

0025 3042 67 (Dec. 21, 2018) – A claimant is denied benefits under G.L. c. 151A, § 25(e)(1), because she quit her job voluntarily and without good cause attributable to the employer when she resigned prior to what would have been a disqualifying discharge for lying (or concealing the truth) from the employer regarding the whereabouts of a missing cell phone.

Board of Review
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Issue ID: 0025 3042 67

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 affirm.

The claimant resigned from her position with the employer on April 20, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 15, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 10, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant the opportunity to provide evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is not eligible to receive unemployment benefits, is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the claimant lied during the employer's investigation and that she quit in anticipation of being discharged.

Findings of Fact

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

1. The claimant worked full time for the employer from April 5, 2017, through April 20, 2018, when the claimant quit.
2. The claimant's work schedule was 4:00 p.m. to 12:00 a.m., Tuesday to Saturday.
3. The employer's House Director was the claimant's immediate Supervisor (Supervisor).
4. On April 11, 2018, the claimant's boyfriend, while visiting the claimant at work, saw a telephone that resembled the claimant's phone on the ground near the claimant's vehicle. He believed that the cell phone belonged to the claimant and placed it inside the claimant's vehicle.
5. On April 11, 2018, the owner of the phone informed the employer that the phone was missing. The claimant and other employees searched for the phone. At that time, the claimant was not aware that her boyfriend had placed a phone in her vehicle.
6. In the morning of April 12, 2018, while at home, the claimant's boyfriend observed the claimant with her phone. He asked the claimant how did she have a phone while her phone was in her vehicle.
7. Instead of returning the phone to the employer, the claimant panicked and decided to place the phone at a local store so that the phone could be tracked to that location.
8. On April 12, 2018, the employer was aware that the Owner of the phone tracked the phone to the claimant's residence.
9. On April 12, 2018, when the claimant reported to work, the Supervisor [asked] the claimant about the phone. The claimant replied that she did not have the phone. The Supervisor informed the claimant that the employer was aware that the phone was tracked to her residence. The Supervisor asked the claimant go home and bring the phone back to the employer.
10. On April 12, 2018, at 5:57 p.m., the claimant informed the Supervisor that her boyfriend retrieved the phone.
11. The claimant's boyfriend retrieved the phone from the local store.
12. On April 16, 2018, the claimant met with the employer's Director of Human Resources, and the Supervisor. During the meeting, the claimant recounted that her boyfriend placed the phone in her vehicle and that she lied to her

Supervisor about having possession of the phone and knowing its location because she was afraid of losing her job.

13. On April 20, 2018, the claimant submitted a resignation letter when her Union Representative informed her that she would be discharged by the employer for lying.
14. The employer expects employees to be truthful during investigation.
15. The claimant was admittedly aware of the employer's expectation.
16. The claimant quit in lieu of termination.

Credibility Assessment:

The claimant denies that she lied to the employer about possession of the phone. The claimant offered that when she returned to work on April 12, 2018, the Supervisor accused her of stealing the phone. She contends that she replied that she did not steal the phone and admitted that her boyfriend had mistakenly taken the phone.

The employer offered that the claimant did not admit to knowing the location of the phone when questioned by her Supervisor. The employer's HR Director offered testimony corroborated by documentation that during a meeting on April 16, 2018 after the claimant returned the phone, the claimant admitted that she lied to her Supervisor about possessing the phone and knowing its location prior to the Supervisor informing her that the phone had been tracked to her residence. The HR Director offered direct testimony that during the meeting, the claimant admitted that she lied because she was afraid of losing her job.

Given the totality of the evidence, it is concluded that the employer's corroborated testimony is more credible.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is not eligible to receive unemployment benefits.

There is no dispute that the claimant submitted a letter of resignation to the employer prior to the employer actually ending the claimant's employment. Accordingly, her qualification for benefits is governed by 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

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits. However, the claimant resigned after being told by her union representative that she was going to be imminently discharged by the employer for lying about her knowledge of the location of the cell phone. It is well-settled that an employee who resigns under reasonable belief that she is facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. See Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G. L. c. 151A, §25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. See White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-599 (1981); and Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion). On the other hand, if the impending separation would have been for deliberate misconduct or a knowingly policy violation, then the employee would not receive benefits.

Given the facts as found by the review examiner, we conclude that the claimant has not shown that she quit her job in anticipation of a non-disqualifying discharge-type separation. We note, as we did above, that we have adopted the review examiner's credibility assessment, which generally credited the employer's version of events. The consolidated findings of fact show that on the morning of April 12, 2018, the claimant found out that her boyfriend had a phone which had been reported missing. The claimant took the phone into her possession and dropped the phone at a local store, so that it could, in some way, be tracked and found by its owner. Rather than immediately tell the employer the whereabouts of the phone, the claimant reported to the employer on April 12, 2018, that she did not have the phone. She initially did not offer that her boyfriend had given her the phone. She did not tell the employer that she had dropped it off at a store. Only later did she tell the employer that her boyfriend had found the phone. See Consolidated Findings of Fact ## 9 and 10. The following week, the claimant admitted in a meeting that she had lied the week before, as she was afraid of losing her job. See Consolidated Finding of Fact # 12.

As noted by the review examiner, during the remand hearing, the claimant denied lying to the employer. She testified that she simply denied *stealing* the phone when she was allegedly told on April 12, 2018, that the employer knew that she had stolen it. The claimant characterized her actions in dropping off the phone at the local store and not informing the employer about it as "bad judgment." We conclude from the consolidated findings of fact that this was more than just

bad judgment or a good-faith error. The claimant knew about what happened to the phone, but lied, or, at the very least, tried to conceal the truth from her employer initially on April 12. Only after she was informed that the phone had been tracked to her home did the claimant admit that she had knowledge of the phone's location. A reasonable inference to draw from this is that the claimant was not being truthful with the employer. The review examiner found that the claimant was admittedly aware that she should be truthful during an employer investigation. See Consolidated Findings of Fact ## 14 and 15. Nothing in the record supports a conclusion that the claimant was somehow unable to comply with the employer's expectation that she be truthful. On the contrary, Consolidated Finding of Fact # 12 suggests that she made a conscious decision to not tell the employer the truth for fear of losing her job.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and free from an error of law, because the claimant quit her job voluntarily and without good cause attributable to the employer when she resigned prior to what would have been a disqualifying discharge by the employer.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning April 15, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – December 21, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

SF/rh