

**Claimant, who credibly testified that his manager angrily sent him home, then sent a text message requesting that he return his keys, was discharged without evidence of deliberate misconduct or knowing policy violations. He was the only witness to the incident to testify under oath and the employer failed to provide surveillance video that could have supported its allegation that the claimant had initiated the separation.**

**Board of Review  
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**Issue ID: 0019 1203 64**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Richard Conway, 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 was separated from his position with the employer on June 25, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 22, 2016. 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 February 24, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and without 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 remanded the case to the review examiner to take additional evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 quit without urgent, compelling, and necessitous reasons, or good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law where, after the remand, the findings show that the claimant did not quit but rather was discharged by the employer.

### **Findings of Fact**

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

1. The claimant's usual occupation is Food Service Worker.
2. The claimant began working for this employer in May, 2012. He worked a varied schedule of part-time hours as a shift leader for the employer's coffee and donut shop. During the last 10 weeks of his employment with this employer he worked an average of 27.65 hours and earned \$11.25 per hour.
3. In October, 2015, the claimant began working an average of 37 hours per week as a food service worker for a 2nd employer. He began with a pay rate of \$13 per hour; at the end of his employment he was being paid \$16 per hour.
4. During the 1st Quarter of 2016, the claimant worked 13 weeks for this employer.
5. On May 15, 2016, the 2nd employer laid the claimant off due to a lack of work.
6. On 5/20/16, the employer paid the claimant \$112.50 for working 10 hours.
7. On 5/27/16, the employer paid the clamant \$310.73 for working 27.62 hours.
8. On 6/3/16, the employer paid the claimant \$377.66 for working 33.57 hours.
9. On 6/10/16, the employer paid the clamant \$414.34 for working 36.83 hours.
10. On 6/17/16, the employer paid the claimant \$409.84 for working 36.43 hours.
11. On 6/24/16, the employer paid the claimant \$435.15 for working 38.68 hours.
12. On Saturday 6/25/16, the claimant arrived at work at 8:00 a.m. and punched-in to his usual register at the drive through window using his personal cash register code. The Assistant Manager [A] helped the claimant sign-in to his register asking the claimant for his cash register sign-in code and entering it for the claimant.
13. Later on 6/25/16, the Manager asked the clamant for his cash register code number because he wanted to open another register. The claimant told the Manager his personal code was already being used for the register where he was currently working and could not be used for a second register at the same time.

14. The claimant believed he was giving accurate information when he told the Manager he was working under his personal code and, therefore, that code could not be used for a second register at the same time
15. Later on 6/25/16, the Manager returned and told the claimant that if he checked the claimant's register and the claimant's code number was not in it, he was sending the claimant home. The claimant knew he had entered the code when he arrived so he invited the Manager to check the register. When the Manager checked the register, the Manager angrily shouted at the claimant that his code was not entered in the register and the Manager angrily pushed at stacks of boxes before directing the claimant to "go home." The claimant left work as directed.
16. On 6/25/16, the claimant suspected the Manager had a way (that the claimant was not familiar with) to remove the claimant's code from the register and that he had done this to show the claimant [sic] up for not providing the personal code earlier.
17. On 6/27/16 at 6:20 a.m., the Manager sent the claimant a text message saying "I need ur keys back today by 11." [Remand Exhibit # 11.] This was how the claimant learned he had been discharged from his job.
18. On 6/29/16, the claimant opened an unemployment claim having an effective date of 6/26/17. The Department of Unemployment Assistance (DUA) determined his benefit rate to be \$318 per week with an earnings exclusion of \$106. The claimant was also determined eligible to receive a \$25 per week dependency allowance.
19. During the base period of his unemployment claim, the claimant had the following wages from this employer and the 2nd employer:

	2nd Quarter 2015	3rd Quarter 2015	4th Quarter 2015	1st Quarter 2016
Instant Employer	\$6,481.60	\$7,076.98	\$4,470.53	\$2,924.58
Second Employer	0	0	\$4,259.19	\$4,899.15
Total Wages	\$6,481.60	\$7,079.98	\$8,729.72	\$7823.73

20. On 7/1/16, the Human Resource and Information Manager sent the claimant a letter stating the claimant had voluntarily resigned on 6/25/16 by allegedly walking off the job without authorization after refusing to work the front counter.
21. The claimant protested his termination by informing the Operations and District Manager (the District Manager) he had never refused to follow a

directive to work the front counter and had not quit. He informed the District Manager the security video would support the claimant's version of events and would show the Manager angrily pushing boxes and telling the claimant to leave.

22. The claimant requested to view the security video for 6/25/16. The District Manager denied the claimant's request and told the claimant his separation from employment was final.
23. For the pay date period of 7/1/16, the claimant worked 26.53 hours and was paid gross wages of \$298.46

#### Credibility Assessment

The claimant's testimony regarding the events of 06/25/16 is more credible because the claimant was the only witness who offered direct testimony under oath about the final incident. The employer witnesses were not present at the time of the final incident and offered only hearsay testimony. The Manager who sent the claimant home and later discharged him did not attend the hearing. The employer did not offer the security videos from 06/25/16 that the claimant consistently argued would prove that his version was the truth.

#### 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 ultimate 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.

The review examiner initially denied benefits after analyzing the claimant's separation under the following provisions of G.L. c. 151A, § 25(e), which state, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) 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 . . . [or] if such individual established 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.

Under these sections of law, it is the claimant's burden to establish that he separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. Based on the employer's unrefuted testimony at the first hearing, the review examiner initially found that the claimant initiated his own separation by walking off the job without explanation after refusing a reasonable directive from his manager to move from the employer's drive-through register to its front counter register. The review examiner concluded that the claimant

abandoned his job without good cause attributable to the employer, without urgent, compelling, and necessitous reasons, and without making reasonable efforts to preserve his job.

We remanded the case because it appeared that the claimant's work for this employer was subsidiary to work he performed for another employer in his base period; and, if so, to determine whether the claimant should be subjected to a constructive deduction based on his separation from the instant employer.

After remand, we believe the claimant did not quit his employer, but rather discharged by the employer. Consequently, the claimant's separation is more properly analyzed under G.L. c. 151A, § 25(e)(2), 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] . . . (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 . . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. We conclude that the employer has not met its burden.

After remand, the review examiner found that the claimant arrived at work and punched in at his usual register at the employer's drive-through window at 8:00 a.m. on June 25, 2016. Later that day, the claimant's manager asked for his register code to open another register. Believing that his code could only be used for one register at a time, the claimant told the manager that his code was already being used on the register where he was working.

Still later, the manager returned to tell the claimant that if his code wasn't on the register where he was working, he would send the claimant home. The claimant knew his code was entered into the register where he was working and invited the manager to check the register. The manager checked the register and shouted angrily at the claimant that his code was not entered into the register, angrily shoved a stack of boxes, and told the claimant to go home. The claimant went home as directed.

At 6:20 a.m. on June 27, 2016, the manager sent the claimant a text message saying, "I need ur [sic] keys back today by 11." See Remand Exhibit # 11. The claimant realized he had been discharged from his job.

The facts found by the review examiner after remand support the conclusion that the employer discharged the claimant on June 25, 2016. Reversing his initial findings and conclusion that the claimant had quit by walking off the job after being given a reasonable directive by his manager, the review examiner made a credibility assessment that the claimant was the only witness present

who offered direct testimony under oath about the final incident. The manager who sent the claimant home did not attend the hearing, and the employer did not produce the security video from June 25, which the claimant repeatedly argued would corroborate his version of events as truthful. The review examiner's credibility assessment was bolstered by the text message from the manager to the claimant. *See* Remand Exhibit # 11. Assessing credibility is within the scope of the fact finder's role and unless such assessments are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). We see no reason to disturb the credibility assessment rendered by the review examiner.

In view of the employer's argument that the claimant became separated due to job abandonment, and the review examiner's rejection of the employer's testimony, the employer is also precluded from arguing that the claimant was discharged for disqualifying misconduct. We, therefore, conclude as a matter of law that the claimant was discharged, without evidence of deliberate misconduct in wilful disregard of the employer's interest or of a knowing violation of a reasonable and uniformly enforced policy or rule of the employer.

Because we conclude that the claimant's separation from this employer was non-disqualifying, there is no need to address the question of a constructive deduction.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 23, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 26, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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](http://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.

JPC/rh