Upon being told of a demotion and that her office was needed, the claimant removed some belongings and posted on Facebook that her last day of work would be the following Monday. However, the review examiner found that these actions were not intended to communicate her resignation, that the claimant was still thinking about it and, in fact, she called in each day thereafter to notify the employer of her absence. Held the employer's termination letter ended her employment. Because there is no evidence of misconduct, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0023 2907 88

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 her position with the employer in October, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 13, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 10, 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, she 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 about the circumstances of the claimant's separation. 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 original decision, which concluded that the combination of a Facebook post and not reporting to work after being told she would be transferred constituted a disqualifying resignation under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law in light of consolidated

findings that show the claimant did not intend the Facebook post to be a resignation and she subsequently called in each day of her absence.

Findings of Fact

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

1. From June 2, 1980, until October 2, 2017, the claimant worked as a full-time Support Staff Supervisor at [Employer Name].

2. The employer is a non-profit community health center.

3. In this role, the claimant's responsibilities included administrative assistant duties and running the day-to-day operations of her department. The claimant also supervised three support staff members.

4. The claimant spent approximately 50% of her time supervising others.

5. The claimant's work location was at the employer's main building, located at [Street Address], [City A].

6. The claimant's direct supervisor was [Manager A].

7. On September 29, 2017, the claimant met with [Manager A] and [Manager B] (Clinical Operations Manager) to discuss the status of her position.

8. At the meeting, [Manager A] and [Manager B] told the claimant that due to restructuring, the employer was eliminating her position. They also explained that [Manager B] was going to be assuming many of the claimant's job responsibilities, including her supervisory duties, in his new role.

9. [Manager A] explained to the claimant that she could be transferred to a different position within the Community Based Flexible Support program. The new position would be located at the employer's "[X] site," which was approximately two or three blocks from the main building.

10. In her new position at the [X] site, some of the claimant's job duties would have remained the same. There would be no change in the claimant's title, pay, hours, or schedule. But the claimant would have no supervisory responsibilities.

11. The claimant previously worked for the Community Based Flexible Support program at the [X] site, in 2012, before her transfer to her current position at the main building.

12. At the September 29, 2017 meeting, the claimant was told that a more formal meeting with Human Resources would occur the following week (on October 2, 2017), and that the claimant would have input as to her job duties.

13. The claimant was not happy with a transfer to [X] and considered it a demotion. She expressed this unhappiness to [Manager A] and [Manager B]. During the conversation, the claimant also conceded that working at the [X] site would make for a shorter commute.

14. Although she did not directly mention it to [Manager A] and [Manager B], the claimant also had serious safety concerns with the [X] site. For example, the claimant recalled a prior incident at the [X] site where someone threw a brick through a window. The claimant also recalled an incident where one of her co-workers was assaulted in his office.

15. [Manager A] asked the claimant to think about what she wanted to do over the weekend.

16. On Saturday, September 30, 2017, the claimant went to the employer's main building and removed some of her belongings from her office.

17. Also on Saturday, September 30, 2017, the claimant posted to her Facebook page the following message: "Last day of work 10/2/2017, 39 years, One door closes and a better one opens."

18. The claimant did not report to work on Monday, October 2, 2017, or any day thereafter.

19. The claimant did not report to work because she had not yet decided whether to accept the transfer and was distraught.

20. For each day, the claimant called out of work and/or emailed [Manager A] to say she was not reporting to work.

21. On or about October 10, 2017, the employer sent the claimant a letter stating that it considered claimant's resignation effective October 2, 2017.

22. The claimant quit her job. The claimant was not discharged by her employer.

Credibility Assessment:

The claimant consistently and credibly testified at the remand hearing that she considered her employer's proposed job transfer to the [X] site to be a demotion. The claimant further testified, and [Manager A] in his own testimony agreed, that up until she was told about the transfer, fifty percent of her job duties entailed supervising others. All parties consistently and credibly testified with the new position at the [X] site, the claimant would have no supervisory duties.

> In regards to the claimant's safety concerns with the [X] site, the claimant directly and credibly testified that she had a number of concerns as the [X] site had several prior instances of staff being victims of violence. Although [Manager A] testified that patients at the [X] site could "blow up," on occasion, both of the employer's witnesses testified that the [X] site was essentially no less safe than the employer's main building.
>
> Regardless of whether one site was objectively less safe than the other, in view of all of the relevant testimony and documentation in this matter, I accept as credible the direct and consistent testimony of the claimant that she had reasonable safety concerns with the [X] site.
>
> With respect to whether the claimant intended to quit on September 30 when she cleaned her belongings out of her office and made a Facebook post, the claimant credibly testified that she did not intend for her actions to be treated as a resignation as of that date. The credibility of this testimony is bolstered by the claimant's, and [Manager A]'s testimony, that she continued to email him that she would not be reporting to work.
>
> Regardless, the claimant conceded that she had a number of concerns about working at the [X] site and that she would likely have never returned to work there. Accordingly, while I do not find that the claimant's Facebook post on September 30, 2017, was intended as a resignation, I do find that the claimant soon thereafter decided that she would not return to work because she did not consider the proposed transfer acceptable.

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. In this case, the conclusions in Consolidated Finding # 22 that the claimant quit and was not discharged are based upon a mixed question of fact and law. As such, we decline to accept this as a finding of fact. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, in light of the consolidated findings after remand, we disagree with the review examiner's legal conclusion that the claimant voluntarily ended her employment, as outlined below.

A key question in this appeal is whether the claimant's employment ended voluntarily or involuntarily. After remand, we believe the evidence shows that although the claimant was thinking of quitting, the employer discharged her before she had done so. We reach this conclusion based upon the following.

After hearing testimony from only the employer's human resources witness at the original hearing, the review examiner's decision concluded that the claimant quit her position on September 30, 2017, when she cleaned out her office and posted on Facebook that her last day of work would be the following Monday.[1] Upon hearing additional testimony from the claimant and her supervisor at the remand hearing, the review examiner's findings now show that on September 30, 2017, the claimant did not quit. He found that she removed only some of her belongings.[2] Consolidated Finding # 16. More specifically, in his credibility assessment, the review examiner found that, on September 30, 2017, when the claimant made the Facebook post and removed belongings from her office, she did not intend for her actions to be treated as a resignation. Such assessments are within the scope of the fact finder's role, and, unless they 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) Despite the wording of the Facebook post, the review examiner observed that the claimant called or emailed her supervisor each day thereafter to notify him that she would not be reporting to work. We believe his assessment is reasonable in relation to the evidence presented.

Upon questioning by the review examiner at the remand hearing, the claimant conceded that she would likely never have returned to work. Consequently, the review examiner states in his credibility assessment that the claimant "soon thereafter decided that she would not return to work." This is a reasonable view of the evidence. However, for our purposes, this statement is ambiguous. We do not know when she made that decision. We do not know if it was before or after the employer terminated the claimant in its October 10, 2017, letter. *See* Consolidated Finding # 21. The fact that the claimant continued to call in her absences suggests that she had not yet resigned. Simply put, the record lacks substantial and credible evidence to show that the claimant quit her job before the employer discharged her. For this reason, we decline to treat her separation as voluntary.

Instead, we view the decision to terminate the claimant's employment to have been made by the employer on October 10, 2017. *See* Exhibit # 12.[3] Where a claimant is fired from her job, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[1] The original hearing decision is in evidence as Remand Exhibit # 1.

[2] Both parties testified that the claimant was told at the September 29, 2017, meeting that the Clinical Operations Manager needed her office. The claimant further explained that she came in with a friend on September 30, 2017 to pick up large items, e.g., a rug, big pictures, but that she still had a bunch of her belongings there. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[3] Exhibit # 12 is the October 10, 2017, employer letter to the claimant, which confirmed that the claimant is no longer employed by the [Employer Name]. This exhibit is also part of the unchallenged evidence in the record.

> [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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the 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).

As a threshold matter, the employer must establish that the claimant's discharge was attributable to a policy violation or other misconduct. There is no such evidence in this case. Although the claimant was expected to report to work and attend a meeting with human resources on October 2, 2017, and she did not, this is not a case of job abandonment. The claimant called out sick for each day she was absent. Consolidated Finding # 20. *Compare* Flores v. Acting Dir. of Division of Unemployment Assistance, No. 06-P-1438, 2007 WL 2701339 (Mass. App. Ct. Sept. 17, 2007), *summary decision pursuant to rule 1:28* (no-call, no-show was job abandonment). We presume, based upon the fact that the claimant had worked for the employer for over 30 years, that she had sufficient sick time to use for October 2nd and each absence through October 10, 2017. Nothing in the record suggests that she did not or that the employer had an issue with how she notified her supervisor of the absences. There is also no evidence to indicate that, before sending its termination letter, the employer informed the claimant that her job was in jeopardy if she did not report back to work. Absent such evidence, the employer has not met its burden to show that the claimant either violated a policy or engaged in deliberate misconduct.

We, therefore, conclude as a matter of law that the claimant was involuntarily terminated from employment. We further conclude that she is not disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 15, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2018

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

AB/rh