

Where the employer approved the claimant to be absent for a 2-week vacation, but the claimant called out and gave the employer excuses for why she could not go to work both before and after the approval period, the claimant is disqualified under G.L. c. 151A, § 25(e)(2), because the review examiner did not find the claimant's excuses for being out to be credible or supported.

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Peter Sliker, 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 was discharged from her position with the employer on July 14, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 17, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 29, 2017.

Benefits were awarded after the review examiner determined that the claimant had not 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 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 accepted the employer's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's vacation requests and reasons for not reporting to work prior to and after she traveled to Kenya. 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 not subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact indicate that the claimant was approved to take a two-week vacation, but was actually out of work longer than that without authorization or reasonable excuse.

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 certified nursing assistant (CNA) for the employer, a nursing home. The claimant began work for the employer on February 29, 2016.
2. The employer maintains an attendance policy which states in part: "If you do not report to work and do not call your supervisor for two (2) shifts, you will be considered to have resigned from your position."
3. The employer maintains a scheduling policy which states in part: "All employees of (Employer) are allowed a maximum of 2 weeks (14 consecutive days) vacation at one time throughout the year, regardless of peak vacation months and regardless of department." The policy also states: "A maximum of 2 weeks will be approved during the summer months."
4. The claimant was aware of the employer's policies.
5. The claimant's father and her husband's family live in Kenya.
6. On Sunday, February 5, 2017 the claimant submitted a Time Off / Special Request form to the employer requesting vacation from June 20, 2017 to July 13, 2017.
7. On Monday, February 6, 2017 the claimant purchased airline tickets for her and her husband to travel to Kenya.
8. The employer's scheduler returned the Time Off / Special Request form to the claimant declining her request. The reason for declining the request was "Only 2 weeks are granted for summer months. Please pick which 2 weeks you are taking off."
9. On March 20, 2017 the claimant submitted a Time Off / Special Request form to the employer requesting vacation from June 25, 2017 to July 9, 2017. On May 5, 2017 the scheduler approved the claimant's vacation request.
10. The claimant did not change the travel dates of her airline tickets. She traveled to Kenya before June 25, 2017.
11. The claimant was scheduled to work on June 20, 2017, June 22, 2017 and June 24, 2017. She was scheduled to return to work after her vacation on Sunday, July 9, 2017.

12. On June 20, 2017 the claimant called out sick. On June 22, 2017 the claimant found another employee to cover her shift. On June 24, 2017 she called out sick.
13. On Friday, July 7, 2017, the claimant called the employer and spoke with the scheduler. She told the scheduler her car broke down and they missed their flight. She told her they had a flight for July 12, 2017. The scheduler told the claimant she would discuss her circumstances with the director of nursing (DON) and call her back.
14. The scheduler discussed the claimant's circumstances with the DON. They agreed that when the claimant returned they would need to discuss her attendance with her.
15. The scheduler called the phone number she had for the claimant which is the phone she uses in the United States. There was no answer. She left voice mail messages asking the claimant to call.
16. The claimant did not return the scheduler's call.
17. The claimant did not work as scheduled on July 9th and July 11th. Her next scheduled shift was July 14, 2017.
18. On July 14, 2017 the claimant went to work. She was instructed to leave work and call the human resources manager.
19. The claimant met with the DON, the administrator and the human resources manager on the telephone. She was discharged.

Credibility Assessment: The claimant testified at the hearing she could not recall the date she purchased the tickets. When it was suggested at the hearing that it would be the same date she received the ticket protection confirmation (Exhibit 12) she did not disagree. It is concluded the date of the ticket protection confirmation is the date of the purchase.

Credibility Assessment: At the hearing the claimant testified that she purchased airline tickets departing the United States on Sunday, June 25, 2017, allowing her to work until her approved vacation, and returning on Friday, July 7, 2017, allowing her to return prior to the end of her approved vacation. However the claimant provided no record of her travel despite knowing the issue of her travel dates has been a question since her first hearing in September 2017. She provided no e-mail, tickets or any other documentation even after the record was left open. The claimant was also offered the opportunity to provide copies of medical records supporting her allegation that she received medical services in the United States on June 24, 2017. These records should be available from her medical provider. She provided no such records. The claimant testified she did not return to the United States on July 7, 2017 because her brother-in-law's car broke down

on the way to the airport. She provided no evidence to support this allegation. Given the lack of credibility and evidence to support her testimony it is not known why the claimant did not return to the United States on July 7, 2017. It cannot be concluded she failed to return to work due to circumstances outside of her control. It is concluded she left the United States before June 25, 2017 and did not alter her original travel plans. It is concluded she purchased her tickets, did not change them, and then made excuses for the days she would not work, so that she would actually have off more than two weeks.

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 credibility assessments and deems them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible to receive unemployment benefits.

The DUA initially determined that G.L. c. 151A, § 25(e)(1) applied in this matter, because the claimant "failed to return from an approved leave." *See* Exhibit # 8. However, we agree with the review examiner that the claimant was discharged from her job. Although the claimant did not return to work on July 9, 2017, which was her first scheduled day of work after her two-week approved vacation, she did report to work on July 14, 2017. Therefore, we cannot reasonably conclude on this record that the claimant abandoned her job. The review examiner found in Consolidated Finding of Fact # 19 that the employer informed the claimant that she was discharged. Thus, the employer initiated the separation, and G.L. c. 151A, § 25(e)(2), controls the outcome of this case. That section of law, in pertinent part, is 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. Following the initial hearing, the review examiner concluded that the employer had failed to carry its burden. After reviewing the entire record, including the consolidated findings of fact, we disagree with that assessment of the evidence.

The employer discharged the claimant after she failed to return to work on July 9, 2017, following a two-week approved vacation. Substantial and credible evidence in the record indicates that the claimant knew that she was to return to work on July 9, 2017. *See* Consolidated Findings of Fact ## 9 and 11. Instead of returning on July 9, she contacted the

employer on July 7, 2017, to say that she could not return to work in time due to a transportation problem in Kenya. She stated that was returning to the United States on July 12, 2017. *See Consolidated Finding of Fact # 13.*

In his decision, the review examiner credited all of the claimant's testimony regarding the reasons for why she could not return to work on July 9, 2017. However, with his consolidated findings of fact, the review examiner found the claimant's explanations to be not credible. He noted that the claimant had trouble recalling her actual travel dates and she presented no documentation to show the dates she left and returned to the United States. He noted that the claimant had ample opportunity and time to find such documentation. Thus, he indicated in his assessment that, although the claimant did call out from work on July 7, 2017, the asserted reasons for her absence were not credible. Consequently, although the findings indicate that the claimant called out on July 7, there is no finding that the claimant actually had car trouble in Kenya, or that the claimant actually missed a flight scheduled to leave Kenya on July 7, 2017. Instead, he indicated in his credibility assessment that the claimant purchased airline tickets to go to and return from Kenya outside of the approved vacation dates (June 25 through July 9), "she did not change them, and then made excuses for the days she would not work, so that she would actually have off more than two weeks." The review examiner's credibility assessment is supported by a full, fair, and reasonable review of the record. Therefore, we will not disturb it or the findings based on it. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

We are then left with a series of events which shows that the claimant was to return to work on July 9, she did not have authorization to be out on or after July 9, there was no extenuating reason for her to be out of work on or after July 9, and the employer discharged her as a result. The legislative intent behind G.L. c. 151A, § 25(e)(2), is "to deny benefits to a claimant who has brought about h[er] own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." *Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979). Unemployment benefits are provided to claimants who are "thrown out of work through no fault of their own." *Leone v. Dir. of Division of Employment Security*, 397 Mass. 728, 733 (1986), *citing Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002, 1003 (1985). In this case, the employer reasonably expected the claimant to return from her vacation on July 9, 2017, in accord with its written policy limiting a vacation to two weeks. It reasonably expected that the claimant would abide by this policy. Even if the claimant was unaware of the written policy,¹ she was aware of the request approval form which stated that she was to return to work on July 9, 2017. Although she knew that she needed to return on July 9, she did not. From what we can discern from the findings, the claimant's testimony, the documentary evidence, and the review examiner's credibility assessment, the claimant attempted

¹ The review examiner found that the claimant was aware of the policy. Consolidated Finding of Fact # 4. During the remand hearing, the claimant indicated that she was not aware of them. The employer submitted the policy to the review examiner after the remand hearing ended. The review examiner entered the policy and the claimant's acknowledgment of it into the record as Remand Exhibit # 7. Although it was irregular for the review examiner to not allow the claimant an opportunity to object to the exhibit, the claimant's initials on the acknowledgement of the "Scheduling Policy" match her initials on a document already in the record, the Attendance Policy. *Compare* Remand Exhibit # 7, p. 5 *with* Exhibit # 7, p. 6. We think there was no error affecting the outcome of the case in the review examiner entering the policy into the record and making findings based on it. Moreover, given his overall credibility assessment, it is no surprise that he did not make a finding that the claimant was unaware of the policy, as she testified.

to cover up the fact that she was taking a vacation which was over two weeks in length. Indeed, with her call-outs prior to the vacation, and the transportation excuse at the end of the vacation, her time off matched up exactly with what she initially requested off from the employer.² In short, she was out of work multiple days without authorization and without a credible excuse. Her absence from work without authorization, which was specifically contrary to the approved vacation period, constituted deliberate misconduct. Based on the review examiner's credibility assessment and lack of findings that sickness, personal issues, or transportation issues actually prevented from the claimant reporting to work as scheduled, we further conclude that the misconduct was done in wilful disregard of the employer's interest without any mitigation.

We, therefore, conclude as a matter of law that the review examiner's initial decision to award unemployment benefits is not supported by substantial and credible evidence or free from error of law, because the review examiner's consolidated findings of fact and the entire record indicates that the claimant was absent without excuse or authorization before and after her two-week approved vacation period contrary to the employer's expectations about her attendance.

² On February 5, 2017, the claimant requested to have off from June 20, 2017, through July 13, 2017. She was to return to work on July 13. *See* Exhibit # 11a. Her time away from work appears to match up with these dates, even though she was only approved to be off from June 25, 2017, through July 9, 2017 (return to work on July 9). *See* Exhibit # 11b and Consolidated Finding of Fact # 9. By calling out from work on June 20, June 22, and June 24, and then asserting that she could not return to the United States until July 12, 2017, *see* Consolidated Findings of Fact ## 11, 12, 13, 17, and 18, the claimant was effectively off from work from June 20 through July 13 (the original vacation request). As the review examiner suggests in his credibility assessment, we decline to conclude that this was a mere coincidence.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 25, 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 - February 27, 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.

SF/rh