Home health care physical therapist did not show that the employer's request to perform an assignment late in the day was unreasonable. The written warning and probationary period, which the employer was about to give to the claimant, did not create good cause attributable to the employer to resign.

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Issue ID: 0021 2514 91

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rachel Zwetchkenbaum, 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 on February 7, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 6, 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 June 8, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been fired without having 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, she 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 further 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.

The issues before the Board are: (1) whether the review examiner's conclusion that the employer discharged the claimant is supported by substantial and credible evidence and is free from error of law; and if not, (2) whether the claimant voluntarily ended her 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. The claimant worked as a Staff Physical Therapist for the employer, a Home Health Care Agency, from July 1, 2015 until February 7, 2017, when she was separated from her employment.

2. The claimant was hired to work a full-time schedule of hours for the employer.

3. The claimant had a set schedule, Monday through Friday, approximately 8 a.m. until 4 p.m.

4. The claimant worked on February 2, 2017.

5. On February 2, 2017, the claimant was asked to get in touch with a new patient. The claimant attempted to get in touch with the patient several times throughout the day. The claimant was told that the patient would not be available until late afternoon. The claimant assumed she would not go see the patient that day because it would be too late.

6. At approximately 4:20 p.m. on February 2, 2017, the claimant received a phone call from one of her supervisors. The supervisor told the claimant that she needed to go see the patient that day. The claimant told her supervisor that she would not go see the patient. The supervisor told the claimant that they would need to have a meeting on Tuesday, February 7, 2017.

7. The claimant met with her supervisor and human resources on February 7, 2017. The claimant was told at the meeting that she was being issued a written warning for failing to complete the assigned evaluation of a patient on February 2, 2017 and insubordination. The claimant immediately said she was resigning. The employer gave the claimant the written warning to sign. The claimant signed the warning and under employee statement the claimant wrote, "I choose to leave voluntarily due to a difference of opinion".

8. The claimant was not terminated.

9. Had the claimant not resigned, she could have continued to work for the employer.

10. The claimant filed for unemployment benefits and received an effective date of March 5, 2017.

CREDIBILITY ASSESSMENT:

The claimant and the employer provided conflicting testimony. The claimant testified at the original hearing that the employer terminated her and that she did not quit her job. At the remand hearing, the employer introduced documentary evidence of the written warning the claimant was given on February 7, 2017. The

> warning had been signed by the claimant and the claimant admitted that she wrote on the warning that she was voluntarily leaving due to a difference of opinion. When the claimant was asked why she would write that on a written warning if she thought she was being terminated, she was unable to say much more than "I don't know". It is concluded that such an answer cannot be deemed credible.
>
> Given the weak and conflicting testimony provided by the claimant, the claimant's testimony is dismissed as not 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, the consolidated findings no longer support the review examiner's legal conclusion that the claimant was discharged from employment or that she is eligible for benefits.

After hearing only the claimant's testimony during the initial hearing, the review examiner concluded that the claimant had been fired from her job. After remand, the consolidated findings now provide that the claimant resigned voluntarily. *See* Consolidated Findings ## 7 and 8. In making the new findings, the review examiner accepted the employer's version of events that the claimant quit upon being told that she would be disciplined for refusing to conduct a patient evaluation on February 2, 2017. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless the credibility assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). The review examiner's credibility assessment is supported by the employer's testimony and the Employee Disciplinary Action Form signed by the claimant. *See* Exhibit # 5.

Since the claimant voluntarily left 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 explicit language in G.L. c. 151A, § 25(e)(1), places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

It is apparent from Consolidated Finding # 7 that the claimant resigned because she was about to be disciplined for refusing to perform the assigned evaluation on February 2, 2017. In order to determine whether such discipline constituted good cause attributable to the employer for the claimant to quit, we focus on the employer's conduct and not on the employee's personal reasons for leaving. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

The findings are sparse as to the claimant's reason for refusing the assignment. Consolidated Finding # 5 suggests that the claimant did not go see the patient because it would have been too late in the day. The employer called the claimant with the assignment at 4:20 p.m. Consolidated Finding # 6. As the claimant explained during the hearing, her last assignment, in [Town A], Massachusetts, ended at around 3:00 p.m., and, when she received the call, she was about 20 minutes from her home in New Hampshire. She further explained that, due to traffic at that time of day, it would have taken an hour to return to [Town B], Massachusetts, about another hour to perform the evaluation, and that by the time she made it home, it would have been well beyond her regular work day ending time of 4:00 p.m.[1]

We do not doubt that the assignment would have lengthened the claimant's work day on February 2, 2017, and it would have added a lot of driving to her day. However, as a home health physical therapist, driving was a regular part of the claimant's job. Moreover, on February 2, 2017, the claimant did not begin her first assignment until almost 10:00 a.m.[2] Nothing in the record suggests that the employer routinely asked the claimant to work well beyond 4:00 p.m. or that complying with the request on that date would have imposed an undue hardship. In short, turning her car around and driving back down to [Town B] would have been inconvenient, but that did not make the employer's request unreasonable. We also believe that issuing a written warning with a 30-day probationary period was a reasonable response to the claimant's behavior under the circumstances. It did not constitute good cause to leave her job within the meaning of G.L. c. 151A, § 25(e)(1).

We, therefore, conclude as a matter of law that the claimant voluntarily separated from employment without showing good cause attributable to the employer under G.L. c. 151A, § 25(e)(1).

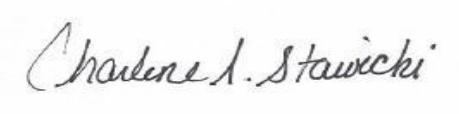
[1] While not explicitly incorporated into the review examiner's findings, this part of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[2] The employer's witness testified that the claimant's first assignment on February 2, 2017, started at 9:57 a.m. This testimony is also part of the undisputed evidence presented during the hearing.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 5, 2017, 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 - November 29, 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.

AB/rh