

Claimant is not disqualified under G.L. c. 151A, § 25(e)(2), because she was laid off from work, rather than discharged for deliberate misconduct or a knowing violation. Employer's evidence was found not to be credible because the review examiner determined the employer fabricated a claimant signature.

**Board of Review
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Issue ID: 0020 4258 34

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by P. Sliker, 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 separated from her position with the employer in November of 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 5, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 19, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without either 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 remanded the case to the review examiner to obtain additional testimony pertaining to the documents in the record. 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 on appeal is whether the review examiner's conclusion that the claimant voluntarily left employment without either good cause attributable to the employer, or urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant was laid 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 an assembler for the employer, a staffing agency. The claimant began work for the employer in February 2016.
2. On February 3, 2016, the claimant signed the employer's forms including an "(employer) Employee Handbook Acknowledgement of Receipt, an "Acknowledgement of Responsibility to Request an Additional Assignment" and an "Attendance Policy."
3. The claimant was assigned to work at a medical manufacturer. She worked Monday through Friday from 7:30 am to 3:30 pm and earned \$11 per hour.
4. On November 11, 2016, the claimant signed a health insurance waiver form.
5. The claimant last performed work for the employer during the week ending November 19, 201[6].
6. The claimant missed seven days of work because of an illness and transportation issues. Each day she called out of work to her supervisor at the manufacturer. The claimant was never told her job was in jeopardy.
7. The claimant called her recruiter. The recruiter told the claimant she was laid off.
8. The claimant went to the employer to pick up her pay stubs.
9. At no time did the claimant tell the employer she quit. At no time did she complete or sign a Voluntary Separation Form stating she quit her employment.
10. On December 5, 2016, the claimant applied for unemployment benefits. She was determined to have a benefit year beginning December 4, 2016.

Credibility assessment:

The record includes a copy of a "Voluntary Separation Form." The employer's account manager, who was present at the initial hearing, testified the claimant signed the form. In her appeal to the Board of Review, the claimant states she did not sign the form. She suggested the signature was copied from somewhere else. Her allegation is supported by the forms and signatures, which are already in the record. The employer offered these as evidence of the claimant's signature. However, the claimant's signature on the "Attendance Policy" is an exact match to the claimant's signature on the "Voluntary Termination Form". The matching qualities to the signatures include where the claimant's name crosses the line and "employee signature" caption, and a small dot after the signature. The signature on the Voluntary Termination Form is also slightly distorted and a looping letter is cut off below the signature, suggesting it was cut and pasted onto the form.

Also, all of the claimant's other signatures on other forms vary slightly. Given these observations, which were made during the hearing, it is concluded the claimant's signature on the Voluntary Termination Form was fabricated.

Because it is concluded the employer fabricated evidence for the hearing, the account manager's testimony is not credible. The claimant's testimony, that she called out sick, was told she was laid off, and never quit, is accepted as 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. However, as discussed more fully below, we believe that these findings of fact support an award of benefits to the claimant.

The review examiner initially concluded the claimant had quit her employment. Consequently, he analyzed the claimant's eligibility for benefits 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 . . . [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.

After remand, however, the review examiner has now found that the claimant was laid off from her employment after she called out of work several days due to illness and transportation issues. The review examiner arrived at this finding after examining the documentary evidence in the record and determining that the documentation established the employer was not credible when it testified that the claimant had quit her employment. As we cannot say that the review examiner's adverse credibility determination against the employer was unreasonable in relation to the evidence presented in the original and remand hearings, we will not disturb it. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7 (1996). In light of the finding that the claimant was laid off, we believe the claimant's eligibility 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 . . .] (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

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” As noted above, the review examiner found that the employer laid off the claimant after the claimant missed several days of work as a result of illness and transportation issues. On the record before us, the employer has failed to establish that the claimant either engaged in any deliberate and wilful misconduct or knowingly violated a reasonable and uniformly enforced rule or policy of the employer. Therefore, the claimant is entitled to benefits under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 26, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2018



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.

SVL/rh