

**On a disputed separation, the review examiner found the claimant testimony as to the final conversation between him and a general manager to be more credible. The claimant's testimony that he thought that he was discharged was accepted and deemed reasonable. Therefore, G.L. c. 151A, § 25(e)(2) applies. Because the employer argued that the claimant quit, it failed to offer evidence supporting disqualification under G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0024 4782 46**

## **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 January 24, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 9, 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 June 20, 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. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. After reviewing those consolidated findings of fact, the Board remanded the matter again to the review examiner, this time for further subsidiary findings of fact from the record, specifically regarding the final interaction between the claimant and the employer's general manager. The review examiner then returned a final set of consolidated findings of fact to the Board. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision to disqualify the claimant, 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 found that, during a conversation on January

24, 2018, the employer's general manager eventually told the claimant not to report to work the following day.

### 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 laundry worker for the instant employer, a hotel, from 09/14/15 until 01/24/18.
2. The claimant's job duties required him to get the carts ready for the housekeepers in the morning. The claimant had been instructed to put the cart back in the laundry room and bring the paperwork to the front desk if the housekeeper hadn't arrived by 10 a.m.
3. The claimant has had issues with how the housekeeping manager (HM) had been speaking to him while working for the employer.
4. The HM would swear at the claimant in Spanish.
5. She would make comments such as "this mother fucker doesn't know how to make the cart" and "this asshole shouldn't even have the job."
6. The claimant told the General Manager (GM) about the HM's comments several times since he began working for the employer.
7. On 01/24/18, the claimant arrived at work and prepared the carts for all the housekeepers. At 10 a.m. one of the housekeepers had not yet reported to work.
8. The claimant put the cart back in the laundry room and brought the paperwork to the front desk. The claimant first tried to call the HM but she was not available.
9. The housekeeper came looking for her cart and the claimant explained that her paperwork was at the front desk. The claimant also saw the HM at this time and told her that he brought the paperwork to the front desk as he had been instructed to do.
10. The housekeeper came back and put the paper in the claimant's face and said "why the fuck did you bring the paper up? You're not my fucking boss. [HM] is my boss. Don't touch my shit."
11. The claimant explained that he did what he had been trained to do. The housekeeper responded to the claimant "Well I have a fucking excuse. You are not my boss."

12. The claimant immediately went to the HM and asked her to say something to the housekeeper because she was swearing at him for bringing her paperwork up to the front desk.
13. The HM looked at the claimant and said “you should’ve gave me the fucking paper.” The claimant explained that he tried to call her but she wasn’t there.
14. The HM said “I’m not gonna say shit.” [sic] referring to speaking to the housekeeper.
15. The claimant immediately went to the GM’s office and sat down and told him about the conversation with the HM that just took place. The GM told the claimant to go back to the laundry room and that he would talk to the HM.
16. The claimant returned to the laundry room and overheard the housekeeper talking in Spanish about how they didn’t want him working there. She came in the laundry room and just stood there smiling at the claimant.
17. The claimant went back to the GM again. The GM told the claimant that he didn’t know if he would get a chance to talk to the HM and asked if that was the only issue.
18. The claimant and the GM went back and forth about the other issues in the work environment. The claimant complained about being the only one who took out the trash as well as making the carts. The claimant felt this wasn’t fair because there were 2 other laundry workers who could also take out the trash.
19. The claimant would come back to bags of trash that needed to be taken out even after days that he didn’t work.
20. The claimant told the GM that he felt he wasn’t doing anything about it. The GM assured the claimant that he would have a talk with housekeeping.
21. The day ended and the claimant went up to the office to punch out. The GM called the claimant into the office and asked him to sign a warning about him being a no call no show.
22. The claimant was upset and explained that he wasn’t a no call no show and explained that he had sent a text to the GM. The GM said he just needed it for the record.
23. The GM asked him to sign another paper that he would continue to make the carts and empty the trash. The claimant told the GM “this is bullshit if you expect me to be the only one to take out the trash and fill up the carts.” The claimant explained that even when he is not at work the trash is “all over the

- floor” and it’s “dirty” and he doesn’t think that he should be the only one who has to do that.
24. The claimant asked if anyone else fill [sic] up the carts. The GM told him no because he was the only full-time laundry person. The claimant reminded him that there were 2 other full-time laundry workers besides him.
  25. The claimant told the GM that he didn’t want to sign it because he felt he was being singled out as far as doing the trash and the carts. The GM told the claimant that he has to sign the paper. The claimant said, “this is fucking bullshit” because he didn’t think that he should be the only one doing the trash if he is not at work every day.
  26. The claimant had to leave to pick up his children. The GM followed the claimant and asked if he was going to continue to have an attitude.
  27. The claimant told the GM that he didn’t have an attitude but he was going to continue to get upset because he was the only one being singled out. The claimant told the GM that the HM wanted him out because she only wants her girls working for her.
  28. The GM told the claimant “if you’re going to continue to have an attitude I don’t want you to show up tomorrow.” The claimant asked the GM “are you firing me?” The GM told the claimant “I don’t want to fire you but if I have to I will.”
  29. The claimant said again “you need to tell me right now, am I fired?” The GM said “no I don’t want to fire you, but if you are going to have an attitude then yes you’re fired. Do not come in tomorrow.”
  30. The claimant said, “so we’re clear, I’m fired because I came up to you with a problem about another manager?” The GM said “yes, if you are going to continue with that attitude, do not show up tomorrow.”
  31. The claimant said, “so if I don’t come in tomorrow it’s because you fired me, right?” The GM said, “yeah if you have that attitude do not come in tomorrow.”
  32. On 01/24/18, the claimant believed he was discharged based on the conversation with the GM.
  33. On 01/25/18, the claimant did not report to work because he believed he had been fired the day before.
  34. On 01/25/18, the claimant sent the GM a text message that read “Hey [GM], since you fired me yesterday I need a letter saying that I’m no longer

employed with [Employer] for my Section 8. Can I pick it up or my wife? Thanks.”

35. Later in the day, on or about 01/25/18, the GM called the claimant and they had a discussion about work. The claimant explained again why he was upset and the GM said “we went through all that and unfortunately you guys weren’t getting along. I’m sorry I had to terminate you but I don’t want 2 staff members not agreeing with each other.”
36. The claimant told the GM that he doesn’t think that he should be fired because he disagreed with how the HM treated him, not about the job. The GM said “unfortunately there is nothing that we can do about that now. That day was your last day. I’m sorry we had to terminate you and I hope everything is going good.”
37. The claimant asked the GM if he was sure that they couldn’t have a sit down with the other staff and work this out. The GM told the claimant that they already had enough laundry staff.

#### Credibility Assessment:

At the initial hearing, which the claimant did not participate in, the employer testified that the claimant yelled “fuck you, fuck you, fuck you” and left the job on 01/24/18. The employer testified that the claimant was a no call no show on 01/25/18 and the claimant only called to ask for documentation regarding his last day of work. The employer’s testimony at the initial hearing was vague.

At the remand hearing, which the employer did not participate in, the claimant testified that he believed he was discharged from the job on 01/24/18 after the conversation he had with the GM. The claimant’s recollection of the events that took place on 01/24/18 was very detailed and his testimony was very specific.

Based on the testimony and evidence presented, it is concluded that the claimant’s testimony is deemed 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 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 quit his position. Based on the new findings of fact, we conclude that the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(2).

As suggested in the review examiner's credibility assessment, there was a dispute between the parties as to whether the claimant quit his job or whether he was discharged. In her decision, the review examiner concluded that the claimant had quit and, therefore, applied G.L. c. 151A, § 25(e)(1). However, the consolidated findings of fact substantially differ from the initial findings. The review examiner has no longer found that the claimant yelled "fuck you" three times on January 24, 2018, and then did not return to work. Instead, she has found that the claimant complained to the general manager on January 24, 2018, about several issues, and the two men subsequently had a rather heated discussion about the claimant's attitude. During the discussion, the claimant asked several times whether he was being fired. The general manager told him that he did not want to fire the claimant, but that, if his behavior continued, he would be fired. Eventually, the general manager told the claimant to not report to work on January 25, 2018. *See Consolidated Findings of Fact ## 29–31.* Based on his conversation with the general manager, the claimant believed that he was discharged. Consolidated Finding of Fact # 32.

In light of the review examiner's findings regarding the final conversation, we think that the claimant was reasonable in thinking that he had been discharged. Although the general manager did not use the word "fired" or "discharged" and he expressed hesitation at firing the claimant, he ultimately told the claimant not to report to work. Because it is reasonable to conclude from the findings that the employer caused the separation in this case, we think that G.L. c. 151A, § 25(e)(2) is applicable to the separation. That 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. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

As we have noted above, the employer argued that the claimant quit his position, or, at the very least, caused his own separation by leaving work on January 24<sup>th</sup> and then failing to return on January 25<sup>th</sup> and thereafter. Because the employer argued that the claimant quit, it failed to offer evidence relevant to an analysis under G.L. c. 151A, § 25(e)(2). We note that the findings of fact certainly indicate that the claimant was arguing with the general manager on January 24, 2018, that the claimant swore during that conversation, and that he had refused to sign a document which was going to confirm the claimant's job responsibilities. *See Consolidated Findings of Fact ## 23 and 25.* Such conduct could be considered insubordinate in certain circumstances. But again, the employer did not offer evidence that it discharged the claimant for this conduct. Without such evidence, we cannot conclude that the employer carried its burden under G.L. c. 151A, § 25(e)(2).

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 support a conclusion that the claimant reasonably believed that he was discharged and the employer has not shown that the claimant should be ineligible to receive unemployment benefits 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 January 21, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – January 17, 2019**



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](http://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