

Despite a misunderstanding about whether the claimant had permission to miss a couple of assigned evening shifts, ultimately, the claimant chose to leave her job when the employer refused to let her work only day shifts. Expecting the claimant continue working under the same terms of employment was reasonable. The claimant did not sustain her burden to show that she quit for good cause attributable to the employer.

**Board of Review
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Issue ID: 0019 9183 03

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Michele Lerner, 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 separated from her position with the employer at the end of September, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 16, 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 December 14, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged from employment and that the discharge was not due to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. Thus, she concluded that the claimant was not disqualified from receiving benefits 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 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.¹

The issues before the Board are: (1) whether the review examiner's original conclusion, that the claimant was discharged for not working on certain dates, is supported by substantial and

¹ The delay in rendering this decision is due to several factors, including the need for the remand hearing to be continued to a second day, postponement requests by the parties' representatives, and the need to obtain the parties' stipulation to place a copy of a missing remand exhibit into the record.

credible evidence and is free from error of law, and (2) if not, whether the claimant voluntarily separated from employment for good cause attributable to the employer.

Findings of Fact

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

1. On May 6, 2016, the claimant began working as a part time bus driver for the employer, a bus company. She indicated at hire that she could work day, evenings and Saturdays. Based on this availability, her manager assigned her a route that had shifts from 6 a.m. to 1 p.m. and 2 p.m. to 7 p.m. Monday through Friday and Saturdays 8 a.m. to 1 p.m.
2. On May 19, 2016, the claimant signed an employee handbook which stated "Days off must be [sic] requests must be submitted 7 days in advance and must be approved. No time off request is guaranteed." The claimant initialed each page of the handbook.
3. On July 19, 2016, the claimant signed a company policies and procedures memo which stated "DAY OFF REQUESTS AND AVAILABILITY- If you need time off, you must request it in writing 14 days in advance. We try not to over hire so it becomes hard to cover our work when drivers have unexpected days off." The claimant initialed each page of this memo.
4. The employer kept a locked box at the satellite office. This box held all the necessary papers for the remote drivers to do their jobs. It was also where the drivers were to lock the fares received during their shifts. Each driver was given a key to this box. One of the papers kept in this box was the time off request forms.
5. If an employee made a request for time off verbally or by text to the claimant's manager, he would normally instruct them to fill out a time off request form.
6. Approximately 20 of the employer's approximately 50 total employees reported to the claimant's manager.
7. No employees have received discipline for failing to give adequate advance notice before taking a day off.
8. After a few weeks of working 40 or more hours a week, the claimant informed the employer that she wanted to be able to travel to [City A] on weekends every other week to visit her son. The manager accommodated this by not scheduling her on Saturday every other week. After a while, the claimant informed her manager that she did not want to work any Saturdays anymore. The manager accommodated this. After July 16, 2016, the claimant was also

taken off Friday shifts. She only worked Mondays through Thursdays, except for the week of August 28, 2016 when she worked a Friday evening shift. She worked a combination of morning and evening shifts.

9. The claimant was scheduled to [work] the following number of day and evening shifts through September 25, 2016, for each of the following week ending dates:
 - a. May 29, 2016 1 day shift and 2 evening shifts;
 - b. June 05, 2016 2 days shifts and 1 evening shift and 1 Saturday shift
 - c. June 12, 2016 3 day shifts and 2 evening shifts and 1 Saturday shift.
 - d. June 19, 2016 4 day shifts and 3 evening shifts.
 - e. June 26, 2016 3 day shifts and 3 evening shifts and 1 Saturday shift.
 - f. July 03, 2016 3 day shifts and 3 evening shifts.
 - g. July 10, 2016 3 days shifts and 2 evening shifts.
 - h. July 17, 2016 4 days shifts and 2 evening shifts
 - i. July 24, 2016 3 days shifts and 2 evening shifts
 - j. July 31, 2016 4 days shifts.
 - k. Aug. 07, 2016 3 days shifts and 1 evening shift
 - l. Aug. 14, 2016 4 day shifts
 - m. Aug. 21, 2016 4 days shifts
 - n. Aug. 28, 2016 2 days shifts and 2 evening shifts
 - o. Sept. 4, 2016 4 days shifts
 - p. Sept. 11, 2016 3 evening shifts [sic]
 - q. Sept. 25, 2016 4 days shifts.
 - r. Oct. 2, 2016 1 day shift, 2 evening shifts [sic]
10. The month prior to the claimant's hire, one driver worked the day shift and another the evening shifts. After the claimant's hire, the driver who had been doing the evening shifts continued to work mostly evening shifts. The driver who had been driving mornings continued to drive some morning shifts after the claimant's hire. A couple of other drivers worked the route driving both morning and evening shifts.
11. One of the drivers who worked the same route as the claimant resigned around the middle of September 2016.
12. On September 12, 2016, the claimant called her manager and told him that she would not be able to cover any evening shifts from September 27, 2016 through September 29, 2016, because she would be attending a church convention. She did not remember that there was a policy requiring her to put such a request in writing and she did not do so.
13. The employer hired a new driver to replace the driver who had resigned. The claimant was under the impression that the new driver was going to work all the evening shifts and that she the claimant would work only morning shifts going forward, unless there was need for some special coverage when another

employee was absent or unable to work a shift. This was never the manager's intention. When he said they would split the shifts he meant each would have a mix of day and evening shifts.

14. The new driver started work on September 26, 2016. For the working week ending October 2, 2016, she was scheduled to work both morning and evening shifts Monday and Tuesday, morning shift Wednesday and Thursday, and afternoon shift on Friday. When the manager reviewed this schedule with the new employee, she informed him that she had an obligation on Wednesday and could not work that shift. The manager removed her from the schedule for this shift, even though she had not filled out a written request in advance. He did not believe it was reasonable to require advance notice for a day off for an employee who had just started work the week she needed the day off.
15. The work week ending October 2, 2016, the claimant was scheduled to work the morning shift on Monday the 26th and the evening shifts on Wednesday the 27, 2016 [sic] Thursday the 28th.
16. The manager came to the satellite location on Monday morning September 26, 2016 to help get [the] new driver settled in. The claimant did not mention an issue with the schedule at that time.
17. The claimant trained the new employee to drive the route during the morning shift on September 26, 2016. The new driver started driving the route herself on the evening shift that day.
18. The manager checked on the new driver on September 26, 2016 after the first shift was over, to see if she had any questions or issues. The new employee told him that he might have a problem because the claimant had told her that she did not intend to work evening shifts.
19. After speaking to the new driver, the manager called the claimant and asked her if she would be working her next shift. She said that she could not work her next shift because of a religious convention. She also stated that she did not want to work evening shifts anymore. He told her that would not work for the employer. He allowed her time to think about what she wanted to do given this information. Later that day, at 2:50 p.m., she sent the manager a text stating, "I would not be coming to work Wednesday". The Manager did not notice her response until 7:33 p.m. At that time, he responded with the text "So you are quitting?" He did this because he considered refusing to work a scheduled shift to be job abandonment absent an emergency and because he thought she might not want to continue working for the employer if he was not going to accommodate her most recent scheduling request to not working evening [sic].
20. Once the manager confirmed that the claimant was not working the Wednesday September 28, 2016 shifts, the [sic] he found another driver who

was willing to cover both the morning and evening shifts on Wednesday September 28, 2016.

21. When, as of 12:40 p.m. on Thursday September 29, 2016, just over an hour before the claimant's next scheduled shift, the manager had received no response to his text from Monday regarding whether the claimant was a [sic] quitting, he sent her a text saying that he needed her to call the office asap. He did this because he wanted to know what the claimant's intentions were going forward. He had arranged for the new driver to take the Thursday evening shift if the claimant did not show up for her shift.
22. The new driver covered the evening shift on Thursday September 29, 2016.
23. At 1:00 p.m., the claimant sent the manager a text message stating, "Better not be no problem with my money tomorrow or I will be in contact with my lawyer." Then at 1:02 p.m., she sent another text stating "And also send me a letter that you let me go through the mail along with my last paycheck or next week."
24. At 1:03 p.m., the manager responded with a text that stated, "I didn't let you go, you quit."
25. The claimant responded to this text with one that stated "I've talked to my lawyer and my lawyer said by law you have a right to send me a letter that I no longer work here do not mess with me I'm not the one ..."
26. The manager believed the claimant had resigned as she had: informed him that she was not going to report for her scheduled shift Wednesday because she had a church function; he had refused to accommodate her desire to only work morning shifts; and she had not appeared for her Thursday shift. The hostile tone of her last text also led him to believe that the claimant was not interested in preserving the employment relationship.
27. The claimant believed that she had been fired because the manager removed her from the schedule when she told him she would not be working her scheduled evening shifts the week of September 26, 2016 and would not be working evening shifts going forward. She was still willing to work morning shifts if scheduled.
28. In response to the claimant's last text message, the manager contacted payroll and asked them to prepare the claimant's last check. On Thursday, September 29, 2016, the manager called the claimant and told her to come in to pick up her last check and to bring any company property still in her possession back at that time.
29. On Friday, September 30, 2016, the claimant and manager spoke by phone. The claimant told the manager that she did not need to pick up her check since

she had direct deposit. The manager had, until that week, found the claimant to be a good, dependable, and fully trained employee. He therefore decided to try one more time to maintain the employment relationship. He told the claimant that if she wanted to continue working for the employer she would have to work the schedules the employer needed her to work which included a mix of day and evening shifts. She declined this option.

30. On October 17, 2016, the claimant filed her 2016-01 claim for unemployment benefits, which was effective October 16, 2016.
31. The clamant filed a MCAD claim of discrimination against the employer for allegedly refusing to allow her time off for a religious reason.
32. On November 16, 2016, DUA issued a Notice of Disqualification, with Issue Identification Number 0019 9183 03-01, stating that the claimant was disqualified under Section 25(e)(1) of the law.
33. The new driver work [sic] morning and afternoon shifts Monday through Thursday, most or all weeks starting October 10, 2016.

Credibility findings:

- 1) There is no substantial evidence to find that any employees have been disciplined for taking time off with insufficient written notice.
- 2) The claimant testified that, on September 12, 2016, she informed her manager that she would not be available to drive the evening routes, September 27, 2016 through September 29, 2016 due to a religious convention. This testimony is credible. Her manager testified that the claimant, prior to refusing to work the afternoons shifts her last week of work, had been an excellent employee. He testified that she was such a good employee that he was willing to recommend maintaining her employment to his supervisor, if she would agree to continue to be available for all the shifts she had originally indicated she could work, including the evening shifts. It would be uncharacteristic for such an employee to have failed to give some advance notice that she needed time off.
- 3) The claimant did not complete a written request for time off because she did not realize it was required. This was either because she failed to read the pertinent parts of the handbook and/or policies and procedure document that she signed, despite being required to initial each page, or forgot what they said about time off requests. There is no evidence, or testimony, in the record to indicate that the claimant was familiar with the procedure from prior requests for time off or from having seen other employees request time off as she would not normally see other drivers in the course of her work. There is also insufficient evidence to find that the manager told her to complete a request

f[or]m since he does not remember her making the verbal request and her testimony ford [sic] not indicated that she was told to do this.

- 4) The manager's testimony that he had no memory of the claimant having told him she needed the time off was credible. He had 20 employees reporting to him and could easily forget an undocumented request for time off. The claimant also described her request as a comment about being unable to help out in the afternoons [as] opposed to a specific request for time off. The manager may not have realized exactly what the clamant was trying to communicate.
- 5) The claimant's testimony at the original hearing indicated that she believed that she was hired to work day shift, 5 a.m. to 1 p.m., with an agreement to work an occasional evening shift when the employer needed her to do. This may have been her understanding, but it is inconsistent with the testimony of the manager, who testified that she was hired to work a split of day and evening shifts based on the needs of the employer, and the schedules which indicated that approximately 1/3 of her shifts were evening shifts. Given this misunderstanding, it is found credible that the claimant told her manager that if she was going to be required to continue working evening shifts, she was not going to work for the employer, as the manager's testimony indicated.
- 6) The manager's testimony, written statements and statements under oath were in many places inconsistent, but the inconsistency appears to be mostly due to memory issue [sic] or semantics rather than dishonesty. Where there are inconsistencies, the facts are based on what the review examiner believed most likely given the record as a whole.
- 7) The claimant testified that after she got off work on Monday, September 26, 2016, the manager called her and told her not to work Tuesday and Thursday because she chose the church. This was not found to be credible as there was no evidence or testimony indicating a motivation for the manager go to the effort of recreate a schedule and find replacements for the claimant shifts.

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. The number and description of shifts worked during each week in Consolidated Finding # 9 is taken directly from the employer's scheduling records, which show that the entries for lines p and r have errors. Line p should be "3 day shifts", and the entry for line r should simply be "1 day shift."² In adopting the remaining

² See Remand Exhibit # 8. While not explicitly incorporated into the review examiner's findings, Remand Exhibit # 8 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly

findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

The first question we must decide is whether the claimant was fired or resigned. In the original decision, the review examiner concluded that the employer fired the claimant for not working all of her scheduled shifts during the week of September 26, 2016. The consolidated findings after remand show a genuine misunderstanding between the claimant and her manager about what happened that week. The manager had no memory of the claimant's verbal request for time off, and he believed that the claimant was walking away from her job by not appearing for her evening shifts on September 27, 2016, and September 28, 2016. The claimant believed that she had permission not to work evenings from September 27–29, 2016, when, two weeks earlier, she had spoken with her manager about attending a religious convention. She apparently believed she was being fired for not working those dates and for telling the employer that she did not want to work evenings going forward. *See Consolidated Findings ## 19, 26, and 27.*

However, when the parties spoke directly to each other on September 30, 2016, any misunderstanding became moot. The manager communicated that the claimant could keep working for the employer, as long as she continued to work both day and evening shifts. *See Consolidated Finding # 29.* Thus, the claimant's job remained available to her, but she turned it down. This constitutes a voluntary separation from employment.

Where a claimant voluntarily resigns from her job, her eligibility for unemployment benefits is properly analyzed under 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

The express terms of this provision assign the burden of proof upon the claimant. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

Consolidated Finding # 29 shows that the claimant quit because she did not want to work the mix of day and evening shifts. It is apparent from the claimant's schedule that she had been working both the day and evening shifts since hire. *See Consolidated Finding # 9.* In fact, as the review examiner noted, almost 30% of her shifts were worked during the evening. Expecting the claimant to continue to work under the same terms was reasonable. The claimant may have been under the impression that the newly hired driver would work all of the evening shifts going forward, but she has not established that the employer ever made such a promise. *See Consolidated Finding # 13.*

referred to in our decision today. *See Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

Although the manager was upset at having to scramble to cover the claimant's assigned shifts at the last minute, there is also no indication that he engaged in any conduct that showed bias or retribution for the claimant attending a church function. In her credibility findings, the review examiner explains that she believed that the manager, who supervised twenty bus drivers, simply forgot the claimant's verbal time off request. *See* Review Examiner Credibility Finding # 4. As she further explains, she believed the manager had no incentive to take away the claimant's assigned shifts because of the effort needed for him to find a replacement. *See* Review Examiner Credibility Finding # 7. Such credibility assessments are within the scope of the fact finder's role, and, unless they 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 conclude that the examiner's credibility assessments and findings are reasonable in relation to the evidence before her.

In sum, the record shows that the claimant ultimately decided to voluntarily leave her job because she no longer wanted to work under the same terms and conditions of employment. Since there is nothing in the record demonstrating that the terms had changed or that the employer's conduct was otherwise unreasonable, she has failed to sustain her burden to show that she had good cause attributable to the employer to leave. We, therefore, conclude as a matter of law that the claimant is not eligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning September 25, 2016, 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 - October 25, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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.

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