The claimant quit in reasonable anticipation of discharge, as the owner told the claimant that he wondered if they were better off parting ways and that if the other owner saw the claimant's terrible numbers, the claimant would be let go quickly and easily. The record indicates that if the claimant had been discharged, it would have been for poor performance and not due to deliberate misconduct or a knowing policy violation. Therefore, he is eligible for benefits.

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

Issue ID: 0023 2546 22

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 affirm.

The claimant resigned from his position with the employer on October 20, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 28, 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 December 20, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to give the employer an opportunity to testify and to obtain documentary evidence pertaining to the cause of the claimant's separation from employment. 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 conclusion that the claimant voluntarily left employment for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant gave his resignation because he believed he would soon be discharged.

Findings of Fact

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

1. The claimant was employed full-time as a General Manager by the employer, a fast food restaurant, from March 3, 2016 until October 20, 2017 when the claimant quit.

2. The claimant's duties consisted of managing 10 to 16 of the employer's restaurants.

3. The claimant worked 6 days a week.

4. The claimant's rate of pay was $1700.00 per week.

5. The employer's Owner was the claimant's immediate supervisor.

6. Prior to working for the employer, the claimant was a Vice President in a corporate environment.

7. The claimant's professional experience is in Finance.

8. The claimant did not have any prior experience managing a fast food restaurant prior to his employment with the employer.

9. The claimant and the Owner had been friends for 15 years prior to the claimant's employment.

10. The claimant was dissatisfied with the position because the position required the claimant to be available 24 hours a day, 7 days a week, and he lacked experience in the fast food industry.

11. The Owner was dissatisfied with the claimant's work performance because the claimant's tenure included negative sales, manager complaints and a high turnover. Employees managed by the claimant complained to the Owner that that they did not feel supported by the claimant in areas, such as help when registers are not functioning or issues with vendors.

12. The Owner admittedly does not believe the claimant's poor work performance was due to deliberate lack of effort from the claimant.

13. On September 24, 2017, at 8:08 p.m., the Owner sent an email to the claimant stating, "Your numbers are off the charts terrible. If (other owner) sees these numbers you're gone, that quick, that easy. Honestly, I'm starting to wonder if we are better off just parting ways here." The Owner informed the claimant that he was going to work on some ideas regarding improving sales that he would send to the claimant.

14. On September 24, 2017, at 8:12 p.m., the claimant replies, "I get it. I'm not cut out for this biz. I am not sure what to do. I can give you an end date if you want. I have a few things on the job front just nothing firm yet. Let me know."

15. On September 24, 2017, at 8:18 p.m., the Owner replies, "Yes sure, what do you have for an end date?"

16. On September 24, 2017, at 8:18 p.m., the claimant replies, "10/20, if not before".

17. On September 24, 2017, at 8:24 p.m., the Owner replies, "Ok. I will plan on your last day being 10/20, at least. Until then, please just keep working. I'm sorry this didn't work out dude. Honestly if you weren't a friend I would have fired you months ago. But it's gotten to the point where shit is just falling apart. With a month left do what you can to keep these stores together as much as possible."

18. The claimant gave the Owner his notice of resignation with an effective date of October 20, 2017 to avoid being discharged.

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.

Since the claimant quit his employment, we analyze his eligibility for benefits under 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 . . . .

Also relevant in this appeal is 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 . . . .

The review examiner originally concluded that the claimant had good cause to quit his employment, as he reasonably believed he would soon be discharged, because the employer was dissatisfied with his work performance. We remanded the case to the review examiner in order to obtain copies of emails referenced by the claimant, which would clarify the exact content of the conversations between the claimant and the owner at the time the claimant gave notice on September 24, 2017.

The parties submitted a series of emails from September 24, 2017, which were entered into the record as remand exhibits ## 5 and 6. In her consolidated findings, the review examiner found that the owner initially sent the claimant an email stating that his numbers were off the charts terrible, and that, if the other owner saw them, the claimant would be "gone, that quick, that easy." The owner also wrote that he was starting to wonder if they were better off just parting ways. The claimant interpreted that email as an indication that he would soon be terminated. The review examiner found that the claimant gave his notice of resignation in response to that email in order to avoid being discharged.

Separation is not voluntary if an employee leaves work because of an objectively reasonable belief that he is about to be fired. Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984). Here, one of the owners essentially told the claimant that he didn't think that the claimant was working out in his role as general manager and assured him that, if the other owner saw the claimant's terrible numbers, he would be let go quickly and easily. In light of these statements by the owner, we find that the claimant quit in reasonable anticipation of imminent discharge.[1] Since the claimant resigned in reasonable anticipation of discharge, this case must be analyzed as if the claimant had in fact been discharged. There is nothing in the record to indicate that the claimant engaged in deliberate misconduct or violated a rule or policy of the employer. Rather, it appears that the claimant did not have the necessary training and experience to successfully execute his job as the general manager of a fast-food business. Thus, had the claimant been discharged, it does not appear that it would have been for a disqualifying reason.

We, therefore, conclude as a matter of law that the claimant's separation from employment was involuntary and not attributable to deliberate misconduct or a knowing violation of a rule or policy of the employer as meant under G.L. c. 151A, § 25(e)(2).

[1] We note that there is evidence in the record that the claimant and the owner had previously agreed the claimant was not a good fit for the general manager role, and he had been looking for another job. However, the claimant had continued to work for months after that conversation, and it was the September 24th email from the owner that ultimately prompted the claimant to give his resignation when he did.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending October 21, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 25, 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.

SVL/rh