

Where the claimant worked for a home health care agency and provided care for a client (her mother) who ceased receiving services via the employer, and where the employer has a policy of not providing its own clients to employees, the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0021 1165 97

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Allison Williams, 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 on or about April 20, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 27, 2017. 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 May 20, 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 or for 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 allow the claimant an opportunity to testify and to determine if the claimant's client continued to receive services from the employer after April 20, 2016. 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.

The issue before the Board is whether the review examiner's conclusion that the claimant abandoned her job without good cause attributable to the employer or for urgent, compelling, and necessitous reasons 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 Home Health Aide for the employer, a home care agency from 11/20/14, until she separated from the employer on 4/20/16.
2. The claimant worked under a Mass health program where she cared for a family member and was compensated based on number of hours allowed by Mass health depending on the medical needs of the family member.
3. When hired the claimant and other employees who work under this Mass health program are informed that they need to bring in their own clients.
4. The claimant was hired to work per diem, earning \$15.00 an hour caring for her mother. She averaged 42 hours a week.
5. On 4/20/16, the claimant contacted her Supervisor and informed her that her mother was leaving the country for the Dominican Republic. (Remand Exhibit 6) The claimant did not accompany her mother to the Dominican Republic. The Supervisor instructed the claimant to call the employer when her mother returned so they could give her hours. It is not known when the claimant's mother returned from her trip to the Dominican Republic.
6. Prior to 4/20/16, Mass health had notified the claimant and the employer that the number of hours the claimant would be entitled to care for her mother would be reduced. (Remand Exhibit 5) The letter indicated that the claimant's hours were going to be reduced beginning 3/1/16. The claimant would be allowed to work 3 hours a day, 6 days a week from 3/1/16 to 5/5/16 then 2 hours a day 6 days a week from 5/6/16 to 5/29/16.
7. After 5/29/16, the hours were going to be reevaluated and based on the reevaluation it would be up to Mass Health as to how many hours the claimant would be able to care for her mother.
8. The claimant's mother subsequently switched health care companies and was no longer eligible for continued services from the employer. It is not known when the claimant's mother switched health insurance companies.
9. The claimant's mother never resumed her services through the instant employer after 4/20/16. The claimant's mother, upon her [return] from her trip, decided to switch agencies to get more hours for the claimant to work. The claimant worked for another agency from May of 2016 until January of 2017 when her hours were again reduced by Mass Health. The claimant's mother is currently looking for another agency.
10. The claimant never requested a leave of absence prior to leaving. She had not received any discipline prior to her separation.

11. The employer would have provided the claimant hours in accordance with Mass health's notification if she had contacted the employer upon her mother's return from the Dominican Republic.
12. The employer never heard from the claimant again after 4/20/16.

Credibility Assessment: The employer's testimony that they were informed by the claimant on 4/20/17 that her mother was traveling to the Dominican Republic is deemed credible. Although the claimant testified that her mother did not travel to the Dominican Republic the weight of the evidence suggest otherwise. The employer witness testified to this information and provided written evidence created by the Manager that the claimant had informed her that her mother was traveling to the Dominican Republic. The claimant supported this fact when she testified that she had in fact called the employer to let them know. In addition, the claimant provided conflicting testimony regarding whether her mother had switched health care providers. She initially testified she had not but after further question of her certified questionnaire that stated she had the claimant admitted that her statement in the questionnaire was true. (Exhibit 3, page 2)

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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Consolidated Finding of Fact # 11 states that the employer would have provided the claimant with hours, if she had merely contacted the employer after her mother returned from the Dominican Republic. This finding is contrary to several other findings and undisputed testimony; namely, that the claimant's mother never resumed services via the employer after returning and that the employer had a policy of not providing other clients to employees. *See* Consolidated Findings of Fact ## 3, 8, and 9. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant quit her employment pursuant to G.L. c. 151A, § 25(e)(1). Rather, we believe the consolidated findings support the conclusion that the claimant's employment ended due to lack of work pursuant to G.L. c. 151A, § 25(e)(2).

As an initial matter, we must determine which portion of G.L. c. 151A, § 25(e), is applicable to the claimant's separations from employment. The relevant sections provide, 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, (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, or (3) because of conviction of a felony or misdemeanor.

The DUA initially granted benefits to the claimant by applying G.L. c. 151A, § 25(e)(2), which deals with employer-initiated discharges. After a hearing on the employer's appeal, however, the review examiner reversed and denied benefits by applying G.L. c. 151A, § 25(e)(1), which deals with employee-initiated resignations or quits. While it was undisputed that the claimant did not contact the employer after April 20, 2016 in order to return to work, it does not necessarily follow that she quit her employment. The question is whether it would have been possible for the claimant to continue her employment with the employer after this date. It was undisputed that the claimant's client never resumed services after this date and, in fact, thereafter switched her home healthcare provider to a different agency. *See Consolidated Findings of Fact ## 8–9.* The claimant indicated that she wished to remain employed, and that she asked the employer if she could provide care for a different client. While the review examiner did not make a finding as to this, it was undisputed that the employer does not provide clients to employees. *See Consolidated Findings of Fact # 3.* As the claimant cannot be held responsible for the client's decision to temporarily depart the country nor for the client's decision to cease her relationship with the employer and obtain care through a different agency, it cannot be said that her separation was voluntary under G.L. c. 151A, § 25(e)(1). The fact that the client in question was the claimant's own mother does not change this conclusion.

We, therefore, conclude as a matter of law that G.L. c. 151A, §§ 25(e)(2), applies and that the claimant's separation occurred due to a lack of work.

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

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 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.

JRK/rh