

The claimant quit his job after the employer refused his request to be laid off. He is disqualified under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0019 3396 07

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Matthew Shortelle, a review examiner of the Department of Unemployment Assistance (DUA), to award 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 21, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 31, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 14, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present testimony and documentary evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 initial conclusion that the claimant was not subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact indicate that the claimant quit his job when the employer refused the claimant's request to lay him off.

Findings of Fact

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

1. The claimant worked as the Quality and Food Safety Manager for the employer, a wholesale bakery, from February 1, 2014, until June 24, 2016.
2. On July 23, 2015, the claimant requested he work four days instead of five each week so as to save the employer money and allow him to work less. The employer agreed.
3. The employer's Director of Operations (the Director) supervised the claimant.
4. On June 6, 2016, the claimant's wife (the Wife) had hip replacement surgery.
5. After the Wife's surgery, the claimant missed work. The Director authorized the claimant to miss work and asked how the Wife was.
6. In June 2016, the claimant asked to work three days per week. The Director did not permit the claimant to work three days and told him as the Quality and Food Safety Manager he needed to work at least four days per week.
7. Before June 21, 2016, the claimant scheduled a food safety audit to be conducted by a third party on June 28, 2016 that would last approximately one and one half days.
8. As the Quality and Food Safety Manager, the Director expected the claimant to be part of the audit.
9. As the Quality and Food Safety Manager, the claimant had the most knowledge about the audit and the information required to complete a successful audit.
10. On June 21, 2016, the claimant met with the employer's President (the President) and the Director.
11. On June 21, 2016, the claimant told the President and the Director he would quit his employment if he was not laid off after the audit. The Director asked the claimant if he would really quit. The claimant said he would walk out if not laid off.
12. The Director and the President told the claimant he would not be laid off.
13. The claimant quit, left the President's office, said good bye to the employer's employees, and left work.
14. On June 21, 2016, the Director created a termination report (the Report) [indicating] the claimant quit when he was told he would not be laid off after the audit.
15. The claimant did not attempt to return to work at any time after June 21, 2016.

16. The claimant did not request Family Medical Leave Act (FMLA) [sic] at any time.
17. The employer offers employees FMLA.
18. The President did not approve any leave request made by the claimant.
19. The Director postponed the audit scheduled for June 28, 2016.
20. On June 27, 2016, at 12:22 p.m., the President emailed the employer's health care provider indicating the claimant had requested COBRA coverage.
21. On June 27, 2016, at 4:13 p.m., the President emailed the claimant COBRA forms and indicated he had to complete the forms so to receive COBRA and provided the claimant with information regarding the costs of COBRA coverage.
22. On June 27, 2016, at 4:37 p.m., the claimant emailed the President asking if his unused vacation and sick days would be used beginning June 22, 2016 since the employer did not offer FMLA leave.
23. On June 27, 2016, at 4:37 p.m., the President confirmed the claimant would be paid for June 22 and 23, 2016.
24. On June 28, 2016, the claimant returned the required COBRA forms to the President via email.
25. On June 30, 2016, the President emailed the claimant requesting he return the keys he used during his employment.
26. On July 6, 2016, the claimant filed a claim for unemployment benefits with an effective date of July 3, 2016.
27. The Director completed a Department of Unemployment questionnaire indicating the claimant demanded he be laid off after the audit and quit when he was told he would not be laid off (the Questionnaire).

Credibility Assessment

At the initial hearing and the remand hearing, the claimant testified he requested a leave of absence under the FMLA to care for the Wife after hip surgery and the employer discharged him after he had left work on leave. At the remand hearing, the claimant initially testified the Director was not present on June 21, 2016 when he spoke with the President before admitting the Director was part of the conversation. At the remand hearing, the claimant admitted he completed the COBRA paperwork because he believed the COBRA applied to his FMLA. The claimant similarly testified the employer did not offer FMLA since he

never received FMLA paperwork despite the President allegedly agreeing to his FMLA on June 21, 2016. The claimant admitted at the remand hearing the audit was scheduled for after June 21, 2016, he scheduled the audit, he had the most knowledge of the audit, and he would likely have been required to participate in the audit. The claimant testified at the initial hearing and the remand hearing he left work on leave on June 21, 2016 with no date of return planned or discussed. The claimant admitted he may have said “see you later” to other employees when leaving work on June 21, 2016.

At the remand hearing, the Director repeatedly testified the employer offers employees FMLA but the claimant did not request FMLA and quit on June 21, 2016 when the employer refused to schedule the claimant’s lay off after the audit. The Director testified he understood the Wife had surgery, had been accommodating of the claimant missing work to care for the Wife, and would have allowed the claimant to miss work if the Wife required care. However, the Director testified the claimant was the individual who knew the most about the audit and would be responsible for providing information and assisting the third party completing the audit.

Based on the Director’s consistent testimony, the Questionnaire, and the Report, the Director’s creation of the Report on June 21, 2016 immediately after the claimant left work, the claimant’s inconsistent testimony as to whether the Director spoke with him and the President on June 21, 2016, the claimant’s completion of COBRA paperwork, and the claimant admitting he said goodbye to other employees on June 21, 2016, it is concluded the Director offered more credible testimony.

As a result it is concluded the claimant quit on June 21, 2016 when the employer refused to lay him off after the completion of the scheduled audit.

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. As discussed more fully below, we now conclude that the claimant is subject to disqualification, under G.L. c. 151A, § 25(e)(1).

The review examiner initially awarded benefits after analyzing the claimant’s separation as a discharge 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] . . . (e) 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 . . .

The employer's witness was unable to attend the initial hearing. The review examiner heard and accepted the claimant's testimony that he was discharged from employment. The review examiner concluded that the claimant was not subject to disqualification, because he had not engaged in deliberate misconduct in wilful violation of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy or rule.

Following remand, the consolidated findings reflect that the claimant's separation occurred when he quit his job after his request to be laid off from work was denied by the employer. As such, his separation is controlled 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] . . . (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 of such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to show that his separation was for good cause attributable to the employer or for urgent, compelling and necessitous reasons. We note that, on remand, the review examiner had the benefit of the testimony of the employer's director who witnessed the claimant's resignation. The consolidated findings establish that the claimant told the employer that he would quit his job if he was not laid off after the upcoming food safety audit. Since the claimant was the quality and food safety manager and had scheduled the audit, he had the most knowledge about the audit and the necessary information required for a successful audit. The claimant quit his job on June 21, 2016, after the employer refused to lay him off after the completion of the scheduled food safety audit. The claimant did not request FMLA at any time, and, consequently, the president did not approve any leave request made by the claimant. After he quit, the claimant said goodbye to coworkers, left work, and never attempted to return to work for the employer.

The foregoing circumstances reflect that, while the claimant may have had his reasons for leaving his employment, he did not have good cause to leave his employment attributable to the employer, nor urgent, compelling and necessitous reasons for doing so. Even assuming he did have such reasons, he would have been required to make a reasonable attempt to preserve his employment or show that such efforts would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89 (1984). There is no evidence suggesting any such attempt to preserve his employment.

The review examiner provided a detailed credibility assessment setting forth his reasons for accepting the employer's testimony over that of the claimant. Such credibility assessments are within the scope of the review examiner's fact finding role, and, unless they are unreasonable in

relation to the evidence presented, they will not be disturbed on appeal. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). We see no basis for disturbing the review examiner's assessment.

We, therefore, conclude as a matter of law that the claimant did not have good cause attributable to the employer or urgent, compelling, and necessitous reasons for voluntarily leaving his employment, within the meaning of G.L. c. 151A, §§ 25(e) or (e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending June 25, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 28, 2017



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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.

SPE/rh