

# Appendix M: Sample Complaint for Judicial Review

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

BOSTON MUNICIPAL COURT  
CIVIL ACTION NO. \_\_\_\_\_

\_\_\_\_\_ )

Ann B, )

Plaintiff, )

v. )

**COMPLAINT FOR**  
**JUDICIAL REVIEW**

KATIE, DISHNICA, in her )

capacity as the Acting Director of the )

Department of Unemployment )

Assistance, and HOME HEALTH )

SERVICES, INC., )

Defendants. )

\_\_\_\_\_ )

### **INTRODUCTION**

The Plaintiff, Ann B (“B”), seeks review and reversal of the final agency decision of the defendant, Department of Unemployment Assistance (“DUA”) denying her unemployment insurance (“UI”) benefits. B worked for the Home Health Services, Inc. (employer), where she was a reliable and hardworking home health aide. B strived to provide good care and she was

well liked by her clients, some of whom she had worked with for almost two years. She never had a problem with unexcused absences and the quality of the services she provided was consistent and trustworthy. In March of 2012, B suffered a medical emergency accompanied by a great deal of pain. B was rushed to the emergency room by her daughter. Shortly after, she was transferred to the hospital and prescribed strong narcotics. As soon as she was able, plaintiff called the office, but she remained uncertain of her condition and the extent of her illness. Upon her return, B provided her employer with notices from two doctors and expected to resume work. B was informed that her clients had been reassigned, but that the supervisor would make some calls and possibly connect her with some new clients. B was never told that she had actually been terminated, but as the employer gave her no further assignments, she applied for and was denied UI.

The UI program provides critical financial assistance to unemployed Massachusetts workers who have lost their jobs through no fault of their own and who are able and available for work. Plaintiff seeks a reversal of this decision because denying UI benefits under these circumstances is an error of law unsupported by substantial evidence.

### **JURISDICTION**

1. Jurisdiction is conferred on this Court under G.L. c. 30A, § 14(7) and c. 151A, §42.

### **PARTIES**

2. Plaintiff, ANN B, is a resident of 123 Main Street, Boston, Massachusetts, 02114. At all relevant times, she was employed by defendant employer, Home Health Services, Inc., and worked at defendant's location at 123 State Street, Boston, SUFFOLK COUNTY, Massachusetts, 02108.
3. Defendant, KATIE DISHNICA, is the Acting Director of the Department of

Unemployment Assistance and in that capacity is charged under G.L. c. 23, §§ 1, 9J with the administration of the UI program in Massachusetts pursuant to the Massachusetts Unemployment Insurance Law, G.L. c. 151A, § 1 *et seq.* Defendant's principal place of business is at the Charles F. Hurley Building, 19 Staniford Street, Boston, SUFFOLK COUNTY, Massachusetts, 02114.

4. Defendant, HOME HEALTH SERVICES, INC., ("employer"), is Plaintiff's former employer, which, on information and belief, has its principal place of business at 123 State Street, Boston, SUFFOLK COUNTY, Massachusetts, 02114.

#### **STATEMENT OF FACTS**

5. Plaintiff, Ann B, worked for the employer part-time, approximately 18-28 hours per week, as a home health aide from February 2010 through March 23, 2012.
6. B worked in clients' homes, assisting with personal care and household tasks.
7. On March 26, 2012, B went to the emergency room and was diagnosed with diverticulitis and perforation of the colon.
8. B was scheduled to work on March 26 and March 27, 2012.
9. B was formally admitted into the hospital on March 27, 2012 and was discharged on March 31, 2012. While admitted, B was given narcotics to manage her pain. During this time, B was heavily sedated.
10. While hospitalized, B realized that she had to submit her timesheet by Tuesday in order to receive a paycheck. On Tuesday, March 27, 2012, with the assistance of a nurse, B faxed her time slips to her employer.

11. On or about March 27, 2012 or March 28, 2012, B had conversations via the telephone with her employer during which B explained that she was in the hospital, that she had faxed in her time slips, and that she did not know how long she would remain in the hospital. B believed that she had properly notified her employer of her continuing absence until some indeterminate date in the future.
12. On March 31, 2012, B discharged herself, despite the fact that she still had a fever and felt ill. Upon her release, the doctor at the hospital told B to see her primary physician and wrote a note saying that B could return to work on Wednesday, April 4, 2012. On April 5, 2012, B saw her primary physician as instructed. The primary care physician wrote her a note excusing her from work on April 5, 2012. B continued to experience pain and felt too ill to work.
13. On Monday, April 9, 2012, B returned to work with the two doctors' notes and stated that she was ready to return to work.
14. The employer terminated B's employment on April 2, 2012 for allegedly being a No Call/No Show on April 2, 2012.
15. On April 9, 2012, B's supervisor informed her that B's clients had been reassigned to other employees since B had not returned to work when expected. B was upset that her clients had been reassigned and indicated that she wanted to keep working for the employer. The supervisor said that there were some new cases and she would make some phone calls – indicating that there were potentially some cases that could be assigned to B. The employer did not contact B with any new cases.

**PRIOR PROCEEDINGS**

16. B applied for UI on April 27, 2012 with an effective date of April 22, 2012.

17. On June 5, 2012, DUA sent B a Notice of Disqualification on the grounds that she failed without adequate reason to inform her employer of her inability to return to work and thus the separation became final.
18. On June 7, 2012, B filed a timely request for a hearing.
19. On July 31, 2012, a hearing was held in the DUA's Boston Office before a duly appointed DUA Review Examiner. B was present but due to a misunderstanding, the employer expected a telephone hearing and did not attend. The Review Examiner took evidence at this hearing.
20. On August 28, 2012 the hearing was re-convened before a DUA Review Examiner and both parties participated in the hearing.
21. On September 4, 2012, the DUA Review Examiner reversed the decision to deny B UI and found that she was entitled to benefits. The Review Examiner concluded that there was a miscommunication between the parties and that the plaintiff believed her prior conversation with her employer excused her from making any further calls to the employer until she was feeling able to return to work. The Review Examiner further concluded that the plaintiff's lack of communication with the employer was a lapse in judgment and not deliberate or intentional wrongdoing.
22. On or about September 2012, the employer appealed.
23. On December 28, 2012, the Board of Review ("Board") allowed review, affording the parties the opportunity to submit written reasons for agreeing or disagreeing with the decision. Only B responded and supplied a memorandum on October 22, 2012.

24. On December 28, 2012, the Board issued a decision that reversed the Review Examiner. Although the Board adopted all of the Review Examiner's findings of fact, without the benefit of holding its own hearing, it concluded that B engaged in deliberate misconduct in willful disregard of the employer's interest by failing to notify it on April 2, 2012 that she was going to be absent from work.
25. On April 5, 2013, the Board issued a corrected decision.
26. Under G.L. c. 151A, § 41, the decision of the Board is the final decision of DUA for the purposes of judicial review.
27. B now seeks judicial review of DUA's final decision pursuant to G.L. c. 151A, § 42.

#### **CAUSES OF ACTION**

28. Plaintiff repeats and incorporates the allegations contained in paragraphs 1 – 27.
29. DUA's decision is based upon an error of law in violation of G.L. c. 30A, § 14(7)(c) under G.L. c. 151A, §25(e)(2), because there is no evidence in the record to support a showing that B had the state of mind to support a disqualification for deliberate misconduct or willful disregard of the employer's interest, or a knowing violation of a work rule or policy.
30. DUA's decision is unsupported by substantial evidence in violation of G.L. c. 30A, §14(7)(e) where it ignores substantial and unrefuted evidence in the record which demonstrates that the plaintiff did not have the requisite state of mind required for deliberate misconduct. DUA's decision also impermissibly relies on uncorroborated hearsay in forming the basis of its decision.

31 DUA's decision to deny B UI where she presented substantial evidence demonstrating that she did not have the requisite state of mind to support a disqualification, is also a violation of G.L. c. 151A, § 74, which mandates that unemployment law "shall be liberally construed in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family."

32. DUA's decision is otherwise based upon error of law, unsupported by substantial evidence, arbitrary and capricious, an abuse of discretion, and not in accordance with the law in violation of G.L. c. 30A, §§14(c), (e), and (g).

**RELIEF SOUGHT**

WHEREFORE, Plaintiff prays that this Honorable Court:

1. Reverse the decision of the defendant DUA and award B UI;
2. Grant such further relief as is equitable and just.

Respectfully submitted,  
Ann B  
By her attorney,

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Ab L. Available  
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Dated: April 24, 2015

Certificate of Service

I, Ab. L. Available, Plaintiff's Attorney, certify that I served a copy of this Complaint for Judicial Review on the defendants by mailing a copy first class certified mail, return receipt requested to Katie Dishnica, Acting Director, Department of Unemployment Assistance, 19 Staniford Street, Boston, MA 02114 and Home Health Services, Inc., 123 State Street, Boston, MA, 02114 this 24<sup>nd</sup> day of April, 2013.

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Ab L. Available