

Where the employer did not present substantial and credible evidence to show that the claimant quit his position or was at fault for an accident which occurred prior to his separation, the review examiner was reasonable in crediting the claimant's testimony that he was discharged without having done anything intentionally wrong. The claimant is eligible to receive benefits.

**Board of Review
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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 on or about September 21, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 9, 2017. 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 January 3, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence, as well as to clarify several of the findings of fact from her original decision. 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 is subject to disqualification from the receipt of unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the employer discharged the claimant following an accident in the employer's vehicle when the claimant told the employer that he was thinking of pursuing legal action against the other driver.

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 Kitchen Exhaust Hood Cleaner Foreman for the employer, a ventilation company, from 7/23/17 to 9/21/17.
2. The claimant drove an employer-issued vehicle to and from work assignments.
3. On 8/21/17, on the way to a client site, the claimant's vehicle was rear-ended on the [Bridge Name], and the other driver left the scene of the crash. The crash occurred at approximately 9:40 p.m.
4. Two Hood Cleaners, "[A]", and "[B]", were in the vehicle the claimant drove when the crash occurred.
5. The claimant wrote down the make and model of the other vehicle, and the license plate number.
6. The claimant called a supervisor, "[C]", after the crash and "[C]" advised him to file a police report and seek medical attention, if necessary.
7. The claimant, along with "[A]" and "[B]", drove the employer vehicle to the Massachusetts State Police barracks in [City A], and filed a police report.
8. The claimant then drove the employer vehicle to a [City A] hospital for evaluation after filing the police report. The medical evaluation included taking x-rays.
9. A physician gave the claimant a note which stated that the claimant should remain out of work for three days. The physician told the claimant he may feel pain from whiplash that occurred during the crash.
10. On 8/22/17, the claimant went to work and gave the above note to the Owner. The Owner permitted the claimant to remain away from work on 8/22/17, 8/23/17, and 8/24/17.
11. The claimant did not file a Worker's Compensation claim with regard to the above crash.
12. On 8/22/17, the claimant told the Owner he did not plan to take legal action against the driver of the other vehicle.

13. The claimant's next scheduled shift started the evening of 8/27/17. The claimant worked that shift, and worked his regular schedule, until his separation from employment.
14. The claimant experienced lower back pain and pain in his ankle after the crash. The claimant had a previous ankle injury, and he believed the crash exacerbated the ankle pain he experienced as a result of the original injury.
15. On or about 9/21/17, the claimant arrived at work to pick up paperwork he needed to take with him to each client site he was assigned to visit during his shift.
16. The claimant spoke with the Owner and the Owner's son at that time and said he was thinking about taking legal action against the driver of the other vehicle, as he experienced pain after the crash.
17. The Owner then told the claimant that his services were no longer needed, and he was replaced.
18. The claimant visited the Owner approximately one week later and asked to be re-hired. The Owner said, "No."

Credibility Assessment:

Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence presented by the claimant was more credible than the evidence presented by the employer. The claimant was the only direct witness to the crash, to the conversation with the Owner when he provided the medical note, and to the conversation with the Owner that resulted in the claimant's separation from employment. The evidence provided by the claimant was more detailed and consistent as compared to the evidence provided by the employer. The employer provided a notarized written statement drafted by the employer witness and signed by the Owner on 6/8/18, which states that the claimant said, "I quit!" to the Owner on his last day of work. The notarized statement does not state which date this allegedly occurred, where it occurred, or whether anyone else witnessed this; nor does it provide any context for this alleged conversation. The employer also provided a non-notarized statement drafted by the employer witness and signed by the Owner's son on 6/8/18. This statement says that the claimant drove to a client site and refused to perform the work to which he was assigned, then told the Owner's son he left his clipboard at the site and drove back to the client site. The statement says that the Owner's son told the claimant he was going to receive a written warning, and possible suspension, and the claimant said, "I quit!" This statement does not say which date this allegedly occurred, whether anyone else witnessed this exchange, or whether this conversation resulted in the claimant's separation from employment. The claimant filed an unemployment insurance claim on 9/27/17, and stated that he was laid off. DUA sent the employer a Lack of Work Notification. The

employer filled it out, and stated that the claimant was discharged from employment, and suspended. Neither party completed Fact Finding Questionnaires; DUA then sent a Notice of Approval to both parties. The Owner filled out the employer's request for an appeal of the Notice of Approval, and stated that the claimant was offered his job back, but decided to quit. This implies that the claimant was first discharged from employment. At the hearing, the employer witness provided hearsay testimony regarding the crash and what occurred on the claimant's last day of work. The employer witness stated that he found out about the crash from a Hood Cleaner, "[D]", on or about 8/22/17. "[D]" was not in the claimant's vehicle at the time of the crash. The employer witness does not know how "[D]" learned of the crash. "[D]" told the employer witness that the claimant caused the crash on purpose by stomping on the brakes. The employer witness stated that he spoke with the claimant after the crash, and the claimant said he was rear ended. The employer witness told the claimant that is not what he heard. The claimant asked what he heard, and the employer witness said that he heard the claimant caused the crash. The claimant said he did not cause the crash. The employer witness stated that the Owner told him that the claimant said he quit his employment because he wanted to go into another line of work. The employer witness was not present for any of the claimant's conversations with the Owner and/or the Owner's son on or after 8/21/17.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the claimant should not be disqualified from receiving unemployment benefits.

As an initial matter, we must decide what provision of law applies to the claimant's separation. The DUA originally applied G.L. c. 151A, § 25(e)(2), the section applicable to discharges. The review examiner applied G.L. c. 151A, § 25(e)(1), the section applicable to quits or resignations. The review examiner has now found that, on or about September 21, 2017, the employer's owner told the claimant "that his services were no longer needed, and he was replaced." Consolidated Finding of Fact # 17. At no point did the claimant indicate that he was quitting his position. Based on this finding, we conclude that the employer initiated this separation, and that G.L. c. 151A, § 25(e)(2) applies. That section of law provides, in relevant part, the following:

[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 section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits.

This case largely turns on which party's version of events was believed by the review examiner. If the employer's witness is to be believed, then the claimant caused his own separation by either quitting or intentionally causing the motor vehicle accident on August 21, 2017. If the claimant is to be believed, then he was discharged after informing the employer that he was thinking of taking legal action against the driver of the other vehicle involved in the accident. As noted above, we have accepted the review examiner's credibility assessment, which largely credited the claimant's version of events, especially regarding the accident and the final conversations between the employer and the claimant.¹

The review examiner's findings of fact and decision must be based on substantial and credible evidence in the record. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 228 (1985). "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., quoting Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627-628 (1984). The employer offered only hearsay evidence to support its assertions as to what happened prior to the claimant's separation. Hearsay evidence is admissible in informal administrative proceedings, such as the one before the review examiner here, and it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether the underlying testimony was presented under oath, was detailed and consistent, was resistant to the suggestiveness of leading questions, was offered by a witness who lacked any motive or reason to make false allegations, and whether it was corroborated by other evidence in the record. Covell, 439 Mass. at 785-786.

In this case, the evidence offered by the employer's management consultant during the hearings was not substantial and credible. As noted in her credibility assessment, this witness' testimony about the accident on August 21, 2017, contains multiple layers of hearsay, and the ultimate source of the first-hand information was not known to the management consultant. The affidavits submitted into the record during the remand hearing are insufficiently detailed to be persuasive. Moreover, there is no independently reliable evidence in the record to corroborate the proffered hearsay. In short, again, we conclude that the review examiner's credibility assessment and treatment of the evidence was reasonable and supported by the record.

In light of our acceptance of the consolidated findings and the credibility assessment, it is apparent that the claimant cannot be denied unemployment benefits. In cases decided under G.L.

¹ The claimant's testimony about the actual dates when the final conversations occurred was not supported by the record. He testified that he was discharged in early September of 2017. The findings clearly do not reflect that, and the findings are supported by payroll records and other evidence in the record. Regardless of the problems with the dates, for the reasons stated in our decision, the review examiner's overall assessment of the credibility of the parties is reasonable in relation to the evidence before her.

c. 151A, § 25(e)(2), the employer has the initial burden to show that the claimant did something wrong or contrary to the employer's interests. Here, such misconduct has not been shown. The claimant was in an accident in an employer vehicle. None of the findings suggest that the claimant was at fault for the accident. No evidence other than the management consultant's testimony was presented to show that the claimant was at fault for the accident. Later, the claimant told the employer that he was thinking of pursuing legal action related to the accident. Neither of these things show that the claimant committed any misconduct or policy violation, much less a knowing or deliberate one.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence in the record or free from error of law, because the review examiner's consolidated findings of fact show that the claimant was discharged and that he did not engage in any misconduct or policy violation prior to his separation.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 17, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 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.

SF/rh