

Assistant Director of Nursing was not fired, but resigned voluntarily when she failed to report for work after several days of illness. Even if she had shown reasons that constituted good cause attributable to the employer or an urgent, compelling, and necessitous basis for leaving, she failed to make reasonable efforts to preserve her job or show that it would have been futile.

**Board of Review
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Issue ID: 0022 2273 89

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 reverse.

The claimant separated from her position with the employer on June 19, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 25, 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 February 6, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been terminated from her employment without evidence that she engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer. Thus, the review examiner concluded that the claimant 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 in order to obtain and consider further evidence that the employer presented in its appeal. Both parties participated in 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 original decision, which concluded that the claimant had not voluntarily left her employment and that she is eligible for benefits, is supported by substantial and credible evidence and is free from error of law in light of the consolidated findings of fact following the remand hearing.

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 for the employer, a long term care and rehabilitation facility, as Assistant Director of Nursing from June 2015 until June 19, 2017. She last physically worked on June 12, 2017.
2. As part of her job duties, the claimant was responsible for maintaining sensitive work-related records.
3. On June 12, 2017, the claimant left work early due to symptoms related to chronic high blood pressure.
4. The claimant called out sick from work on June 13, 2017 and June 14, 2017 due to continuing symptoms related to high blood pressure. She experienced dizziness and headaches during this time, and self-treated with a previously prescribed blood pressure medication.
5. On both June 13, 2017 and June 14, 2017, the claimant notified her supervisor, the Director of Nursing, of her absences by text. She had adequate sick time to cover her absences. On June 14, 2017, the DON suggested that the claimant take off the remainder of the week since she was not yet feeling well.
6. In June 2017, the employer was audited by the State Department of Public Health. On June 16, 2017, the DPH informed the DON that they wished to review the 2017 records that the claimant was responsible for maintaining.
7. The DON knew where the claimant normally kept the records in question and knew what the binder of applicable documents looked like.
8. On June 16, 2017, the DON opened the claimant's office to retrieve the records but did not find them in their designated location.
9. The DON believed that, based on the appearance of the claimant's office, she had removed her personal effects from the workplace on an unknown prior date. She observed the claimant's sweater and lab coat but did not see a pair of dolls previously kept by the claimant.
10. The claimant had recently rearranged her office but did not remove her personal belongings or plan to quit her job.
11. The DON and a second employee searched the claimant's office again on June 17, 2017.
12. They located a binder labeled 2014 – 2016, which contained records through November 2016. The DON found records for 2016 mixed in with documents

from 2015 but was unable to locate any records more current than November 2016.

13. The claimant had removed some of the older records for the years marked on the binder and moved them to a file cabinet to make room in the binder for newer documents.
14. On June 17, 2017, the claimant's scheduled day off, she received a text message from the DON. The DON stated that it appeared the claimant had quit her job. The claimant's supervisor indicated that she was unable to locate any of the specified records for 2017, and she felt it was the claimant's responsibility to show her where the records were and / or to get the records to the employer.
15. The claimant responded providing a physical description of the binder in which the records were contained, as well as the location of the binder.
16. The DON reported that [sic] binder described contained no documentation for 2017. The claimant disputed the DON's claim and explained that the records were current through May 2017 – the most current data available at the time. The DON then asked where in the binder the records were located, and whether the documents were in the same sleeve as 2016.
17. The claimant did not respond to the portion of the June 17, 2017 text regarding her alleged quit because she was focused on the DON's allegation that the records for which she was responsible were missing.
18. It is unknown why the claimant failed to respond to her supervisor's specific questions regarding the location of the necessary records in the binder / sleeves.
19. The claimant planned to return to work when she recovered from her illness.
20. On June 19, 2017, the claimant again texted her supervisor that she would be out ill.
21. The DON responded that the records in question had not yet been located, and she requested that the claimant appear at the office to assist in locating the files. She reminded the claimant that the documents were being requested by the state, and informed the claimant that she remained unable to locate the records even after taking apart the binder.
22. The employer did not inform the claimant that she had been discharged on or before June 19, 2017.
23. The claimant did not respond to the employer's message.

24. The claimant did not appear on June 19, 2017 because she felt she had already provided the DON with all information available regarding the location of the records.
25. Additionally, based on the DON's June 17, 2017 text expressing her belief that the claimant had quit, the claimant believed she had already been terminated by the DON.
26. The claimant did not attempt to clarify that she had not quit her job because she was intimidated by the DON's general demeanor, which she felt to be overly critical. She also believed that the DON had made a final decision to end her employment and that it would be fruitless to discuss the matter further.
27. Between June 19, 2017 and June 30, 2017, the only communication the claimant received from any representative of the employer was a personal voicemail from the business manager.
28. On approximately June 30, 2017, the claimant received a letter from the employer stating that she had been terminated for job abandonment. The document also expressed the employer's belief that the claimant had taken the records in question. The claimant was asked to return her office keys, which she did via certified mail on or around July 5, 2017.
29. Effective June 19, 2017, the claimant left work when she failed to respond to her supervisor's text message or either appear for or call out from any scheduled shifts beyond that date.

Credibility Assessment:

The credibility of several of the claimant's statements during the remand hearing were questionable.

She testified that she did not appear at the office to assist the employer in locating the missing records on June 19, 2017 because she believed she had been terminated via the DON's June 17, 2017 text message. If she believed she had been separated from employment on June 17, 2017, it is unclear why the claimant called out sick from work on June 19, 2017.

The claimant testified that she failed to respond to the employer's June 17, 2017 text, which presented specific questions regarding the location of the documentation in question, because she felt she had already provided her supervisor with all available information. At the remand hearing, the claimant stated that she had moved some of the older records to a file cabinet from the binder in which they were usually stored. It is unclear why she would not deem this information relevant to relay to the employer.

Knowing that the employer believed the claimant had quit her job, it is unclear why a reasonable person would make no effort to clarify that was not the case and to maintain their employment. If the claimant was intimidated by her supervisor and uncomfortable approaching her directly, she clearly had other resources at her disposal, including the business manager with whom she had a personal relationship.

NOTE:

The text communications referenced in the Finding of Facts [sic] have been marked as Remand Exhibit 7.

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 Consolidated Findings ## 24, 25, and the portion of Consolidated Finding # 26 stating that the claimant believed the Director of Nursing had made a final decision to end her employment. We do so in light of statements in the review examiner's credibility assessment that do not credit the claimant testimony captured in these findings. 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.

In her decision, the review examiner analyzed the claimant's separation as an involuntary discharge. The consolidated findings and credibility assessment after remand no longer support that conclusion. Specifically, the review examiner does not find credible the claimant's testimony that she believed the Director of Nursing terminated her in the June 17, 2017, text message. 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). As the review examiner's assessment suggests, it would not make sense for the claimant to call out sick on June 19, 2017, if she truly believed she had been fired two days earlier. This credibility assessment is reasonable in relation to the evidence presented.

As Consolidated Finding # 29 indicates, the review examiner now concludes that the claimant left work voluntarily. Voluntary separations from employment must be analyzed pursuant to the following provisions under G.L. c. 151A, § 25(e), which state:

[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 language in these provisions place the burden of proof upon the claimant.

To determine if the claimant has carried her burden to show good cause under the above-cited statute, we must first address whether the claimant had a reasonable workplace complaint. *See Fergione v. Dir. of Division of Employment Security*, 396 Mass. 281, 284 (1985). Since the claimant maintained that she had been fired, she did not directly testify about a particular workplace complaint that caused her to resign. Consolidated Finding # 26 does state that the claimant felt intimidated by the Director of Nursing's general demeanor, which the claimant felt to be overly critical. We also consider the claimant's earlier written response to the DUA's fact-finding questionnaire, which stated:

The environment had become increasingly hostile which made for a very difficult work environment. The last few days I was berated and humiliated in front of other employees, department heads and also subordinates. I began to feel anxious and began having episodes of hypertension with accompanied symptoms of dizziness, headache and facial numbness along with tachycardia.

*See Exhibit # 2, page 5.*¹ Conceivably, a work environment that causes illness could constitute good cause to leave employment or, perhaps, be the basis for determining that the work environment created urgent, compelling, and necessitous reasons to resign. *See, e.g., Carney Hospital v. Dir. of Division of Employment Security*, 382 Mass. 691 (1981) (rescript opinion) (maid's reasonable belief that her work environment caused a recurrent, severe skin infection constituted urgent, compelling, and necessitous circumstances to leave her job).

However, even if we were to accept these complaints as true, an individual who voluntarily leaves employment due to an employer's action or due to urgent, compelling, and necessitous reasons has the burden to show that she made a reasonable attempt to correct the situation, or that such attempt would have been futile. *Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93-94 (1984); *Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development*, 66 Mass. App. Ct. 759, 766 (2009). Nothing in the record suggests that the claimant made such efforts or shows that such efforts would have been futile. As noted in the review examiner's credibility assessment, even if the claimant felt intimidated and uncomfortable approaching her supervisor, it would have been reasonable to reach out to the employer for help in another way, such as through the business manager with whom the claimant had a personal relationship.

In sum, we conclude as a matter of law that the claimant was not discharged from employment; she voluntarily resigned when she stopped reporting for work. *Olechnicky v. Dir. of Division of Employment Security*, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his 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)). We further

¹ If we were to rely upon the assertions in this statement in rendering our decision, we would first remand the case again in order to afford the employer an opportunity to contest it. However, in light of our decision to deny benefits, a further remand is not necessary.

conclude that the claimant has not demonstrated good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving. Therefore, she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 11, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 27, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

AB/rh