

Where the claimant was discharged for being absent from work due to his arrest and incarceration, and he did not commit the acts for which he was arrested, his is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2). Because the claimant was only absent from work for one or two days before being separated by the employer, and the claimant's father notified the employer about his son's absence on both days, the claimant did not abandon his job and G.L. c. 151A, § 25(e)(1) does not apply.

**Board of Review
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Issue ID: 0023 0241 74

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 his position with the employer around June 23, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 3, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant via telephone, the review examiner modified the agency's initial determination and denied benefits in a decision rendered on January 27, 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, 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 regarding the circumstances of the claimant's arrest. Both parties attended the remand hearing, which was conducted via telephone. 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 decision, which concluded that the claimant effectively quit his employment pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as the General Manager for the employer, a restaurant, from June 12, 2017 until June 21, 2017.
2. The employer's Owner (the Owner) supervised the claimant.
3. On June 20, 2017 at approximately 10 p.m., the claimant's wife (the Wife) attacked the claimant. The claimant did not strike or push the Wife. The claimant did not abuse the Wife.
4. On June 21, 2017 at approximately 7:30 p.m., the claimant was arrested and incarcerated for domestic violence. The claimant was charged with domestic violence.
5. The claimant told police officers arresting him he had been attacked and did not engage in domestic violence.
6. When arrested and incarcerated, police told the claimant his bail hearing would be set for July 5, 2017.
7. Around June 21, 2017, the claimant's friend (the Friend) notified the claimant's father (the Father) the claimant had been arrested and incarcerated.
8. Around June 22, 2017, the Father called the restaurant and spoke with an unknown male and an unknown female, telling them the claimant had been incarcerated and would not be able to work as scheduled.
9. Around June 22, 2017, the Father called the restaurant and obtained the Owner's cell phone number.
10. Around June 23, 2017, the Father called the Owner's cell phone, told the Owner the claimant had been incarcerated, and would not be able to return to work until his release in July 2017.
11. Around June 23, 2017, the Owner told the Father he did not want to be involved with the claimant, asked the Father to return the claimant's keys, and told the Father the claimant's pay check was awaiting pick up.
12. On July 5, 2017, the claimant had a bail hearing.
13. On July 5, 2017, the claimant was released from prison.
14. After July 5, 2017, the claimant contacted the Owner's cell phone and left a message indicating he wanted to return to work. The Owner did not respond.
15. As of the date of the unemployment hearing, the claimant has not entered any plea regarding the charge of domestic violence.

16. On January 30, 2018, the Rhode Island District Court dismissed the charges against the claimant.
17. On February 15, 2018, the claimant's motion to seal the court proceedings against him was granted.
18. The claimant did not tell any employer personnel he quit or would not return to work.
19. The Father did not tell any employer personnel the claimant quit or would not return to work.

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 effectively quit his employment pursuant to G.L. c. 151A, § 25(e)(1). Rather, as outlined below, we believe the consolidated findings compel a conclusion that the claimant was discharged from his employment pursuant to G.L. c. 151A, § 25(e)(2), and that his discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy.

In determining the applicable section of law to apply to the claimant's separation, the review examiner initially applied G.L. c. 151A, § 25(e)(1), which is the portion of the statute applicable to resignations from employment. However, this is a legal rather than a factual question. While it is up to the review examiner to determine the facts based on the record before him, on appeal, "[a]pplication 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 evidence in the record that suggests that the claimant intended to quit his employment. The consolidated findings state that neither the claimant nor his father ever indicated to the employer he wished to do so. Rather, after his last day of work on June 21, 2017, the claimant was temporarily unable to work due to his arrest and incarceration. It is not clear from the record whether the claimant was scheduled to work on June 22, 2017, and June 23, 2017¹. However, the consolidated findings state that the claimant's father contacted the employer on June 22, 2017, and June 23, 2017, to explain that his son would be absent due to his arrest. During the phone call on June 23, 2017, the employer's owner indicated that he did not wish to continue the employment relationship. At this point, it is clear that the claimant's employment was terminated.

¹ Neither the claimant nor the employer commented on this in their testimony. The claimant's father testified that June 22, 2017, was the claimant's scheduled day off.

The failure of an employee to notify his employer of the reason for an absence from work may be considered tantamount to voluntarily leaving 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). Here, the claimant was only absent from work for, at most, two days before the employer ended his employment. And the employer, via the claimant's father, was notified of the claimant's absence and the reason behind it. In light of these facts, we conclude as a matter of law that the claimant was discharged from his employment.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), 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 . . . (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 provision of the statute, "[T]he burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979).

In this case, it appears that the employer discharged the claimant for being arrested on domestic violence charges and being absent for one or two days. Under either the deliberate misconduct standard or the knowing violation standard, the employer must establish not only that the alleged conduct actually occurred, but also that the claimant did so deliberately or knowingly. In this regard, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984).

The question is whether the claimant intentionally committed the acts for which he was arrested and incarcerated, and whether he was intentionally absent from work. After remand, the consolidated findings state that the claimant's wife was the aggressor in the incident in question, that the claimant did not in fact strike his wife, and that the claimant was unable to report to work because he was incarcerated from June 21, 2017, until July 5, 2017. While the review examiner did not explicitly prepare a credibility assessment, his credibility assessment is implicit in his findings of fact. See Swansea Water District v. Dir. of Unemployment Assistance, No. 15-P-184, 2016 WL 873008 (Mass. App. Ct. Mar. 8, 2016), *summary decision pursuant to rule 1:28* (the findings "implicitly determined that that affidavits lacked credibility, including findings that they were not notarized and that the positions stated in the affidavits were contrary to positions the affiants took while commissioners . . ."). Unless the review examiner's findings 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). In

this case, the claimant's testimony was consistent and reasonable, while the employer presented no contradictory evidence. Thus, the review examiner's findings are eminently reasonable in relation to the record before us.

We, therefore, conclude as a matter of law that the claimant was discharged and that his discharge was not 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 within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 1, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 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.

JRK/rh