

Claimant was laid off from his job when his supervisor told him at the end of the day that this was his last day, and that the supervisor would call him, but never did.

**Board of Review
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Issue ID: 1390061

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Peter Sliker, 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 affirm.

The claimant was separated from his position with the employer on December 1, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 10, 2017. 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 November 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 provide an opportunity for the employer to present evidence. Only the employer 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 was separated from the employer due to a lack of work is supported by substantial and credible evidence and is free from error of law.

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 a pizza maker for the employer, a restaurant company. The claimant began work for the employer on [sic] in September, 2016.
2. The claimant worked evenings from 4 p.m. to 8 p.m. or 6 p.m. to 10 p.m. He worked 24 to 30 hours each week. He earned \$10 per hour.
3. The claimant was not absent from work.
4. The claimant was not informed there was a problem with his attendance or performance. He was never told his job was in jeopardy.
5. During the winter months business at the restaurant usually slows down. Rather than lay off employees, it is the employer's practice to reduce all employee hours.
6. In late 2016, business at the employer began to slow down and hours were reduced.
7. At 6 p.m. on December 1, 2016, the claimant's supervisor, the location manager, told him that [it] would be his last day. He told the claimant he would call him.
8. The claimant completed his shift and left.
9. The store manager never called the claimant back to work.
10. The claimant applied for unemployment benefits and was determined to have a benefit year beginning January 29, 2017.

Credibility Assessment:

Only the claimant attended the initial hearing on November 13, 2017. He described the events that led up to his separation. He stated he was discharged due to a lack of work. Only the employer owner attended the remand hearing on January 19, 2018. He stated the claimant was not discharged. He testified that it was the employer's practice to reduce hours if business was slow, not discharge employees. However he admitted he was not present when the claimant was separated. The claimant's supervisor, the location manager, no longer works for the employer and was not available to testify. The owner testified at the hearing that he spoke with the location manager about the claimant and that he told him he never told him there was no work. The record was left open to allow the owner to provide evidence to support his [sic] such as a posted schedule however none was available. Given all of these facts, because the location manager is not available to question, the claimant's direct testimony is more credible than his hearsay statement.

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 credibility assessment and deems them to be supported by substantial and credible evidence. As discussed more fully below, we also conclude that the claimant is entitled to benefits.

In our view, the claimant was involuntarily separated on December 1, 2016, when he was informed by his supervisor that it would be his last day. Such an involuntary separation is governed by 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

Under the above statutory provision, it is the employer's burden to show that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly enforced rule or policy.

The review examiner's consolidated findings of fact establish that, on December 1, 2016, the claimant was laid off when his supervisor told him that would be his last day, and that the supervisor would call him. However, the supervisor never called the claimant to come back to work. The review examiner made a detailed credibility assessment in which he credited the testimony of the claimant over that of the employer, who denied that the claimant was laid off and testified that the claimant abandoned his position with the employer. The review examiner noted that the employer was not present at the claimant's separation, and the claimant's supervisor no longer worked for the employer and did not testify. The employer contended that he had spoken with the claimant's supervisor who denied telling claimant that there was no work. At the hearing, the employer agreed to provide documentary evidence to support the owner's contentions, such as a posted work schedule. Despite the fact that the record was left open for the employer to submit evidence, none was provided. The review examiner found that given all of these facts, the claimant's direct testimony was more credible than the employer's hearsay statements. Such 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 believe his assessment is reasonable in relation to the evidence before him.

Based 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 affirmed. The claimant is entitled to receive benefits for the week beginning December 1, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 16, 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.

SPE/rh