

The review examiner's credibility assessment that the claimant resigned and was not fired for poor performance is reasonable in relation to the evidence presented. Because the claimant failed to appear at the remand hearing to explain the real reason for her separation, a personal issue with her son, there is insufficient evidence to conclude that she left for urgent, compelling, and necessitous circumstances. She is disqualified under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0025 8546 35

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 March 27, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 11, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 4, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violating a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present evidence. Only the employer 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 original decision, which concluded that the claimant was eligible for benefits because the employer had discharged her for poor performance, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant had voluntarily resigned for personal reasons.

Findings of Fact

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

1. The claimant worked as a Stock Clerk for the employer, an electronics company, from 8/21/17 until 3/26/18 when she became separated. The claimant had last performed work on 3/22/18.
2. On 3/22/18, the claimant left her shift early. The claimant had informed her Supervisor that she needed to leave early because she was having a personal issue with her son and that she was not sure if she would be returning.
3. On 3/23/18, the Supervisor notified the Vice President of Human Resources of the events the night before.
4. The Vice President of Human Resources attempted to reach the claimant on 3/23/18 to no avail, leaving the claimant a message.
5. On Monday 3/26/18, the claimant called the Vice President of Human Resources back and explained she was having a personal issue with her son and that she may need to quit.
6. The Vice President of Human Resources informed the claimant that she was not eligible for FMLA but that there were other personal leaves available to her if she needed time off. The claimant told the Vice President of Human Resources that she may need a month or more off, that she was very embarrassed by the situation and felt that it would be best if she just resigns.
7. The Vice President of Human Resources asked the claimant to come in to sign a resignation form if she planned on quitting.
8. On 3/27/18, the claimant came in to meet with the Vice President of Human Resources and completed a resignation form. (Remand Exhibit 2, Page 9)
9. The employer has not heard from the claimant since.
10. At no time was the claimant discharged.
11. There [were] no issues with the claimant's performance. The claimant had been trained properly, her job was never in jeopardy.

Credibility Assessment:

In the absence of rebuttal testimony from the claimant, the employer witnesses' testimony of the events are deemed more credible. The employer provided written evidence in support of their testimony. (Remand Exhibit 2, Page 9)

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and determine: (1) whether the consolidated findings are supported by substantial and credible evidence; as well as (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except to note that the separation date in Consolidated Finding # 1, which states it was on March 26, 2018, is inconsistent with the date shown in Consolidated Finding # 8 and Remand Exhibit 2, page 9, which reflect a resignation date of March 27, 2018. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Based upon the new evidence and consolidated findings after remand, we reject the review examiner's original legal conclusion that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2), as outlined below.

The review examiner's decision was based upon hearing testimony only from the claimant at the initial hearing, during which the claimant asserted that she had been fired for unsatisfactory work performance.¹ If true, she would be eligible for benefits under G.L. c. 151A, § 25(e)(2), as the review examiner originally concluded. *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979) ("When a worker is ill equipped for his job . . . , any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits."). However, in its appeal to the Board, the employer attached a document that purported to be a resignation letter from the claimant. We remanded to consider this additional evidence, which indicated that, in fact, the claimant had not been fired.

After remand, the review examiner has now found that the claimant was not fired, but that she resigned from her job. *See Consolidated Findings ## 6–8, and 10.* Since the claimant initiated her own separation, we must analyze her eligibility for benefits under the following provisions of G.L. c. 151A, § 25(e):

[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.

The express language in this section of law places the burden of proof upon the claimant.

¹ *See also* claimant's responses to the DUA fact-finding questionnaires entered into the record as Exhibits 3 and 4. While not explicitly incorporated into the review examiner's findings, the claimant statements are part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

In order to show that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). At the initial hearing, the claimant testified that the employer was unhappy with her work and that the problems were attributable to insufficient training. After remand, the employers' witnesses testified that the employer had no issues with the claimant's performance, that she had been properly trained, and that her job was not in jeopardy. Consolidated Finding # 11. In rendering this finding, the review examiner found the employer's testimony to be more credible than the claimant's. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). 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 explained in her credibility assessment, the review examiner believed the employer's version of events because the employer presented what appeared to be a written resignation from the claimant, and the claimant did not appear at the hearing to contest it. We believe the review examiner's assessment is reasonable in relation to the evidence presented.

Without the original findings about the claimant not being adequately trained or the employer unfairly reprimanding her for unsatisfactory work, there is nothing to indicate that the employer's conduct was unreasonable. Thus, there is no basis to conclude that the claimant resigned for good cause attributable to the employer.

Consolidated Finding # 5 suggests that the claimant had to quit because of a personal issue with her son. "[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under" G.L. c. 151A, § 25(e), "which may render involuntary a claimant's departure from work." Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). However, we must know something about those circumstances to assess whether they created an urgent, compelling, and necessitous reason to quit. Because the claimant never mentioned this at the first hearing as a reason for leaving her job, and she failed to participate in the remand hearing, we do not know anything about her son's personal issue. Consequently, there is also insufficient evidence to rule that the claimant separated for urgent, compelling, and necessitous reasons.

We, therefore, conclude as a matter of law that the claimant voluntarily left her employment and is ineligible for benefits under G.L. c. 151A, § 25(e)(1), because she did not establish good cause attributable to the employer or urgent, compelling, and necessitous circumstances that caused her to leave.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 25, 2018, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 20, 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

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.

AB/rh