Dental technician stopped coming to work after the employer denied his request for a pay increase and a change in schedule. Text correspondence supported the review examiner's findings that the employer did not tell the claimant that he was fired.

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Issue ID: 0021 5589 67

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by John P. Cronin, 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 affirm.

The claimant separated from his position with the employer in March, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 12, 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 August 15, 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 urgent, compelling, and necessitous reasons, and, thus, he 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 obtain further evidence about communications between the parties at the time of the claimant's separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 is disqualified under G.L. c. 151A, § 25(e)(1), because he voluntarily left his job after the employer would not grant his requests for a raise and schedule change 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. From January 1, 2016 until March 21, 2017, the claimant worked as a dental assistant for the employer, a dentist office.

2. From the beginning of his employment, the claimant worked 3 Saturdays per month.

3. The claimant desired, however, to spend more time with his family on the weekends and also desired to be paid more than the $22 per hour that he was earning as of March 3, 2017.

4. As a result, on that date, the claimant – who had previously requested additional Saturdays off and was able to occasionally work less than three Saturdays per month when he was able to find coverage – submitted to the employer a "**REQUEST FOR PAY INCREASE**," which highlighted the manners in which he believed he "**BENEFITS THE OFFICE**."

5. The claimant also submitted a "**REQUEST FOR PERMANENT SCHEDULE**," which stated, "Current schedule is inconsistent," and stated a request for a regular weekday schedule, as well as indicating that he was "Willing to work no more than **2 Saturdays** [per month]."

6. In response to the claimant's request, the employer's owner initially indicated that he was considering giving the claimant a $1-$2 per hour raise.

7. At some point, however, the office manager informed the claimant that his request for a schedule change and a raise would not be granted.

8. On March 27, 2017, the employer's office manager, who wanted to confirm his forthcoming attendance at his next scheduled work shift, texted the claimant, writing, "Hi [claimant,] I just wanted to confirm we start @ 9am this [Wednesday.]"

9. Having not received a response from the claimant, the office manager called the claimant twice during the early afternoon of March 27, 2017. At approximately 2:22 p.m., in response to the office manager's third phone call, the claimant answered.

10. During the phone conversation that ensued, the office manager – who never stated that the claimant had been discharged – told him that if, given the employer's position, he desired to resign from his employment, he could do so by submitting his two weeks' notice so that the employer could begin the process of hiring a new employee to replace him. The claimant did not state, in response, that he was quitting his employment.

11. Subsequently, at approximately 3:03 p.m. on the same day, the office manager texted the claimant, stating, "We need to know it by today for your 2 weeks

notice if decided to do so. We need start working on hiring other assistant. Please let me know by 5pm today. Thank you."

12. At 3:12 p.m. on the following day, the claimant responded via text message, "I'll b there tomorrow at 9 am."

13. In response, the office manager texted, "I won't be here tmr as you know, it is my day off. Please change suction filter tmr. And let me know about the 2 weeks notice you can call me or text me. Thanks[.]"

14. At 5:20 p.m., the claimant texted in response, "There are other employees who could have changed the filters." In response, the office manager texted, "They did two weeks ago now it is your turn," and "I also ask [Coworker A] and she will do it with you tmr since you are not here im letting you to do it so as a Manager."

15. On the following morning, March 29, 2017, the claimant, for unknown reasons, did not appear for his 9 a,m. shift with the employer.

16. At 9:59 a.m., the office manager texted the claimant, stating, "You didn't show up for work again."

17. The claimant declined to respond to the message or to report for any further shifts with the employer, effectively quitting his position.

18. The claimant did not have any contact with the employer until April 4, 2017, when he sent the office manager a text stating, in pertinent part, "U can fax over termination papers."

19. In response to the claimant's request, the employer, on April 13, 2017, wrote the claimant a letter stating, in pertinent part, "We are writing this letter, upon your request, to confirm that your employment with [the employer] is terminated effective immediately because you stopped coming to work as of March 29, 2017 without any prior notification or excusable reason."

20. The claimant filed a claim for unemployment insurance benefits on April 14, 2017. The effective date of the claim was April 9, 2017.

CREDIBILITY ASSESSMENT:

The claimant consistently asserted, during both the initial hearing and remand hearing, that, although he was never specifically told that he had been discharged, the office manager had implied as much during a telephone call on March 27, 2017, including that the office manager told the claimant that he was "not needed anymore," an assertion also testified to by the claimant's brother. In view of all of the relevant testimony and documentation in this matter, however, I accept as credible the direct and consistent testimony of the office manager that she neither

> overtly nor impliedly discharged the claimant during the relevant phone conversation. The office manager's testimony is deemed to be more credible in light of corroborating text messages she exchanged with the claimant after the phone conversation in question. In particular, mere minutes after the relevant telephone call, the office manager texted, "We need to know it by today for your 2 weeks notice if decided to do so. We need start working on hiring other assistant. Please let me know by 5pm today. Thank you," implying that the claimant had not yet separated from the employer. Subsequent text messages exchanged between the two also suggest that the employment relationship had yet to be severed; the claimant texted on March 28, 2017 that he would "b[e] there tomorrow at 9am," and then participated in a back-in-forth [sic] of messaging regarding a particular job duty that he would be expected to complete when he arrived. Especially in light of the office manager's text, on March 29, 2017, which informed the clamant that he "didn't show up again," for his scheduled shift that morning, and its letter to him, on April 13, 2017, reiterating that the claimant did not separate from his employment until his failure to report for work on March 29, 2017 and thereafter, I find the office manager's testimony regarding the circumstances surrounding the claimant's separation to constitute the substantial and credible relevant testimony in this matter.

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. The portion of Consolidated Finding # 17, which states that the claimant effectively quit his position, is not a finding of fact but a ruling of law to be made by the Board. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we believe the consolidated findings support the review examiner's legal conclusion that the claimant is ineligible for benefits.

The key question in this appeal is whether the claimant was discharged, as asserted by the claimant, or whether he voluntarily left his job, as asserted by the employer. The consolidated findings provide that on March 3, 2017, the claimant submitted a written request for changes to the terms of his employment, including an increase in pay and a fewer scheduled Saturday workdays. Consolidated Findings ## 4 and 5. There is no dispute that his requests were denied. *See* Consolidated Finding # 7. There is also no dispute that the claimant did not report for work on March 29, 2017, or thereafter. *See* Consolidated Finding # 15. At issue is whether the claimant did not show up because the employer told him that he was fired, or whether the claimant voluntarily chose not to report to work.

Specifically, the claimant asserted that, during a telephone conversation on March 27, 2017, the office manager said or implied that the claimant was discharged. The review examiner rejected

this assertion as not credible. 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 Mass. 623, 627 (1984) (citations omitted).

The review examiner found that, during that March 27, 2017, telephone conversation, the office manager did not say that the claimant had been discharged, but asked the claimant to give two-weeks notice, if the claimant decided to resign. Consolidated Finding # 10. As explained in the credibility assessment, this finding is supported by the evidence presented, particularly by subsequent text message exchanges, in which the claimant stated that he would be in the next day, and in which he and the office manager quibble about cleaning a filter on his next scheduled day of work. *See* Consolidated Findings ## 12–14; *see also* Exhibit # 14 and Remand Exhibit # 7. We agree with the review examiner that this evidence demonstrates that the employer had not fired the claimant, but expected him to report for work and clean filters.

The claimant did not show up for work, or notify the employer that he would not report for work, on March 29, 2017, or thereafter. *See* Consolidated Findings ## 15 and 17. The failure of an employee to notify his employer of the reason for absence is tantamount to voluntarily abandoning a job. Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950). Since the claimant's departure was voluntary, his eligibility for benefits is governed by 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express provisions under this section of law place the burden of proof upon the claimant.

In analyzing whether a separation was for good cause attributable to the employer, 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). During the hearing and on appeal, the claimant asserted that the employer's work environment was unsafe. In his original decision, the review examiner rejected this as his reason for leaving because safety is not even mentioned in the claimant's March 3, 2017, written demand to the employer. *See* Exhibit # 11. We agree. The claimant's request for a pay increase and permanent two Saturdays a month schedule indicate that he was willing to keep working, notwithstanding any alleged unsafe conditions, provided the employer acceded to his request for higher pay and more Saturdays off.

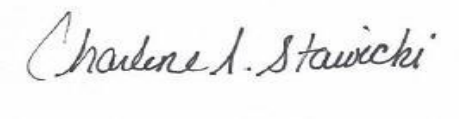
Because the employer hired the claimant at a pay rate of $22.00 per hour and with the understanding that he would work three Saturdays a month, it was reasonable to expect the claimant to continue to work under the same terms and conditions of employment.

Thus, we conclude as a matter of law that the claimant voluntarily left his employment by abandoning his job and without establishing good cause attributable to the employer for doing so, as required under G.L. c. 151A, § 25(e)(1). We further conclude that the claimant has not presented any evidence suggesting that his separation was due to urgent, compelling, or necessitous reasons.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending April 1, 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 - January 11, 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.

AB/rh