

The claimant's belief that she was discharged was not reasonable, as her belief was based solely on the word of a coworker, who did not have any supervisory role over the claimant.

**Board of Review
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Issue ID: 0022 9219 57

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 September 5, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 25, 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 January 27, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 remanded the case to the review examiner to obtain additional testimony and documentary evidence pertaining to parties' schedules and duties. 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 reasonably believed she had been discharged by the employer, is supported by substantial and credible evidence, where, following remand, the record indicates the claimant relied solely on the statement made by a co-worker.

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 a deli manager for the employer, a convenience store/ gas station, from 10/17/16 through 09/05/17. The claimant's rate of pay was \$14.00 per hour.
2. The existence of any applicable policy is unknown.
3. The employer's expectation is unknown.
4. The claimant was regularly scheduled to work 5:45 a.m. – 1:00 p.m.; the claimant's immediate supervisor had revised her schedule at least one week prior to 09/05/17.
5. On 09/05/17, the claimant was scheduled to work 5:45 a.m. – 12:00 p.m.
6. On 09/05/17, the claimant was not feeling well, but reported to work.
7. During her shift, an employee who was scheduled to work that day sent the claimant a text message stating she was quitting and not reporting to work.
8. The claimant – who had a scheduled doctor's appointment after her shift – had no one to cover the deli (inside the convenience store) after her shift ended since the employee resigned.
9. The claimant telephoned the President to inform her of the situation. The claimant telephoned the President because her immediate supervisor was on a leave of absence.
10. The dates the immediate supervisor's leave of absence began and ended were not established.
11. The President reminded the claimant it was her responsibility as manager to arrange coverage.
12. As a manager, the claimant was responsible for managing coverage of the store. In the past, if no coverage was available, the immediate supervisor would close the deli, which was located within a convenience store.
13. The claimant told the President she was ill and needed to go to her doctor's appointment.
14. The President told the claimant: "You are not my fucking priority. Put [convenience store cashier] on the phone."
15. The claimant handed the phone to the convenience store cashier who spoke to the President.

16. While still at work, the claimant's immediate supervisor sent her a text message informing her that he had returned from his recent leave of absence.
17. The claimant told him about the employee who had resigned that day.
18. At 11:22 a.m., the claimant sent the immediate supervisor a text message that stated: "Glad you are back have you herd anything if I am closing at 1:00 or is someone coming in?" [sic]
19. Prior to leaving the store, the claimant was made aware that the cashier from the convenience store would cover the deli.
20. At 12:00, the claimant left work and went to her doctor's appointment.
21. The doctor provided the claimant with a note to give her employer stating she should not report to work from 09/05/17 through 09/06/17.
22. The claimant sent the immediate supervisor a text message that stated: "How am I expected to go back after I walked out on [President]?"
23. The immediate supervisor responded: "Apologize to [President]."
24. The claimant replied to her supervisor a copy of the doctor's note and a text message that stated: "No way I am sick and I was not staying at work when I had a Dr. Appointment. My doctor has me out today and tomorrow. I have a bacterial infection."
25. The claimant did not call the President and apologize because she had "swore at" her in the previous day's telephone conversation.
26. On 09/06/17, the claimant did not report to work per her doctor's instructions.
27. At 6:15 a.m., the convenience store cashier telephoned the claimant on her home phone and asked her the procedure for ordering.
28. The claimant told the cashier that she would take care of ordering when she returned to work on 09/07/17.
29. The cashier said to the claimant: "I'm sorry, you've been replaced."
30. At 11:00 a.m., the immediate supervisor contacted the claimant and informed her that he had been discharged.
31. The claimant told him what the cashier said to her that morning; the immediate supervisor told the claimant he had no idea about her employment status.

32. The claimant believed she was discharged.

33. On 09/24/17, the claimant filed her claim for unemployment benefits with an effective date of 09/24/17.

Credibility Assessment:

Both parties and the employer's attorney attended both remand hearings. The first remand hearing was continued to give both parties the opportunity to obtain and submit into evidence multiple documents requested by the Board of Review. At the continued remand hearing, the employer provided only a DUA Notice of Disqualification under Section 25(e)(1) effective 09/03/17 pertaining to the claimant's immediate supervisor. The claimant provided hard copies of text messages between herself and the immediate supervisor on 09/05/17, including her doctor's note. The claimant obtained phone records from both her cell phone and land line for 09/05/17 and 09/06/17. The claimant testified that the cell phone records do not show the cashier called her cell phone on 09/06/17 and the land line provider sent the claimant only a list of outgoing calls and the claimant did not believe she had time to obtain additional information from the company showing incoming calls. The claimant testified that she referred to the cashier as a "customer" in her fact finding because the cashier – who worked primarily in the convenience store - frequented the deli she managed as a customer as well. Further, the claimant acknowledged throughout the hearings that her recollection as to whether her contacts with the cashier and the immediate supervisor were through text messaging, verbal telephone conversations, or both which sufficiently explains the lack of evidence regarding the existence of text messages for some of the conversations. In contrast, the employer provided little additional testimony and although afforded the opportunity failed to provide all of the specific documents requested by the Board of Review. In the present case, the claimant's testimony and corroborating evidence is found more reliable than the employer.

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. 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was discharged from her employment. We believe that the review examiner's consolidated findings of fact support the conclusion that the claimant voluntarily left her employment without good cause attributable to the employer.

The review examiner originally concluded that the claimant had been discharged from her employment. However, after reviewing the consolidated findings of fact, we find that the review examiner's conclusion is not supported by the substantial and credible evidence in the record.

Thus, we conclude that G.L. c. 151A, § 25(e)(2), does not apply. Rather, we believe the claimant's 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

The review examiner found after both the initial hearing and the remand hearings that the claimant believed she was discharged, because a coworker informed her that she had been replaced. This exchange happened the day after the claimant had an argument with the employer's president regarding the employer's expectation that the claimant find coverage for an employee who quit unexpectedly. It does not appear on the record before us that the claimant inquired of the co-worker the source or accuracy of this information. After speaking with her coworker, the claimant inquired about the status of her job with her supervisor, but he informed her that he had just been fired and was unaware of the claimant's employment status. Following this conversation, the claimant did not attempt to either validate the information conveyed by the co-worker or clarify the status of her employment. The claimant could have readily have done so. The claimant had the president's contact information, as she had been dealing with her regarding any issues at work while her supervisor had been out on leave, but she chose not to contact her regarding the status of her employment. Instead, the claimant relied solely on the word of her coworker, who had no supervisory role over the claimant.

In light of the foregoing, we conclude that the claimant's belief she was discharged was not reasonable. The claimant abandoned her job without good cause when she failed to return to work after speaking with her coworker.

We, therefore, conclude as a matter of law that the claimant quit her job without good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1), as her belief that she was discharged was not reasonable.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending September 24, 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 - July 30, 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.

SVL/rh