The claimant, who had failed three CDL road tests, did not establish a reasonable belief that he would fail his fourth CDL road test and be discharged, as he had over three weeks to prepare for the test, and he could not have known what the outcome of this test would be, despite his prior failures.

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Issue ID: 0023 2887 41

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 his position with the employer on October 13, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 21, 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 January 23, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged from his employment, and he neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 give the employer an opportunity to testify and provide other evidence. 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 original decision, which concludes that the claimant was discharged from his employment, 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 and credibility assessments are set forth below in their entirety:

1. The claimant worked as a full-time distribution manager for the employer, a frozen food sales and distribution company, between September 2015 and 10/13/2017, when he separated.

2. The claimant's direct supervisor was the zone general manager of the northeast region (general manager).

3. Upon hire, the hiring manager told the claimant that he "may eventually have to drive" for the employer. Driving for the company required a commercial driver's license (CDL). The claimant did not have a CDL upon hire.

4. During the claimant's employment, drivers separated from employment with the company.

5. In early 2017, the general manager began speaking with the claimant about obtaining his CDL.

6. The claimant attended a driving school while simultaneously managing depots for the employer.

7. The claimant completed the driving classes and driving hours.

8. In order to obtain a CDL, one must complete and pass a road test with Massachusetts State Troopers.

9. The claimant took the road test on three (3) occasions. The claimant did not pass the road test and did not obtain his CDL.

10. The employer maintains a "three (3) strike" policy allowing three (3) attempts to obtain a CDL before termination from employment.

11. Per the general manager's instruction, the claimant terminated another driver for not obtaining his CDL after three (3) attempts.

12. On or about 09/21/2017, the general manager and human resources manager spoke to the claimant about taking the road test for a fourth time by a deadline of 10/17/2017. The claimant expressed that he did not think he could pass the road test. The claimant requested time off from his management duties to prepare for and take the road test. The employer could not accommodate the claimant's request.

13. The distribution manager position required the claimant to obtain his CDL. Work as a distribution manager would not remain available to the claimant if he did not obtain his CDL.

14. The claimant was attempting to pass the road test and meet the employer's requirement that he obtain his CDL.

15. In a later conversation after 09/21/2017, the human resources manager expressed to the claimant that "maybe the area manager position" was not the best position for the claimant.

16. The claimant verbally resigned. The general manager and human resources manager informed the claimant that his final day would be 10/13/2017 and instructed the claimant to tender his written resignation. The claimant tendered his written resignation at the employer's request.

17. The claimant separated from employment because he believed that his employment would be terminated if he did not pass the fourth road test by 10/17/2017, and he did not think he could pass the road test by that time.

Credibility Assessment:

During the remand hearing, the general manager offered testimony that was unreasonable and not plausible. The general manager initially testified that the distribution manager position required a CDL license (creating an inference that failure to obtain the required license would result in separation from employment). It was undisputed that the employer had a "three (3) strike" policy allowing three (3) attempts to obtain a CDL, and that the claimant exhausted those three (3) attempts. However, the general manager asserted that this policy applied only to drivers and that the employer would have allowed the claimant to keep testing because he was in management. It is neither reasonable nor plausible that continuing work as general manager was available to the claimant in light of: 1) the claimant's three (3) failed attempts at obtaining his CDL while simultaneously managing the depots, 2) the employer's "three (3) strike" policy calling for separation from employment if unable to obtain a CDL after three (3) attempts, 3) the claimant's termination of another driver for failing to obtain his CDL after three (3) attempts, 4) the claimant's request to be removed from his duties while preparing for the fourth road test, and 5) the employer's inability to accommodate the claimant's request at that time. While the general manager asserted that the employer would have made accommodations for the claimant, the claimant offered detailed, direct testimony regarding his meetings with the general manager and human resources manager, and such testimony was consistent between the original hearing and the remand hearing that the claimant requested such accommodations for the fourth road test and the employer cold [sic] not make such accommodations. The claimant's testimony on this point is more credible than that of the general manager. As such, it was reasonable for the claimant to believe that he was not going to pass the fourth road test, and that his employment would be terminated if he did not pass the fourth road test by 10/17/2017.

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 the portion of the credibility assessment that states the claimant reasonably believed he was not going the pass the fourth road test, and his employment would be terminated, as the reasonability of the claimant's belief is a question of law for the Board to decide, not the review examiner. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support a denial of benefits to the claimant.

Since the review examiner found after remand that the claimant resigned from his employment, G.L. c. 151A, § 25(e)(2) does not apply in this case. Instead, the claimant's qualification 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 . . . .

After remand, the review examiner found that the claimant had failed three CDL license road tests in 2017, and that he could not continue in his employment if he failed a fourth test. On approximately September 21, 2017, the employer notified the claimant that he had until October 17, 2017, to pass the road test and obtain his CDL license. The review examiner found that the employer denied the claimant's request for time off to focus on studying for his fourth road test. The review examiner further found that, because the claimant believed he would not pass the test and would, therefore, be terminated, he decided to resign instead.

The Supreme Judicial Court has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–598 (1981). Although, at the time the claimant was preparing for a CDL road test in late September 2017, he had already failed three CDL road tests that same year, we cannot conclude that the claimant's belief he would fail the fourth test and be terminated from employment was reasonable. The claimant had approximately three-and-a-half weeks to prepare for the fourth test, on top of the classes and driving hours he had already completed, and he could not have known what the outcome of this test would be, despite his prior failures. Thus, it is not clear that the claimant's discharge from his employment was imminent. The claimant has not established that he had a reasonable belief he would fail his CDL road test and be discharged on October 17, 2017. Thus, he has not shown that he left work involuntarily or voluntarily with good cause attributable to the employer, as meant under G.L. c. 151A, § 25(e)(1).

Even assuming *arguendo* that the claimant left work involuntarily or voluntarily for good cause, we cannot conclude on this record that the claimant made a reasonable attempt to preserve his employment, as required under Massachusetts law. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984) (an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile). The findings establish that the employer offered the claimant an opportunity to re-take the CDL test. In so doing, the employer presented the claimant with a viable means by which the claimant could attempt to preserve his employment — namely, to re-take the test. As noted above, after the employer made this offer, the claimant had over three weeks to prepare for the test in addition to the preparation he had already undergone. By quitting before re-taking the test or even preparing to re-take it, the claimant failed to take advantage of the viable avenue before him to possibly preserve his employment. Consequently, we do not believe that prior to quitting, the claimant reasonably attempted to preserve his employment

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he is eligible for employment benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 14, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

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.

SVL/rh