Claimant's request to not work as an on call driver for the employer, which led to the employer asking the claimant to give in his keys and phone, did not transform the case into a quit situation pursuant to G.L. c. 151A, § 25(e)(1). Under G.L. c. 151A, § 25(e)(2), the claimant's response that he wanted to work the schedule assigned to him when he was hired was not deliberate misconduct.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0021 3348 42
Claimant ID: 10551923

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Krista Tibby, 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 his position with the employer on March 9, 2017. He then re-opened an unemployment claim, which had been previously filed and which was initially effective January 1, 2017. On April 25, 2017, the DUA sent the claimant a Notice of Disqualification, informing him that he was not eligible to receive benefits beginning the week of March 5, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 19, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer 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 accepted the claimant's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 is subject to disqualification under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant told the employer he preferred to stay on the schedule he was hired to do rather than be an on-call driver.

Findings of Fact

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

1. The claimant maintained a commercial driver's license (CDL) and was trained as a heavy duty tow truck driver.

2. The claimant worked full time as a manager for the employer, a towing company, from February 27, 2017 until March 9, 2017.

3. The claimant's direct supervisor was the owner (the Owner).

4. The employer's clerk (the Clerk) operated the day-to-day operations of the employer's business, including the schedule.

5. At the time the claimant was hired, the Owner told him his set schedule was Monday through Friday, from 8 a.m. to 4:30 p.m., and two on-call shifts.

6. At the time the claimant was hired, the Owner worked Tuesday and Thursday on-call as the primary dispatch (the Primary). The Primary received calls from the answering service and dispatched the appropriate tow truck and also worked as an on call tow truck driver.

7. The Owner told the claimant he would be assigned as the Primary on Tuesday and Thursday.

8. On February 28, 2017, the claimant signed a job description for a "Tow Truck Operator and Fleet Maintenance" position. Included in the job description were on call hours of operations and rate of pay for on call jobs.

9. The employer employed eight drivers, including the claimant. The employer's entire staff of drivers worked on an alternating on-call schedule, as it was the nature of the employer's business. Four of the employer's drivers had CDLs and were trained to be heavy duty drivers, including the Owner and the claimant. The employer typically had three employees on call, a heavy driver, a light duty driver and a road service driver.

10. The Department of Transportation (the DOT) prohibited tow truck drivers from working longer than eleven hours a day, *i.e.* if a driver went on a tow call at 8 a.m.; he was required to stop working at 7 p.m.

11. When an employee was scheduled on call and started driving during their regular scheduled shift, the employer replaced the on call employee with a different employee at the completion of their eleven hours.

12. The employer did not receive phone calls every day for heavy duty tow truck drivers.

13. On an unknown date during the claimant's second week of employment, a coworker told him that the on-call schedule was going to change and he could possibly be scheduled three on-call shifts and every other weekend.

14. On March 9, 2017, the employer's clerk (the Clerk) asked the claimant what his preference was for on-call evenings because she needed to create an on-call schedule and she wanted to attempt to accommodate the drivers' preferences. The claimant told the clerk he preferred not to do on-call as a driver but that he wanted to work as the Primary on Tuesday and Thursday as he discussed with the Owner. The claimant told the Clerk he did not want to work on call because his "wife will divorce" him.

15. The Clerk told the Owner the claimant did not want to work on call as a driver.

16. The Owner called the claimant into his office and asked him what was going on with the on call schedule. The claimant told the Owner he did not want to work on call as a driver because his "wife would divorce" him and wanted to work as the Primary on Tuesday and Thursday.

17. After the claimant told the Owner he did not want to work on call as a driver because his "wife would divorce" him, the Owner asked the claimant for his key and his phone and the claimant left.

18. On March 9, 2017, the claimant quit because he did not want to work on call as a driver.

19. The Owner did not discharge the claimant.

20. On March 9, 2017, the Clerk had not completed the on call schedule.

21. As of March 9, 2017, the claimant had not worked an on call shift for the employer.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and credibility assessment except as follows. As explained more fully below, we conclude that the findings of fact support a conclusion that the employer initiated the claimant's separation. They do not support a conclusion that the claimant quit. Therefore, we reject Findings of Fact ## 18 and 19. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

As noted in Part III of her decision, the parties disputed whether the claimant quit his job or whether he was discharged on March 9, 2017. After reviewing some of the testimony from the hearing, the review examiner concluded, "[b]ased upon the claimant's failure to provide any credible testimony or evidence, and the Clerk's credible testimony the claimant quit, it is

determined the claimant quit." However, simply because the employer asserts that the claimant quit does not mean that this is true. What section of law controls the claimant's separation is not determined by the parties or the credibility of the parties. It is determined by what occurred between the parties prior to the separation, and what occurred is contained within the review examiner's findings of fact. Although the review examiner may conclude that the claimant quit, if the findings of fact do not support such a conclusion, then her decision will be unsupported and cannot stand. Based upon the review examiner's findings of fact, we conclude that the employer initiated the claimant's separation on March 9, 2017, and, consequently, G.L. c. 151A, § 25(e)(2), controls the outcome of this case.

The claimant obtained his job with the employer in the benefit year of his unemployment claim. At hire, the claimant had a set schedule of Monday through Friday, 8 a.m. to 4:30 p.m. He was also assigned to do two on-call shifts. Finding of Fact # 5. At the time he was hired, the employer's owner worked "Tuesday and Thursday on-call as the primary dispatch." Finding of Fact # 6. During the hiring discussions, the owner "told the claimant he would be assigned as the Primary on Tuesday and Thursday." Finding of Fact # 7. Reading Findings of Fact ## 6 and 7 together with the testimony from the hearing, it appears that the claimant took over the owner's shifts working as the "on-call" primary dispatch on Tuesdays and Thursdays. This job included receiving calls, dispatching appropriate tow trucks, and working as an on-call tow truck driver. This was the agreement that the parties had at hire.

On March 9, 2017, the employer's clerk asked the claimant what his preference was for on-call shifts. Rather than refuse to work certain shifts, the claimant merely indicated that "he preferred not to do on-call as a driver but that he wanted to work as the Primary on Tuesday and Thursday as he discussed" at hire with the owner. Finding of Fact # 14. In essence, the claimant was requesting what was promised to him at hire. He may have been indicating that he did not want a shift consisting totally of on-call driving work, but he was stating that he wanted the primary dispatch work, which could include some driving. When the claimant later spoke with the owner about the issue, he reiterated that he wanted to be the Primary on Tuesdays and Thursdays, rather than a straight on-call driver. Finding of Fact # 16. The owner then asked the claimant for his employer-issued keys and phone. Finding of Fact # 17.

Findings of Fact ## 16 and 17, which show that the claimant talked with the employer about working Tuesdays and Thursdays and indicated he did not want to work as an on-call driver only, are inconsistent with Finding of Fact # 18, which states that the claimant quit. A refusal to do work does not always lead to a conclusion that the claimant has quit his position. It might, in certain circumstances, if it is accompanied by other indicia that the person is voluntarily deciding to leave his job. However, where a claimant refuses to do something, even if it is within his job description, and the employer then decides to end the employment relationship, the employer has initiated the separation. Indeed, this case is no different from a straightforward insubordination scenario where an employee refuses to do work and the employer fires the employee. Again, as noted above, simply because the employer viewed this as a quit does not make it a quit situation. Thus, when the claimant expressed his desire to continue as the Tuesday/Thursday primary dispatch (which had been the owner's on call shifts), and the employer subsequently asked him for his keys, the claimant was effectively discharged.

Because we conclude that the claimant was terminated from his employment, his qualification for benefits 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 this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Although the focus of the review examiner's decision was on the claimant's alleged resignation, we believe that there are sufficient findings for us to conclude that the claimant is not subject to disqualification under the above-cited provision.

We have noted that the employer decided to end the employment relationship when the claimant told the employer that he preferred to work the Tuesday/Thursday primary dispatch shifts, rather than on-call driving shifts. No policies are noted in the findings, so the question is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. The central issue to this analysis is the claimant's state of mind at the time of the alleged misconduct. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). At a minimum, the claimant had to know that what he was doing was wrong or prohibited by the employer.

Here, the facts do not indicate that the claimant would have been aware that telling the employer he wanted to work as the Primary on Tuesdays and Thursdays was wrong to do. After all, he was hired to be the Primary on Tuesdays and Thursdays, apparently filling in on the on-call shift the owner worked. Moreover, he was asked on March 9, 2017, by the clerk what his preference was regarding his work schedule. He responded with what he preferred. Thereafter, he merely maintained that he wanted to work what he was hired to work, and what he was hired to do is noted in Findings of Fact ## 6 and 7. He did not engage in any intentional misconduct.

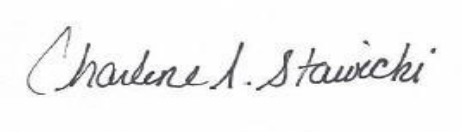
We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence or free from error of law, because the employer initiated the claimant's separation on March 9, 2017, and the claimant's behavior on March 9, 2017, was not disqualifying 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 beginning March 5, 2017, and for subsequent weeks if otherwise eligible.

N.B.: Because the claimant began work for this employer in his benefit year, and the employer is not a base period employer, the employer in this case will not be charged for benefits paid out on the January 1, 2017, claim.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 18, 2017

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

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.

SF/rh