

Claimant had permission to leave work for a death in the family and, upon his return from out-of-state, called the employer several times to return to work. Where employer failed to return his calls, Board concludes that the claimant did not quit, but was discharged. Because there is no evidence of misconduct, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 7294 55

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 was separated from his position with the employer on December 8, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 12, 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 August 2, 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, 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 take further evidence and make additional findings. Both parties attended two remand hearings. 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 conclusion that the claimant did not return to work or contact the employer after going to Connecticut for a death in his family is supported by substantial and credible evidence and is free from error of law, where the consolidated findings establish that, when the claimant returned, he made attempts to work, but although the employer told him he would arrange a meeting, the employer never returned his calls.

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 line cook for the instant employer, a chain restaurant, and he was employed from 10/24/17 until his separation on 12/2/17.
2. On 12/2/17 before his shift ended, the claimant was informed by the manager on duty that his mother was on the phone and there was a family emergency and that he needed to go to the office to speak with his mother. The claimant's mother told the claimant that his grandmother had died and needed to leave work immediately to travel to Connecticut.
3. The claimant informed the manager of the death in his family and he told the claimant that his mother had already informed him of the death, he told the claimant to leave and, as soon as everything was taken care of, he should call and he would be put back on the schedule.
4. The claimant returned to the area on 12/13/17 and he called the restaurant and spoke with the chef about being put on the schedule. The chef informed the claimant that he knew nothing about a death in the family and that he believed that the claimant had abandoned his job.
5. The chef informed the claimant that he would need to meet with him and the restaurant general manager to further discuss the situation. The chef said that he would have to arrange a date and time for them to meet and that he would call the claimant.
6. The claimant never received a call about a meeting with the chef and the general manager.
7. The claimant made another call to speak with the chef or the general manager and he was told that neither were available.
8. The claimant had no further contact with the company and found another job. At the time of this hearing, the claimant is no longer working at this other job.

[Credibility Assessment:]

The claimant's testimony about his conversations with the manager in charge and the chef is considered most credible as he was the only witness with firsthand involvement in these conversations. The examiner considered that the general manager spoke to the chef and the manager in charge about the incidents, however the examiner has no ability to clarify the claimant's conversations with these individuals as they are no longer working and were not available to give testimony at the remand hearing.

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. However, as discussed more fully below, we conclude that these findings do not support the review examiner's decision to disqualify the claimant.

The review examiner denied benefits after analyzing the claimant's separation under 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 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

Based on the record before us, however, we do not concur with the review examiner's conclusion that the claimant quit his job. Rather, for the foregoing reasons, we believe the employer discharged the claimant.

The review examiner initially concluded that the claimant had quit and denied benefits based solely on the employer's testimony that the claimant was allowed to leave his last shift for the employer due to a death in his family, but that he did not return to work or have any further contact with the employer. Following the claimant's testimony at two remand hearings, the facts indicate that the claimant left work with the employer's knowledge and consent after the employer received a telephone call from the claimant's mother stating that there was a family emergency, that the claimant's grandmother had died, and that the claimant needed to leave work immediately and travel to Connecticut. The review examiner's consolidated findings also establish that when the claimant returned from Connecticut, he called the employer about returning to work. He spoke to the chef who said that he would arrange a date and time for the claimant to meet with him and the general manager to discuss the situation, and that the chef would call the claimant back. The claimant did not receive a call back about a meeting and called again to speak with the chef or the general manager. The employer never returned the claimant's calls.

In rendering her consolidated findings, the review examiner made a credibility assessment deeming the claimant's testimony more credible than that of the employer. 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). We see no reason to disturb either the review examiner's credibility assessment or the findings derived from said assessment.

Based upon these findings, we conclude the claimant was discharged from his employment when the employer did not allow the claimant to return to his job following an approved absence. Consequently, we analyze the claimant's eligibility for benefits under G.L. c. 151A, § 25(e), which 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).

On the record before us, because there is no indication that the claimant engaged in any misconduct, the employer has not met its burden of establishing that the claimant either knowingly violated a reasonable and uniformly enforced employer rule or policy or engaged in deliberate and wilful misconduct.

We, therefore, conclude as a matter of law that the claimant was discharged from his employment. We further conclude that there is no evidence in the record of either a knowing violation or deliberate misconduct within the meaning of 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 December 17, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 17, 2019



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.

SPE/rh