

Employer temporary staffing agency, which granted claimant's requests to initially work remotely from her home as a recruiter, then later to work remotely as a recruiter while attending school in Michigan, and even wrote a recommendation for her to receive tuition assistance through its own tuition reimbursement program, initiated claimant's separation as a discharge. The employer unilaterally withdrew its approval for her to work remotely without any evidence of misconduct or poor performance.

**Board of Review
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Issue ID: 0024 9290 12

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 her position with the employer on February 23, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 23, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 30, 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 and without 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 additional evidence regarding the employer's tuition reimbursement program, as well as the parties' communications regarding the claimant's employment status after she relocated to western Massachusetts and, later, to Michigan. Both parties attended a two-day remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 initiated her separation to relocate to Michigan to attend school, and that she did so without good cause attributable to the employer and without urgent, compelling, and necessitous reasons, are supported by substantial and credible evidence and are free from error of law.

Findings of Fact

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

1. The claimant began full-time work as a Specialized Recruiter for this employer on 05/12/14.
2. While working full-time, the claimant worked forty hours per week and was paid at a rate of \$25.00 per hour.
3. While working full-time, the claimant was working at the employer's office in [City A], Massachusetts.
4. In January 2017, the claimant requested to work remotely because she wanted to move her home to [City B], Massachusetts to live with her Partner in the western part of the state.
5. The claimant's supervisor, the Director of Recruiting, authorized the claimant to work remotely. The claimant's job duties remained the same but her paid hours were reduced to thirty hours per week.
6. The claimant understood that the granted accommodation to work remotely from [City B], Massachusetts was a permanent accommodation.
7. The claimant relocated to western Massachusetts in January 2017 and began working remotely.
8. The claimant's job is done on the telephone and with e-mails, so working remotely did not change the claimant's job duties.
9. As part of her recruiter job, the claimant is not required to attend weekly meetings and recruiting events in [City A], Massachusetts. When the claimant was working in [City A], she never attended recruiting meetings and was never told that there was any issue with her not attending such meetings.
10. The one task the claimant did while working in [City A] that she could not do while working remotely was going over initial paperwork with new hires. Frequently, the new hires preferred that this task be done by the local in house human resource staff rather than the recruiting staff. It was rare that the claimant needed to meet with anyone in person.
11. When the claimant applied for funding for graduate school through the employers [sic] Professional Development Fund, she had her supervisor the Director of Recruiting sign off on her application.

12. The Professional Development Fund provides reimbursement of up to \$800.00 per course with a maximum reimbursement of \$1,600.00 per semester. To qualify for this fund, the worker must remain an employee working at least 30 hours per week and must agree to remain as an employee for at least one year after the educational program has ended. The claimant was told she would have to repay any Fund money provided if she did not remain an employee working at least 30 hours per week throughout the school program plus one additional year.
13. The claimant expected to work for this employer throughout the approximate three years needed to complete her Master's program plus the required additional year so she would not be required to repay any Fund money provided. When the Director of Recruiting signed off on the claimants [sic] application for funding from the employer, the claimant understood the employer was aware the claimant was committing to at least four more years of employment with this employer if she wanted to retain the scholarship money she applied to receive.
14. The claimant had always made clear during her many conversations with the Director of Recruiting, her intention to study in Michigan while remaining an employee of this employer.
15. The claimant during the summer of 2017 was traveling frequently from her home in [City B], Massachusetts to Michigan where [she] was planning to attend graduate school while continuing her [weekly] 30 hours of remote employment with this employer.
16. During e-mail communications in August of 2017 between the claimant and the director of Recruiting, it is mentioned by the claimant an understanding that the claimant would continue to work for the employer while attending school in Michigan and the employer wanting to speak more on this issue to hash out details and asking the claimant to provide her school schedule to arrange a work schedule. In a 08/18/17 e-mail communication, the employer Director of Recruiting expressed a desire to keep the claimant as an employee of the department working remotely.
17. On 08/28/17, the claimant moved her home from [City B], Massachusetts to [City C], Michigan where she would be attending school.
18. After the claimant relocated her home to Michigan, her employment tasks remained the same. The claimant continued to work 30 hours per week at a rate of \$25.00 per hour. All of the claimant's work tasks were done by phone and e-mail and the claimant was never told of any issues with her job performance while working remotely.

19. The claimant was never told that her remote employment in Michigan was a temporary accommodation or that it would last only until a replacement was located.
20. On 01/17/18, the claimant was told, via telephone, by the Director of Recruiting, that he had a “change of heart” and no longer was willing to accommodate the claimant’s request to work 30 hours per week remotely. The claimant was not told why there was a “change of heart” regarding the claimant working remotely. The Director did tell the claimant his belief that having an employee working remotely from Michigan was unprecedented.
21. The employer was aware of other employees attending school while working remotely out of state in Connecticut. The claimant never learned specifically why her agreed upon accommodation suddenly ended.
22. The claimant was surprised by the sudden decision of the employer [to] discharge her and to end her employment. The claimant offered several options, including a willingness to travel back to Massachusetts whenever the employer wanted, in an effort to preserve her job. The claimant was told the decision to end her employment was final. The employer never told the claimant of any allegations of misconduct related to the employer’s decision to discharge her from employment.
23. On 01/17/18, when the claimant was told of the employer’s decision to end her employment, no other employee had been hired to replace her as a Specialized Recruiter.
24. On 01/17/18, the claimant was given a range of dates by the Director of Recruiting to be her last day of employment and the claimant chose the furthest date out, 02/23/18, to be her last day of work as she wanted to remain employed as long as possible.
25. The claimant wanted to remain employed with this employer for funding for her school as well as a source of income while attending her graduate studies. The claimant did not want to leave her employment and would have continued to work for this employer had that been an option.
26. The claimant was never paid any money from the Professional Development Fund, as she was not permitted to remain as an employee. The claimant never failed to provide to the employer any information or documentation requested. The claimant was never sent a promissory note by the employer with a request that she sign it and return it to the employer to obtain school funding.
27. On 02/26/18, the claimant filed a claim for unemployment benefits effective 02/25/18.

Credibility Assessment:

The claimant's testimony that she was discharged from her employment and did not voluntarily quit her position is credible because she went through an application process to secure funding from the employer for her school aware that a condition for receiving this funding was continued employment of 30 hours or more per week with this employer plus an additional year of work to avoid being required to repay the money. The e-mail communications between the parties support the claimant's contention that the employer was aware of her plans to study in Michigan while continuing to work remotely for the employer to obtain, and retain, Professional Development Fund scholarship money.

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. As discussed below, we further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The review examiner initially concluded that the claimant initiated her own separation and denied benefits after analyzing that separation under G.L. c. 151A, §§ 25(e) and 25(e)(1), which provide, in pertinent 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 (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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under G.L. c. 151A, §§ 25(e) and 25(e)(1), it is the claimant's burden to establish that she separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. The review examiner initially found that the claimant initiated her own separation by choosing to relocate to Michigan and to work remotely while attending graduate school, and concluded she did not meet her burden under the statute.

Typically, when a claimant leaves employment to attend school, or to relocate out of state for reasons that are not urgent, compelling, and necessitous, her separation is deemed to be disqualifying. Here, however, we remanded the case to take additional evidence regarding the parties' communications about the claimant's requests to work remotely, the employer's responses to those requests, and the claimant's participation in the employer's tuition reimbursement program. After remand, the review examiner's findings compel a different outcome.

After remand, we believe that the claimant's separation is more properly analyzed under G.L. c. 151A, § 25(e)(2), 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] . . . (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 G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, or for deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). We conclude that the employer has not met its burden.

After remand, the review examiner found that the claimant began her employment as a recruiter for the employer in May, 2014, working 40 hours per week out of the employer's office in [City A], Massachusetts. Her job duties are primarily performed by telephone and email.

In January, 2017, the claimant wanted to relocate to [City B], Massachusetts, to live with her partner. After her supervisor, the director of recruiting (director), granted her request, the claimant relocated to [City B] in January 2017. Her job duties remained the same, but her hours were reduced from 40 to 30 per week. The sole task the claimant could no longer perform remotely was to review initial paperwork in person with new hires, but these new hires often preferred to do this task with in-house human resources staff rather than recruiters.

The review examiner found that the claimant believed the accommodation to work remotely from [City B] was a permanent accommodation, rather than a temporary one. The employer provided no documentary evidence on remand to dispel this belief.¹

While working remotely from [City B], the claimant applied to a graduate program in Michigan. The claimant conveyed her interest in working for the employer remotely while attending school in Michigan to her director, including an email exchange with him from August 18, 2017. *See* Remand Exhibit # 10, pp. 7–8. The director replied by asking for the claimant's school schedule and noting they could discuss it further the following Tuesday to "map some stuff out." *Id.* The review examiner found the director indicated he wanted to keep the claimant as an employee working remotely from Michigan.

The review examiner also found that the claimant relocated to Michigan on August 28, 2017, to begin attending school, and that she continued to work remotely for the employer in the same

¹For the remand hearing, the employer provided two packages of documents responsive to the Board's remand order. *See* Remand Exhibits ## 10 (22 pages) and 11 (five pages). Nothing provided by the employer, which retains sole access to the claimant's company email account, contradicted the claimant's testimony that she believed her permission to work remotely from [City B] had been granted indefinitely.

capacity as she had been working from [City B]: she worked 30 hours per week and performed her tasks by phone and email. The employer did not raise any issues with her job performance while she worked remotely. The review examiner further found that the employer never told the claimant that her remote employment from Michigan was a temporary accommodation, or that it would only last until a replacement was located.²

In addition, the review examiner found that the claimant also pursued employer-assisted tuition reimbursement through the employer's Professional Development Fund (PDF). The PDF reimburses employees up to \$800.00 per course, with a maximum of \$1,600.00 per semester. To qualify for the program, the employee must work at least 30 hours per week and must agree to work for the employer for at least one year after completing their educational program. Employees whose employment ends without completing one year of work after finishing their program are required to repay those funds to the employer.

In late December, 2017, the claimant asked her director for a letter of recommendation for the PDF. *See* Remand Exhibit # 10, pp. 13–15. The director provided a strongly favorable written recommendation on December 29, 2017. *See* Hearings Exhibit # 12, p. 6.³ But barely three weeks later, the director told the claimant that he had a “change of heart” and that she would no longer be permitted to work remotely. Although he did not give a reason for his decision, the director said he believed having an employee work remotely from Michigan was “unprecedented.” The review examiner found the claimant was surprised by the director's decision, and proposed various options to preserve her job. The director declined the claimant's suggestions and gave her a range of dates to pick for her last day of employment. The claimant chose the farthest date out, remaining employed until February 23, 2018. At the time of her discharge, the employer had not yet hired a replacement to fill her position.

The facts found by the review examiner after remand support the conclusion that the employer “changed its mind” about letting the claimant work remotely from Michigan, and unilaterally decided to end her employment. Reversing his initial findings and conclusion that the claimant had quit to relocate to Michigan to attend school, the review examiner issued a credibility assessment noting that the claimant had tried to secure modest tuition reimbursement assistance through the employer's PDF, which would have required her to work 30 hours per week and remain employed for one year after completing her program. The review examiner's credibility assessment was bolstered by email communications — provided by the employer — confirming that her director knew of her plans to attend school in Michigan while working remotely, and did not convey any objections to this plan in writing. 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). As stated, we believe the assessment is reasonable in light of the record.

The employer has consistently maintained that the claimant quit her employment, during its testimony before the review examiner initially and on remand, as well as going back to its

²As noted above, the employer provided two packages of documents responsive to the Board's remand order. *See* Remand Exhibits # 10 (22 pages) and # 11 (five pages). Nothing in these documents contradicted the claimant's testimony that she believed her permission to work remotely from Michigan had been granted indefinitely.

³ The review examiner found the claimant ultimately never received any funds from the employer's PDF.

statements to DUA adjudicators. *See* Hearings Exhibits ## 2, 3, and 5. The findings, however, compel a conclusion that the claimant was discharged. They further indicate that the employer had no disciplinary or performance issues with the claimant during her employment. Rather, the decision to discharge was motivated solely by the employer's change of heart about remote employment.

We, therefore, conclude as a matter of law that the claimant was discharged, without evidence of deliberate misconduct in wilful disregard of the employer's interest or of a knowing violation of a reasonable and uniformly enforced policy or rule of the employer as required for disqualification 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 ending February 24, 2018, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2018



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.

JPC/rh