

0022 2055 38 (Aug. 31, 2018) – Because claimant’s unreported absences were due to domestic violence, she is eligible for benefits. Even if she did not present hospital records of treatment for injuries by her abusive boyfriend on the date of her first absence, other evidence, including police reports of domestic violence before and immediately after her absences, restraining orders, and her own undisputed testimony, showed that her separation was attributable to her need to address the physical and psychological effects of domestic violence pursuant to G.L. c. 151A, § 25(e).

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

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

Issue ID: 0022 2055 38

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 her position with the employer in June, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 19, 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 February 2, 2018. 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, she 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 pertaining to the circumstances of the claimant’s separation and whether it was attributable to domestic violence. 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 issue before the Board is whether the review examiner’s decision, which concluded that the claimant voluntarily left her job under disqualifying circumstances, is supported by substantial and credible evidence and is free from error of law, where the record after remand demonstrates that, at the time of her separation, the claimant was dealing with the physical and psychological effects of domestic violence.

Findings of Fact

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

1. The claimant's boyfriend began physically abusing her in or around 2015.
2. On August 2, 2016, the claimant called the police to her residence because her boyfriend threatened her with a firearm, said he was going to her friend's home to "shoot that up" and he was going to shoot up her residence.
3. The claimant was employed part-time as a cashier, food preparer and customer service employee for the employer, a restaurant, from October 24, 2016, until June 17, 2017.
4. The claimant's immediate supervisor was the store manager (the Store Manager).
5. The claimant's last physical day of work was June 16, 2017.
6. On June 17, 2017, the claimant did not report to work and did not report her absence.
7. On June 17, 2017, the claimant did not call the police to report a domestic violence incident.
8. On Sunday, June 18, 2017, the Store Manager sent the claimant's friend (the Friend) a text message through a smartphone messaging application, stating, "I'm gonna take it as [the claimant] quit ![sic] Haven't heard from her It's her job not yours to call for her So with that being said she quit Because she wants to pull this shit on my fuckin kids bday [sic]".
9. On Sunday, June 18, 2017, the Store Manager initiated the contact with the Friend. The Store Manager sent the Friend a message because she was frustrated she had not heard from the claimant and was aware the Friend and the claimant were friends outside of work. She told the Friend it was not her job to notify her of the claimant's absence because the claimant had not reported her absence and it was not the Friend's responsibility.
10. On Sunday June 18, 2017, the claimant did not report to work and did not report her absence.
11. On Monday June 19, 2017, the claimant obtained a note from a doctor excusing her from work between June 17, 2017, and June 21, 2017. The note stated the claimant was allowed to return to work on June 22, 2017.

12. The doctor that provided the claimant with a note did not see the claimant on June 17, 2017.
13. The doctor's note did not state what the doctor was treating the claimant for and did not state why she was unable to work.
14. The employer did not receive the claimant's doctor's note.
15. It was unknown why the employer did not receive the claimant's doctor's note.
16. On Tuesday June 20, 2017, the Friend responded to the Store Manager's text message by text message stating, "Hey im [sic] not sure if she's contacted you she was still at the hospital Sunday morning n I haven't seen her since and her phones [sic] broken sorry I can't always get on messenger or I..."
17. On Wednesday June 21, 2017, the claimant did not report to work and did not report her absence.
18. On Thursday June 22, 2017, the claimant did not report to work and did not report her absence.
19. On an unknown date during the week ending June 24, 2017, the claimant's mother (the Mother) went to the employer's store as a customer. The Store Manager asked the Mother where the claimant was. The Mother told the Store Manager she did not know and would let her know.
20. The Mother did not provide the Store Manager with the claimant's doctor's note.
21. The Store Manager did not receive an update from the Mother about the claimant's whereabouts after June 24, 2017.
22. On Friday June 23, 2017, the Store Manager the Director of Operations removed the claimant's name from the employer's schedule when they created the schedules for the future weeks because the Store Manager had not heard from the claimant since June 16, 2017, and they believed she abandoned her position.
23. On Saturday June 24, 2017, the Store Manager and an employee (the Employee 1) were scheduled to work. At the time the Store Manager [sic] closing the store, the claimant arrived to pick up her paycheck. While there, the Store Manager asked the claimant if she was okay. The claimant said she was okay, that she had been in a bar fight, she obtained her paycheck and left. The claimant did not ask about her employment status at that time.

24. On June 25, 2017, the claimant called the police because her boyfriend assaulted her, hitting her in the face, during an argument. The claimant declined to file a restraining order at that time.
25. On an unknown date, the claimant contacted the store and asked for a letter confirming her separation and the date of her separation.
26. On Thursday June 29, 2017, the Director of Operations wrote a letter for claimant that stated, "To whom it may concern, [the claimant] is no longer employed at our [store's address] Location. Her last day worked was approximately 6/16/16 (sic). [The claimant] disappeared for a week before re-appearing and by that point we had considered it voluntary job abandonment." The Director of Operations left the letter at the store for the claimant to pick up.
27. On Saturday June 17, 2017, the claimant quit her job when she failed to report to work and report her absence.
28. On Saturday June 17, 2017, the claimant quit for an unknown reason.
29. The Store Manager did not discharge the claimant.
30. On November 20, 2017, the claimant applied for and was granted a restraining order against her boyfriend with an expiration date of December 4, 2017.
31. On December 4, 2017, the restraining order was extended until May 4, 2018.
32. At the initial continued hearing held on January 24, 2018, the employer provided a signed statement dated 12/5/17 from the Employee 1 that stated, "My name is [the Employee 1] and I work at [the employer] at [the employer's address]. I was working on 6/24/17 at 7 P.M when [the claimant] came to pick up her last check. We had just locked the door and [the Store Manager] was taking out the trash. [The Store Manager] came inside and got her check for her and then brought it to her just outside of the front door." With the statement, the employer provided the Employee 1's timecard.
33. At the continued remand hearing held on June 18, 2018, the claimant provided a copy of the [City A] Police Department Summons Report [dated] August 2, 2016; the [City A] Police Department Summons Report [dated] June 25, 2017; and the restraining order dated November 20, 2017 and extended to May 4, 2018.
34. At the continued remand hearing held on June 18, 2018, the claimant provided a notarized letter from the Mother stating that the claimant was the victim of domestic violence and that the Store Manager was aware the claimant was the victim of domestic violence.

35. The claimant did not provide contemporaneous medical documentary evidence or police reports relating to domestic violence at the initial remand hearing or the continued remand hearing of her personal circumstance as to why she did not report to work on June 17, 2017.

Credibility Assessment:

At both of the initial hearings and at both the remand hearings, the claimant testified that she was the victim of domestic violence. At the continued remand hearing, she provided documentary evidence establishing that she was a victim of domestic violence.

Although the initial remand hearing was continued to allow the claimant to provide documentation showing she was hospitalized on June 17, 2017, she failed to provide such documentation. Even though the Review Examiner explained to the claimant that she could redact the reason for her hospitalization, the claimant refused to provide the documentation requested by the Review Examiner and the Board of Review because she felt the doctor's note dated June 19, 2017 was sufficient. The claimant also testified there was no police report filed for the abuse she testified to occurring on June 17, 2017 because her boyfriend threatened her and she said he had not done that before. However, the police report dated August 2, 2016 contradicts the claimant's testimony in that she told the police that not only had her boyfriend threatened to "shoot up" her residence, he threatened to do the same to her friend's residence. Further, the claimant called the police to report abuse at the hands of her boyfriend only eight (8) days after she failed to report her absence on June 17, 2017, documentation of which she provided at the hearing. Also, the text message from the Friend to the Store Manager on June 20, 2017 indicates the claimant remained in the hospital, at least overnight from June 17, 2017 to June 18, 2017, which contradicts the claimant testimony that she was only in the hospital for four (4) hours on June 17, 2017. Although the Mother wrote a statement that was notarized, confirming the claimant was a victim of domestic violence, it did not support the claimant's testimony that the Mother notified the Friend the claimant was in the hospital, asking her to contact the Store Manager or that the Mother allegedly drove the claimant to the store to drop off her doctor's note dated June 19, 2017.

Based on the information in the record obtained at the initial hearings and at the remands hearings, it cannot be concluded that domestic violence was the reason the claimant failed to return to work or report her absences after June 16, 2017.

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 except as follows. We reject the portion of Consolidated Finding # 28, which concludes that the

claimant quit for an unknown reason, as well as the portion of Consolidated Finding # 35, which states that the claimant did not provide contemporaneous police reports relating to domestic violence or as to why she did not report to work on June 17, 2017, because these findings are unreasonable in relation to the evidence presented.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 legal conclusion that the claimant is ineligible for benefits.

Much of the testimony during the hearing focused on whether or not the claimant notified the employer of her absences from June 17 through June 24, 2017. Whereas the claimant testified that she, her friend, and her mother communicated with the employer about her absences, the employer's manager testified that they had not. The consolidated findings show that the review examiner accepted the employer's testimony that the claimant was a no-call, no-show all week. *See Consolidated Findings ## 6, 10, 17, 18, and 22.* "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). We accept her findings that the claimant failed to report her absences during this week as they are reasonably supported by the employer's testimony.

We have previously held that the failure of an employee to notify her employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1). *See Olechnicky v. Dir. of Division of Employment Security*, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion). For this reason, we do not dispute the review examiner's legal conclusion that the claimant quit her job.

However, the facts in this case demand that in determining whether the claimant is eligible for unemployment benefits, we also consider a separate provision that the Legislature added to G.L. c. 151A, § 25(e). It states, in relevant part, as follows:

An individual shall not be disqualified from receiving benefits under this clause if the individual establishes to the satisfaction of the commissioner that the reason for the individual's leaving work was due to domestic violence, including: . . .

(3) the individual's need to address the physical, psychological and legal effects of domestic violence

In her credibility assessment, the review examiner states that it cannot be concluded from the information in the record that domestic violence was the reason for the claimant's failure to return to work or report her absences after June 16, 2017. 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

¹ We further note that the statement in Consolidated Finding # 9, which provides that the Store Manager initiated contact with the friend, is inconsistent with the rest of this finding and wording of the Store Manager's text quoted in Consolidated Finding # 8, which strongly suggest that the friend had initially contacted the Store Manager to report the claimant's absence. However, this fact is immaterial to our decision.

supported by “substantial evidence.” Lycurgus v. Dir. of Division of Employment Security, 391 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 evidence presented in this case, the review examiner’s statement is unreasonable.

Whether or not a separation from employment was due to domestic violence is also a mixed question of fact and law. “Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.” Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

There is no question that the claimant had a physically abusive boyfriend during the period preceding, during, and after she worked for the employer. This was shown in the claimant’s own testimony, *see* Consolidated Findings ## 1, 2, 24, 30, and 31, as well as Remand Exhibits 7, 8, 10, and 11.² Despite the employer’s store manager testimony that she was not aware of the claimant’s domestic violence situation, she conceded that the claimant would show up with unexplained bruises. The employer had further reported to the DUA that the claimant “missed work before and stated that it was due to an abusive relationship.” *See* Exhibit 6g.

In her credibility assessment, the review examiner seems to reject the notion that, on the first date of the claimant’s absence, June 17, 2017, the claimant had to be treated in the hospital for injuries caused by this abuse. We think the review examiner places undue weight on the fact that the claimant did not want to enter the hospital records into evidence.³ Although this may have been the best evidence, it is not the only evidence which the review examiner must consider. *See* G.L. c. 151A, § 39(b). “If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered.” New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 471 (1981), *quoting* Louis L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 598, 608 (1965). What we do have in the record is the claimant’s undisputed testimony that she had to spend time in the emergency room on June 17, 2017, because she had been beaten up by her boyfriend. Her hospitalization is corroborated by the friend’s statement in the text message exchange with the claimant’s manager. *See* Remand Exhibit # 12.⁴ The separate medical note from her physician,

² Remand Exhibits ## 7 and 8 are domestic violence police reports, dated August 2, 2016, and June 25, 2017. Remand Exhibit # 10 is a District Court Abuse Prevention Order issued on November 20, 2017, and extended on December 4, 2017. Remand Exhibit # 11 is a notarized statement from the claimant’s mother stating that the claimant was in a violent domestic relationship. While not explicitly incorporated into the review examiner’s findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

³ Despite being advised that they could be redacted, at the hearing, the claimant expressed privacy concerns with sharing this information with the employer. Moreover, the recorded transcript does not support the review examiner’s statement that the remand hearing was continued to allow the claimant to provide these records. Rather, it had to be continued because there was insufficient time during the May 14, 2018, hearing to hear from all of the witnesses.

⁴ Unlike the review examiner, we fail to see anything contradictory about the friend’s statement that the claimant was still in the hospital Sunday morning and the claimant’s testimony that she was there for about four hours. The review examiner did not ask the claimant what time of day or night she first entered the emergency room.

as far as it goes, also shows that another medical provider determined that the claimant was unable to report for work for five days, beginning June 17, 2017. *See Exhibit # 4.*

We also reject the review examiner's suggestion that the June 17, 2017, violence did not occur simply because the claimant did not, on that date, report it to the police. We find nothing contradictory about the claimant's statement that, on this date, she did not call the police because she was in fear of her life and the fact that she produced police reports for two other incidents. During the hearing, the claimant clearly and articulately explained the difference between this incident and the two others when she did contact the police.⁵ We believe the review examiner failed to appreciate the nature of the domestic violence occurring in this case, improperly substituted her own judgment for the claimant's actual state of mind.

Here, by the manager's own account, we have an employee that rarely called out of work. She would show up at her job with unexplained bruises.⁶ Beginning June 17, 2017, she missed a week of work – at the beginning of which she needed treatment in the emergency room and at the end of which the boyfriend again physically assaulted her. *See Consolidated Finding # 24.* In addition to her testimony, the claimant presented into evidence two police reports of domestic violence at the hands of her boyfriend and a restraining order. *See Consolidated Findings ## 2, 24, 30, and 31.* On this record, we are satisfied that the separation arising from the claimant's failure to appear for work in June, 2017 was due to domestic violence.

We, therefore, conclude as a matter of law that the reason for the claimant's leaving work was due to her need to address the physical and psychological effects of domestic violence within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits beginning June 11, 2017, and for subsequent weeks if otherwise eligible.

⁵ The claimant testified that, on June 17, 2017, "I was told that if I was to call the police and make a report that he would kill me before the police got there . . . Out of fear, I chose not to call the police. . . I chose not to call the police afterward because he'd never really threatened to kill me but I truly believed him that day." On June 25, 2017, she called the police, because "In that moment, I was not in fear for my life. He was not present. He fled before the police had gotten there." She further explained that she was not in fear of her life on August 2, 2016, because she was with her cousin and aunt at her mother's house and though he threatened her with a firearm, she knew he did not have access to one. These statements are also part of the undisputed testimony in the record.

⁶ These manager statements were not contested by the claimant.

Pursuant to G.L. c. 151A, § 14(d)(3), benefits shall not be charged to the employer's account but shall be charged to the solvency account.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 31, 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

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