**Claimant, who had been in a final written warning for attendance, quit a day after being a no-call, no-show, before human resources decided whether or not to discharge him. Referring the matter to human resources did not constitute good cause attributable to the employer to resign. By quitting before a decision about his employment—or even an investigation—had been made, the claimant could not show that he quit under a reasonable belief of imminent discharge.**

**Board of Review**
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**Issue ID: 0021 3583 05**

# 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 his position with the employer on February 21, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 11, 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 16, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or having 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 afford the employer an opportunity to present evidence. The remand hearing was held on two days. Both parties participated in the hearing held on August 23, 2017, but only the employer attended the continued remand hearing on September 21, 2107. 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 original conclusion that the employer terminated the claimant's employment is supported by substantial and credible evidence and is free from error of law; and (2) if not, whether the claimant voluntarily ended his

employment for either good cause attributable to the employer or because he reasonably believed he was about to be discharged.

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 Customer Service Technician for the employer, an Automobile Shop, from September 1, 2015 until February 21, 2017, when he was separated from his employment.

2. The claimant worked a full time schedule of hours for the employer.

3. The employer posts the schedule every Friday for the upcoming week.

4. On August 29, 2016, the claimant received a written warning for attendance issues.

5. On February 7, 2017, the claimant received a final written warning for attendance issues.

6. The claimant worked on February 19, 2017 [sic].

7. The claimant was next scheduled to work at 9 a.m. on February 20, 2017.

8. The claimant did not report to work for his shift on February 20, 2017.

9. On February 20, 2017, one of the claimant's co-workers, who is also a friend of the claimant, contacted the claimant and let him know that he was scheduled to work that day.

10. On February 20, 2017, the claimant called and spoke to a supervisor. The claimant told the supervisor that he did not know he was supposed to work that day. The claimant also asked the supervisor if he should go to work at that time. The supervisor told the claimant that since he was on a final written warning that the absence would need to be reported to human resources and that human resources would determine the next steps.

11. On February 20, 2017, the employer submitted documentation about the claimant's absence to the human resources office.

12. On February 21, 2017, the claimant reported to work and gave the employer a letter that stated he was resigning, effective that day.

13. The employer never told the claimant that he was terminated.

14. Had the claimant not resigned, human resources would have conducted an investigation into the incident in order to decide what action should be taken.

15. The claimant filed for unemployment benefits and received an effective date of March 19, 2017.

CREDIBILITY ASSESSMENT

The claimant asserted at the original hearing that he was terminated from his job and that he did not quit his job. During the remand hearing, the employer presented documentary evidence that the claimant had not been terminated, but instead resigned. The employer produced a resignation letter that was signed by the claimant, which stated that as of February 21, 2017, he was resigning from his employment with the instant employer. The claimant did not deny that he signed the resignation letter. The claimant did not deny that he gave the employer the resignation letter. Given the record as a whole in terms of the claimant's inconsistent testimony as to how he became separated from his employment, it is concluded that the claimant's assertion that he was discharged from his job 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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Consolidated Finding # 6 incorrectly states that the claimant worked on February 19, 2017, a Sunday. During the hearing, the parties agreed that the claimant had worked instead on Saturday, February 18, 2017.[1] 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 original legal conclusion that the claimant is eligible for benefits.

After hearing only the claimant's testimony during the initial hearing, the review examiner accepted his assertion that he had been fired. Following the remand hearing, the review examiner instead accepted the employer's evidence showing that the claimant resigned. Her credibility assessment explains her reasons for doing so. 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391

[1] During the remand hearing, the employer's human resource analyst read from the claimant's timecards. The claimant agreed that he had worked on February 18, not on February 19. While not explicitly incorporated into the review examiner's findings, this 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).

Mass. 623, 627 (1984)(citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981)(further citations omitted.) In light of the claimant's signed resignation letter, Remand Exhibit 7, which supports the employer's testimony that he left voluntarily, the review examiner's assessment that the claimant quit his job is reasonable.

Since the claimant voluntarily left his employment, his eligibility for benefits is properly analyzed under G.L. c. 151A, § 25(e), 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 express terms of this statutory provision place the burden of proof upon the claimant.

Under G.L. c. 151A, § 25(e)(1), the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). In her original decision, the review examiner found that, at some point, the employer changed the claimant's work schedule without notifying him. *See* Remand Exhibit 1. The consolidated findings omit any reference to the employer changing the claimant's schedule, presumably because she no longer believed that this occurred. However, even if we give the claimant the benefit of the doubt, and assume that his absence on February 20, 2017 was an innocent mistake, as suggested in Consolidated Finding # 10, we see nothing in the employer's conduct that gave the claimant good cause to resign.

In response to the claimant not calling or showing up for work on February 20, 2017, the consolidated findings show that the supervisor explained what the employer would do next. Because the claimant was on a final written warning, human resources would have to get involved. Consolidated Finding # 10. Given the claimant's disciplinary record, we see nothing unreasonable in the employer's action of referring the matter to human resources. This response did not, by itself, constitute good cause attributable to the employer for the claimant to resign the next day. *See* Consolidated Finding # 12.

Obviously, both parties knew that there was a chance that the claimant would be fired, but there was also a chance that he might instead receive a lesser disciplinary consequence. His final written warning stated that failure to improve might result in suspension or termination.[2] The Supreme Judicial Court has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment

[2] The portion of Remand Exhibit 8, the claimant's final written warning, is illegible in parts. We rely upon the review examiner reading from the exhibit that the form asked what should happen if the claimant's conduct did not improve. The document's handwritten entry, "suspension . . . or possible termination" is clear. This document is also part of the unchallenged evidence included in the record.

Security, 391 Mass. 399, 401-402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981).

Here, the employer never told the claimant that he would be terminated. Consolidated Finding # 13. Although it is unclear whether the claimant knew that the human resource department would conduct an investigation before deciding whether to end his employment, he knew that they would make a decision about his continued employment. *See* Consolidated Findings # 10 and 14. He quit before human resources had an opportunity to do anything. Because the evidence shows that the employer had not decided whether the discharge the claimant, the claimant has not shown a reasonable basis for his belief that he faced imminent termination. *See* Board of Review decision 0002 2960 41 (Jan. 17, 2014), *quoting* Board of Review decision BR-119386-A (Nov. 2, 2011) (at the time the claimant resigned, the employer had not even held an investigatory interview with him).[3]

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he had good cause attributable to the employer to resign, or that he quit under a reasonable belief of imminent discharge.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 19, 2017, and for subsequent weeks until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - October 31, 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

[3] Board of Review decision BR-119386-A is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

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/ jv