

Where the employer had given the claimant several performance-based warnings over the course of less than two months, a supervisor told the claimant that the employer was considering discharging her, and a supervisor confirmed that the claimant's job was in jeopardy, the claimant had a reasonable belief that she could soon be discharged and is eligible to receive benefits following her resignation.

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J.
Member

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 affirm.

The claimant resigned from her position with the employer effective May 31, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 30, 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 October 24, 2017.

Benefits were awarded after the review examiner determined that the claimant, who reasonably believed that she was about to be discharged from her job, voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence and to clarify the claimant's reasons for leaving her job. Both parties attended the remand hearing, which took place over the course of three days. 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 is eligible to receive unemployment benefits is supported by substantial and credible evidence and is free from error of law, where the claimant believed that she was going to be imminently discharged after she received several warnings for her job performance in quick succession and her supervisors confirmed that her job was in jeopardy.

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 full time as an Office Manager for the employer, a cardiology clinic, from March 2016 until 05/31/17. The claimant's annual salary was \$65,000.00.
2. The existence of a written rule or policy was not established.
3. The employer expected the claimant to perform her job duties adequately.
4. The claimant understood the employer's expectation having been issued prior warnings for poor job performance.
5. Throughout her employment, the claimant struggled to complete her job duties within the timeframe allowed by the employer.
6. On 03/08/17, the employer issued the claimant a verbal warning for poor job performance.
7. On 04/03/17, the employer issued the claimant a written warning for poor job performance.
8. On 04/18/17, the employer again verbally warned the claimant for poor job performance.
9. The claimant was performing her job duties to the best of her ability.
10. In April [2017], the claimant's supervisor, the Assistant Practice Manager, reprimanded the claimant for her failure to follow up with doctors regarding an insurance reimbursement program.
11. The Assistant Program Manager instructed temporary employees to print out patient summaries in an attempt to "meet measure" for the insurance reimbursement program.
12. Because the patient summaries were printed after the patient visits, the claimant felt the Assistant Practice Manager's actions were "fraudulent" and she feared she would be "scapegoated."
13. The claimant felt as if the employer was "building a case" in order to discharge her.

14. On 05/10/17, the Practice Manager and Assistant Practice Manager met with the claimant and informed her that she was still “not meeting expectations” and that “discharge was being discussed.”
15. The claimant believed that her discharge was imminent and was concerned it would negatively affect her finding new employment.
16. The Assistant Practice Manager said to the claimant: “Do you really think this job is working for you?” The claimant replied: “Is my job in danger?” The Assistant Program Manager answered: “Yes.”
17. The claimant, upset, telephoned her husband and informed him that she was going to resign rather than be discharged.
18. The claimant notified the employer that she was submitting her notice of resignation effective 05/31/17.
19. The Practice Manager told the claimant: “I think that’s a good choice.”
20. The claimant worked through 05/31/17.
21. On 06/14/17, the claimant filed her claim for unemployment benefits with an effective date of 06/11/17.

[CREDIBILITY ASSESSMENT:]

Both parties attended the three remanded hearings. The employer was represented by an agent. The employer presented only hearsay testimony and evidence to counter the claimant’s direct testimony and the claimant’s testimony regarding the circumstances of her separation from employment is found more reliable. The March 1, 2018 hearing was continued in order to allow the claimant time to get her subpoena for the appearance of the Practice Manager, who is no longer employed by the employer, enforced. On 04/24/18, the Review Examiner vacated the subpoena after the claimant agreed to enter into the hearing record a notarized statement by the Practice Manager in lieu of her appearance.

In her DUA fact finding, the claimant indicated that she quit her employment because: “I was not given the proper tools and training to do my job effectively. Subsequently, I was given a warning so I decided to quit (resign). I felt like I was being pushed out of my position.” At the hearing, the claimant testified that the information she provided to the DUA in the fact finding was “generalized” in an attempt “to be succinct.” In her appeal, the claimant included a note that stated: “I left work because I was dissatisfied with a decision made by upper management. I witnessed upper management make a decision that goes against the protocols, policies and procedures for meaningful use and I did not want the blame to fall on me. I left work because I felt as though my integrity for my work was being compromised.” At the hearing, the claimant testified that the purpose of the

included note with her appeal request was to “give blanket information until summoned for an appeal.” The claimant’s explanation as to the information she provided to the DUA in the fact finding is sufficient and her direct and consistent testimony at the multiple hearings is found 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 ultimate 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. We further believe that the review examiner’s credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the result reached by the review examiner is supported by the full record and free from error of law.

Because it was undisputed that the claimant resigned her position as an office manager, her qualification 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

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits. After only hearing testimony from the claimant initially, the review examiner concluded that the claimant had carried her burden. Following our review of the entire record, including the testimony from both parties and the review examiner’s consolidated findings of fact, we conclude the same.

Following a meeting with the practice manager and assistant practice manager on May 10, 2017, the claimant gave her notice of resignation. At that time, she “believed that her discharge was imminent and was concerned it would negatively affect her finding new employment.” Consolidated Finding of Fact # 15. It is well-settled law that an employee who resigns under a reasonable belief that she is facing imminent discharge does not become disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. See Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the inquiry focuses on whether, if the claimant had been discharged, the separation would have been for a disqualifying reason under G. L. c. 151A, § 25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. See Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion); White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–599 (1981).

Here, we think that the claimant had a reasonable belief that she was going to soon be discharged for performance-related issues.¹ After almost one year of employment, the claimant received three performance-related warnings over the course of approximately one and one-half months. On May 10, 2017, the claimant was told that she was still not meeting expectations and that the employer was considering discharging her. The claimant was then told that her job was in danger. Given the history of warnings, the indication that the employer was considering discharging her, and the confirmation that her job was in jeopardy, we think that the claimant had a reasonable belief that she could be discharged. Moreover, since it appears that the employer was actively considering discharge for the claimant, the record supports a conclusion that the claimant reasonably could have thought that the discharge, which would not have been for a disqualifying reason, was imminent.

We, therefore, conclude as a matter of law that the review examiner's decision to award unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning May 28, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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

¹ We note that this does not mean that there is actual evidence that the employer *was going to* discharge her. The standard is only whether the claimant could have reasonably believed that, based on the circumstances, her discharge would soon happen.

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