

Where claimant was told not to report to work until the employer called, and then never received a call, held her separation was an involuntary discharge. Lacking any evidence of misconduct in the consolidated findings, the claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0017 5274 76

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 in October, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 20, 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 January 25, 2019. 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, she 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 afford the claimant an opportunity to present evidence. The claimant and the employer's third party administrator 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 decision, which concluded that the claimant is ineligible for benefits, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings do not show any misconduct, and further provide that a manager instructed the claimant to stay away from work until she was called, but the claimant never received any call.

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 part time as a general crew member for the employer, a fast food restaurant, from October 1, 2017 until on or about October 3, 2018.
2. The claimant's immediate supervisor was the general manager (the GM).
3. On September 25, 2018, the claimant arrived to work at 8 a.m. and was scheduled to work until 2 p.m.
4. The claimant left work at 2 p.m.
5. After the claimant left work on September 25, 2018, the assistant manager (the Assistant Manager) received a complaint about the claimant's behavior during her shift from a customer. The Assistant Manager called the GM and notified her of the complaint the customer made against the claimant.
6. The GM called the claimant, suspended her until further notice pending an investigation and told her she would be in contact to setup a meeting to discuss the customer's allegation. The GM told the claimant not to enter the employer's location until the she [sic] contacted her.
7. Approximately two to three days after September 25, 2018, the claimant called the store and left a message with a crew member for the GM to call her back.
8. The GM did not return the claimant's phone call. It was unknown why the GM did not return the claimant's phone call.
9. After the claimant's phone call to the employer, she called the store on multiple unknown dates, sometimes three times a day. The claimant left messages for the GM with crew members when she called the employer.
10. The claimant did not receive calls back from the GM after September 25, 2018.
11. The claimant sent the GM multiple text messages after September 25, 2018.
12. The GM did not respond to the claimant's text messages. It was unknown why the GM did not respond to the claimant's text messages.
13. On multiple unknown dates, the claimant called the district manager ("the DM") and left voicemails because he did not answer her phone calls.
14. It was unknown why the DM did not return the claimant's phone calls.

15. Around October 3, 2018, the GM and the Assistant Manager called the claimant to schedule a meeting to discuss the incident. The claimant did not answer her call and the GM left a message asking for her to return her call.
16. As of October 3, 2018, the GM had not made a decision of what discipline the claimant would have received.
17. The claimant did not receive the GM's phone call and did not receive the voicemail from the GM.
18. It was unknown why the claimant did not receive the GM's phone call and voicemail.
19. It was unknown if the GM received the messages from the crew members that the claimant had called the employer.
20. The employer had work available for the claimant.
21. The claimant did not quit her employment.
22. The claimant did not return to the store after September 25, 2018 to speak with the GM because the GM told her to not to return to the store until she received a phone call from the GM.
23. On October 22, 2018, the claimant filed an unemployment claim effective for October 21, 2018.
24. The claimant filed her unemployment on October 22, 2018 because the employer had not returned her phone calls.
25. At the time she filed her unemployment claim, she indicated to the Department of Unemployment Assistant she had been suspended from employment.

Credibility Assessment:

Although at the remand hearing the claimant disputed the Assistant Manager's testimony from the original hearing about the incident that caused her suspension, it was undisputed by the Assistant Manager at the original hearing and by the claimant at the remand hearing that the claimant was suspended on September 25, 2018. Further, it was undisputed by the Assistant Manager at the initial hearing and by the claimant at the remand hearing that the claimant's separation occurred after the suspension. Additionally, the claimant provided direct testimony at the remand hearing denying the customer's allegation.

At the original hearing, the Assistant Manager testified that she and the GM attempted to contact the claimant on one occasion, around October 3, 2018. The

Assistant Manager also testified that she did not receive any contact from the claimant after September 25, 2018 and that she did not receive any contact from the to [sic] the voicemail left on or about October 3, 2018. However, as a result of its failure to attend the remand hearing, the employer failed to offer any additional testimony about whether the GM received phone messages from the claimant by crew members.

The claimant offered unrefuted testimony at the remand hearing that she did not receive the phone call and voicemail left by the GM and Assistant Manager around October 3, 2018. The claimant further testified that [sic] called the store and left several messages with crew members and sent several text messages to management after September 25, 2018 but did not receive any response. Further, the claimant waited until October 22, 2018 to file her unemployment claim because she had not heard from the employer in nearly a month.

As the claimant provided detailed, consistent testimony and her testimony was consistent with her statements to the Department of Unemployment Assistance, the totality of the claimant's testimony at the remand hearing outweighs the employer's testimony given in the initial hearing. Therefore, the claimant is deemed more credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. Based upon the consolidated findings after remand, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question that we must decide is whether the claimant left her employment voluntarily or not. There was no dispute that the employer placed the claimant on a suspension on September 25, 2018. Consolidated Findings ## 5 and 6. After only listening to the employer's testimony at the original hearing, the review examiner concluded that the claimant separated of her own volition when she failed to respond to the employer's October 3, 2018, voicemail asking the claimant to call back and schedule a meeting.¹ If the claimant separated voluntarily, it would be her burden to show that she did so for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1). However, at the remand hearing, the claimant denied receiving any communication from the employer after October 3, 2018.

The review examiner has now found that the claimant was told not to report to work until called, and that she never received a call from her General Manager nor any response to her own efforts to contact the General Manager and District Manager. *See* Consolidated Findings ## 6–15, and

¹ The review examiner's original decision is entered into the record as Remand Exhibit 1.

17. In rendering these new consolidated findings, the review examiner had to decide between the parties' competing testimony. See 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) (“The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony. . . .’”). Such assessments will not be disturbed on appeal unless they are unreasonable in relation to the evidence presented. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). For the reasons stated in her credibility assessment, we believe these findings are reasonable in relation to the evidence presented.

Since the employer instructed the claimant not to report to work, we conclude that the claimant's employment ended involuntarily, and her eligibility for benefits is properly analyzed under G.L. c. 151A, § 25(e)(2). This section 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

“[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). In this case, the employer has not met its burden.

As a threshold matter, the employer must prove that the claimant engaged in some sort of misconduct. In this case, all we have is a finding that the employer received a complaint about the claimant from a customer. See Consolidated Finding # 5. Any findings from the original decision, which indicated that the claimant contacted a customer's workplace with a fabricated story to get him in trouble, were omitted from the consolidated findings.² Consequently, there is nothing from which we can conclude that the claimant behaved in a manner which might constitute a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest.

We, therefore, conclude as a matter of law that the claimant was discharged from her employment. We further conclude that the employer failed to show that the claimant is ineligible for benefits under G.L. c. 151A, § 25(e)(2).

² See Remand Exhibit 1.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 21, 2018, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 30, 2019



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.

AB/rh