The employer discharged the claimant when he told her to leave with the departing partner, after she made it clear she wanted to remain working for the employer. Because she was involuntarily terminated without evidence of any misconduct, the claimant is eligible for benefits.

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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 her position with the employer on May 14, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 8, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 18, 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant voluntarily left employment without good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law, where the findings state that the employer told the claimant she should go with the departing partner.

Findings of Fact

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

1. The claimant worked for the employer, a public accounting firm, from July 1, 2014 to May 18, 2018 as an Audit Manager.

2. When the claimant started her employment with the employer, the claimant entered into a limited Covenant Not to Compete, valid for four years. The agreement allowed the claimant to work with new clients or with clients of a new employer, but not to compete with or solicit clients sold to the employer.

3. The firm had three locations in and around [City A], Massachusetts.

4. The claimant worked primarily under one Partner, who oversaw the audit services.

5. In December of 2017, the Partner informed the other Partner (and President) that she was going to start her own firm to take place on or about June 1, 2018.

6. On or about January 23, 2018, the announcement was made to staff about the split.

7. The claimant preferred to follow the majority of the audit work.

8. The Partner/President and the departing Partner had ongoing discussions about the split, particularly who they thought was going with whom. For the departing partner, it was presumed that the claimant and six others will follow the departing Partner.

9. On February 18, 2018, the Partner/President emailed the claimant inviting her to participate in weekly audit meetings to discuss what the firm's audit department will look like after June 1, 2018.

10. On March 16, 2018, the Partner/President invited the claimant's input in deciding which audits to keep. The claimant responded that she declined to be part of the process to concentrate on her work when she is at work. The claimant also protested on the grounds of not feeling right doing it when the other Partner will be in surgery and fighting cancer. The Partner/President replied that he understood.

11. On March 23, 2018, the Partner/President emailed all staff informing them that the departing Partner's last day will be May 18, 2018, and that they wished to have a decision on who was going with whom by April 2, 2018.

12. On April 2, 2018, the Partner/President sent an email reminding all staff that they needed to make a decision by 4:00 p.m. that day. The claimant responded stating that a few staff were being placed in a difficult position during a busy time and that a few of them did not want to respond at the moment because of some "unknowns." The claimant specifically asked where certain audits will

be, who the new Audit Partner will be, when will the clients be told and whether the clients have a choice in the matter, and how audits that have been started by split if not finished before then [sic]. The Partner/President responded that he understood and many of the decisions will be made before May 14, 2018.

13. In late April of 2018, the claimant, who was concerned with the non-compete agreement, did not think it was wise to go with the new employer until after July 1, 2018.

14. On May 7, 2018, the Partner/President sent an email to all staff reminding them that the company policy was to give two weeks' notice in light of the departing Partner's last day being May 18, 2018.

15. On May 8, 2018, the Partner/President emailed the claimant individually asking her for two weeks' notice if her decision is to leave the firm and follow the departing Partner. The claimant responded that she understood what his expectations were.

16. On May 14, 2018 at approximately 8:30 a.m., the employer had a staff meeting. At the end of the all-staff meeting, the announcement was made for those employees going with the departing Partner to go to the upstairs conference room and those remaining with the Partner/President to remain where they were. The claimant remained and the Partner/President informed her that she should go upstairs with the departing Partner. The claimant indicated that she was not informed that she will be with the departing Partner. The Partner/President stated that he believed that she would be and she should go upstairs and speak with the departing Partner. The claimant asked if she was being laid off and the Partner/President stated that she was not and it was his belief that she was going to work for the departing Partner.

17. The claimant went upstairs and the departing Partner commented, "I didn't think you were coming. I already started the meeting." The claimant then left the work place instead of staying for the all-staff post-tax season luncheon.

18. At approximately 3:00 p.m., the Partner/President emailed the claimant and copied the departing Partner on it, stating that he and the departing Partner discussed what was owed to the claimant and that the departing Partner was very sure that the claimant's decision was to continue employment with her and that they spoke last week about someone coming to transfer the claimant's computer to the departing Partner's business. The Partner/President stated that he was surprised at the claimant's comments after the meeting earlier that day, that the departing Partner assumed the claimant was going with her, which was his assumption as well based on the claimant not submitting task lists for the past three weeks, not working on a particular audit, and not wanting to be a part of the management team.

19. On or about May 16, 2018, the claimant and the departing partner had a telephone conversation, during which the departing Partner asked the claimant if she would work for her. The claimant conveyed that she cannot because of the non-compete agreement still in effect until July 1, 2018.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We modify Finding of Fact # 12 by adding the president's complete response to the claimant's email on April 2, 2018, which is included in Exhibit # 11.[1] In addition to telling the claimant that many of the decisions regarding the partners' separation would be made before May 14, 2018, the president said he would let the claimant know of the decisions at that time in order to provide her with clarification and time to make her own decision. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant voluntarily left her employment without good cause attributable to the employer. We believe that the review examiner's findings of fact support the conclusion that the claimant was discharged from her employment.

The review examiner concluded that the claimant voluntarily quit her employment when she refused to work for the departing partner at the partner's new accounting firm. The review examiner erred when he analyzed the claimant's separation based on her relationship with the departing partner. Once the departing partner ended the partnership, the departing partner was not the claimant's employer. During the relevant period, the claimant was employed by the instant employer, [Employer A] CPA PC, Inc., referred to in the findings as the Partner/President, and we must, therefore, analyze the claimant's separation from this employer.

The review examiner found that the claimant remained in the room with the instant employer's president when staff split into two groups — the group that was leaving with the departing partner and those remaining with the instant employer. The review examiner also found that at that time, the president toldl the claimant that she was to go with the departing partner. In light these events, we find that the claimant did not quit her employment. Rather, the president discharged her, and, therefore, her qualification for benefits is governed by 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,

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

> provided that such violation is not shown to be as a result of the employee's incompetence . . . .

The review examiner found that the claimant did not answer the employer's multiple queries over the course of several weeks, regarding whether she would stay with the instant employer or leave with the departing partner. However, the review examiner also found that the claimant informed the employer on April 2, 2018, that she needed more information before she made her decision, and the documentary evidence in the record establishes the president responded that he would give more information to the claimant by May 14, 2018, which would help her make her decision regarding her employment status. Despite this assurance, during a meeting on May 14th, the president essentially told the claimant that she could not stay with the employer, thus making the decision for her.

As mentioned above, when the president asked employees on May 14th to split into a group going with the departing partner and a group staying with the instant employer, the claimant remained in the group staying with the instant employer, and it was the president who ordered the claimant to leave his group and follow the departing partner. The claimant indicated that she had no idea she was supposed to go with the departing partner and asked if the president was laying her off. Although the president said he was not laying her off, he reiterated that the claimant should go with the departing partner.

At the hearing, the president insisted that had the claimant chosen to remain with the instant employer, she could have continued working for him. However, the claimant clearly indicated that she was choosing to remain employed by the instant employer when she stayed in the employer's group during the May 14th meeting, but the president refused to let her stay. At that point, the claimant reasonably believed that she had been discharged by the employer. The claimant confirmed this belief on May 16, 2018, when she sent the president an email (Exhibit # 5) stating that he made it clear he did not a have a position for the claimant, and in his email response, he did not refute this.

The legislative intent behind G.L. c. 151A, § 25(e)(2) is "to deny benefits to a claimant who has brought about [her] own unemployment through intentional disregard of standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). "[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Here, the employer failed to establish that the claimant engaged in any behavior that constituted misconduct or a knowing violation of the employer's policies. Rather, it appears that the president assumed the claimant would be leaving with the departing partner, and when the claimant made it clear that was not her intent, the president refused to accept her decision. Under these circumstances, we cannot deny benefits to the claimant.

We, therefore, conclude as a matter of law that the claimant's separation from employment was not due to either deliberate misconduct in wilful disregard of the employer's interests, or to a knowing violation of a uniformly enforced rule or policy of the employer, as meant 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 May 26, 2018, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 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.

SVL/rh