Where a claimant was in contact with his employer each day he could not report to work due to car problems, yet the employer discharged him anyway, the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2), because the employer did not carry its burden to show that the claimant was no call/no show on the days he was absent from work.

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Issue ID: 0024 0312 16

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 September 14, 2017. He later filed a claim for unemployment benefits, and the claim has an effective date of December 17, 2017. On March 3, 2018, the DUA sent the employer a Notice of Approval, stating that the claimant was eligible to receive unemployment benefits. 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 April 19, 2018.

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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide 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 decision, which concluded that the claimant abandoned his job and, thus, is disqualified 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 claimant was unable to report to work due to car problems and he notified the employer about this issue prior to being discharged for allegedly being no-call/no-show.

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 Store Manager for the employer, a Coffee Shop, from August 7, 2017, until September 14, 2017, when the claimant was separated from his employment.

2. The claimant was terminated for allegedly being a no-call/no-show for three consecutive shifts.

3. The claimant worked full-time hours for the employer.

4. The employer is located in [Town A], Massachusetts.

5. The claimant lives in [Town B], Massachusetts.

6. The claimant gets to and from work by means of driving his own car.

7. There is no public transportation between the claimant's home and the employer's location.

8. The claimant worked his scheduled shift on September 9, 2017.

9. The claimant was next scheduled to work on September 10, 2017, at 5 a.m.

10. The claimant attempted to drive to work for his shift on September 10, 2017.

11. On September 10, 2017, the claimant realized his car was not functioning properly and he could not drive it.

12. At approximately 5 a.m. on September 10, 2017, the claimant sent his supervisor a text messaging [sic] informing him that he could not make it to work that day because of car problems.

13. The claimant's supervisor received and read the claimant's text message.

14. The claimant was next scheduled to work on September 11, 2017.

15. Because the claimant had just started working for the employer, he did not have the money he needed to fix his car at that time.

16. The claimant looked to see if he could get to his job by means of public transportation, but realized it was not possible.

17. The claimant does not have any family or friends in the area who could drive the claimant to and from work.

18. On September 11, 2017, the claimant sent his supervisor another text message, stating he was still having car problems and because of that, he could not make it in for his shift that day.

19. The claimant's supervisor received and read the text message.

20. At approximately 2 p.m. on September 11, 2017, the supervisor called and spoke to the claimant. The claimant explained that because he lacked the funds to fix his car, for the time being, he could not report to work in the [Town A] location. The claimant asked his supervisor if it was possible to work out of a store location closer to the claimant that he could get to by public transportation. The supervisor told the claimant that such a transfer was not possible.

21. The telephone conversation between the claimant and his supervisor lasted approximately eight minutes.

22. The claimant was *not* scheduled to work on September 12, 2017.

23. On September 12, 2017, the supervisor called the claimant and left him a voicemail.

24. The claimant received the voicemail, but due to an issue with his phone, he could not call him back, but he could text message him.

25. On September 12, 2017, the claimant informed his supervisor of the cell phone issue and that he needed to use text message to communicate. The claimant also informed his supervisor that his car situation had not changed.

26. On September 12, 2017, the claimant's supervisor responded to the claimant's text message and asked him if there was any other way he could get to work. The claimant replied to the text message, informing his supervisor that he did not have any local family or friends. The claimant again asked if he could temporarily transfer to a different store location, closer to where the claimant lived. The claimant's supervisor texted the claimant that he would get back to him and that they would talk about it later.

27. The claimant's supervisor never got back to the claimant about the possibility of transferring.

28. It is unknown whether the claimant was scheduled to work on September 13, 2017.

29. The claimant was not scheduled to work on September 14, 2017.

30. On September 14, 2017, the claimant's supervisor sent the claimant a text message informing him that he was being let go for being a no-call/no-show.

31. Had the claimant not had serious car problems, he would have worked all of his scheduled shifts.

32. The claimant filed for unemployment benefits and received an effective date of December 17, 2017.

Credibility Assessment:

The employer presented conflicting testimony between the original hearing and the remand hearing. The employer originally testified at the first hearing that the claimant was terminated for being a no-call/no-show for three consecutive shifts. Specifically, the employer stated the claimant was a no-call/no-show for shifts on September 10, 2017, September 11, 2017, and September 13, 2017. The employer further testified at the original hearing that he never heard from the claimant again after the claimant's shift on September 9, 2017. When asked if the claimant tried to call him or text message him at any point after September 9, 2017, the employer responded, "no".

At the remand hearing, the claimant presented his cell phone, which showed that there was an incoming phone call from the employer's cell phone number to the claimant on September 11, 2017, and that the call lasted approximately eight minutes. When the employer was asked if he had a phone conversation with the claimant on September 11, 2017, that lasted approximately eight minutes, the employer answered in the affirmative. When the employer was asked if he had received text messages stating that he could not report to work for shifts because of car problems, the employer also answered in the affirmative. When the employer was asked why he testified at the first hearing that he did not hear from the claimant at all after September 9, 2017, the employer replied, "I missed that part". Furthermore, the employer testified at the remand hearing that the claimant was terminated for being a no-call/no-show for his shifts on September 12, 2017, September 13, 2017, and September 14, 2017. When the employer was questioned further about how the claimant could be a no-call/no-show for a shift he was not scheduled to work on September 12, 2017, the employer had no answer.

Given the record as a whole, the employer's testimony is dismissed as not credible.

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 ultimate 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 reject the review examiner's legal conclusion that the claimant is subject to disqualification from the receipt of benefits pursuant to G.L. c. 151A, § 25(e)(1).

As noted above, the review examiner resolved this matter under G.L. c. 151A, § 25(e)(1), the statute relating to quits and voluntary resignations. She applied that section of law, based on the employer's testimony from the initial hearing that the claimant last worked on September 9, 2017, and then never reported to work again or made contact with the employer. On this evidence, the review examiner reasonably concluded that the claimant had quit his job without any notice to the employer. *See* Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661–663 (1950).

However, during the remand hearing, the claimant offered testimony that he was in contact with the employer regarding his inability to get to work due to car problems. The employer's witness, the district manager, then confirmed that the claimant had been in contact with him after his last day of work, September 9, 2017. Based on the inconsistencies in the district manager's testimony, the review examiner ultimately found his testimony to be not credible. She credited the claimant's testimony that he notified the employer on September 10, 2017, that he would not be in to work. Consolidated Finding of Fact # 12. She credited his testimony that he was also in contact with the employer on September 11, 2017, to state that he would not be in to work on that day. Consolidated Finding of Fact # 18. The claimant was not scheduled to work on September 12, 2017, and the record was not clear if he was scheduled to work on September 13, 2017. Consolidated Findings of Fact ## 22 and 28. In light of these supported findings, the claimant did not abandon his job. Nothing about the situation suggests that he quit. On the contrary, when he was in contact with the district manager, the claimant had conversations about a possible transfer to a store location which was closer to his house so that he could get to work. *See* Consolidated Findings of Fact ## 20 and 26. The claimant did not voluntarily separate from his job.

Therefore, G.L. c. 151A, § 25(e)(1), does not apply. Rather, because the claimant was discharged by the employer when he could not report to work, the applicable section of the law is G.L. c. 151A, § 25(e)(2), which applies to discharges. This section of law, provides, in relevant 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 section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits.

In any discharge case, the employer must first show that the claimant engaged in prohibited conduct. This is the misconduct or policy violation which leads to the separation. Here, the employer alleged that the claimant was a no-call/no-show. Consolidated Finding of Fact # 30. As can be gleaned from our discussion above, the employer has not carried its burden to show that the claimant was a no-call/no-show in the days prior to his separation. He was in contact with the district manager throughout the final week or so prior to the discharge on September 14, 2017. Indeed, on each day he was scheduled to work, he told the employer that he was not going to be able to come to work due to his car problems. *See* Consolidated Findings of Fact ## 12 and 18. In short, the employer has not shown that the claimant engaged in any misconduct or policy violation.[1]

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because the credible evidence in the record supports a conclusion that the claimant did not quit or abandon his job and the employer has not shown that he was a no-call/no-show prior to his separation from employment.[2]

[1] As noted in the review examiner's credibility assessment, during the remand hearing, the district manager was unclear as to which days the claimant was an alleged no-call/no-show.

[2] Even if the employer had argued that the claimant engaged in misconduct by not reporting to work for several days, we could not conclude that the claimant is subject to disqualification. Although the expectation that a worker report to work as scheduled is certainly reasonable, mitigating circumstances in this case prevented the claimant from traveling to work. *See* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted) (noting that mitigating circumstances must be considered when determining whether disqualification is warranted 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 September 3, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – July 30, 2018

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

SF/rh