 66 Mass. App. Ct. at 766, quoting Raytheon Co., 364 Mass. at 596-598. In other words, it was his "own inaction rather than compelling personal reasons that cause[d] the leaving."[8] Dohoney, 377 Mass. at 336.

[8] It is not clear whether or how DUA's "sincere efforts" standard differs from the case law's "reasonable means" standard, and counsel for DUA demurred at oral argument when asked to clarify what the word "sincere" adds. Given the complete lack of pre-incident efforts, we need not and do not resolve this issue. We do note that what is "reasonable" may vary from claimant to

The employee also argues that he is entitled at least to a remand, because the board unfairly surprised him by adopting a new standard after his case was argued but before it was decided. See Attorney Gen. v. Department of Pub. Utils., 453 Mass. 191, 199 (2009) ("although the department may establish a policy in an adjudicatory proceeding, the application of that policy to other parties may, depending on the nature of the policy at issue, require an additional process"). To the extent that the employee is suggesting that he was unfairly surprised by the requirement that he show he had made "sincere efforts" to control his alcoholism, such a claim is belied by the record.[9] And, to the extent that the employee is claiming that he was unfairly surprised by DUA's requirement that that his efforts to manage his alcoholism precede his arrest, his claim still fails. Putting aside whether post-termination efforts should matter in the "reasonable means" analysis, the employee has not made clear what additional evidence he would have presented had he been

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claimant, see Norfolk County Ret. Sys., 66 Mass. App. Ct. at 767-768, and the same is likely true of what constitutes a "sincere" effort.

[9] Indeed, the employee's attorney emphasized the "sincere efforts" standard in the very first sentence of his closing argument at the hearing before the review examiner. Given that his attorney relied on the "sincere efforts" standard at the hearing before the review examiner, the employee cannot argue on appeal that he was at all surprised by the application of that standard.

aware of the standard DUA ultimately applied. In fact, his counsel argued in closing that the employee was "making all kinds of efforts and steps to overcome his alcoholism." That comment suggests that the attorney fully understood that he should present all available evidence of any efforts that the employee had been undertaking. Thus, any change in DUA's standards did not unfairly surprise the employee.

Judgment affirmed.

By the Court (Milkey, Desmond & Englander, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: July 19, 2021.

[10] The panelists are listed in order of seniority.