

The parties disputed the nature of separation; the review examiner accepted as credible the employer's project manager, who said the claimant quit after being sent home for the day, rather than the claimant's claim that he was discharged. The manager's testimony was more credible, where the claimant initially claimed he was fired when he showed up, then claimed he was sent home and discharged by the owner, and finally claimed he believed he had been discharged by text message from the owner.

**Board of Review
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Issue ID: 0030 0084 73

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. Benefits were denied on the ground that the claimant quit without establishing good cause attributable to the employer, or urgent, compelling, and necessitous reasons for leaving pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on April 19, 2019. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on June 12, 2019. The claimant sought review by the Board, which denied his appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On January 13, 2020, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence from the claimant regarding the circumstances that created his separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant quit without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full time as a laborer for the employer, a civil contractor, on [and] off from an unknown date in the early 2000s until March 12, 2019.
2. The claimant's immediate supervisors were the Project Manager and the owner (the Owner).
3. The Project Manager oversaw the claimant in the capacity of snow removal projects.
4. The Project Manager did not have the authority to discharge employees.
5. The Owner oversaw the claimant's daily job duties.
6. During the winter season, the employer contracted with commercial businesses to remove snow from their properties.
7. Throughout the claimant's employment, he completed snow removal for the employer during the winter.
8. On an unknown date prior to March, 2019, the Project Manager asked the claimant to work a side job with him, which was a personal job for the Project Manager. The claimant declined to work the side job.
9. The Project Manager did not discipline the claimant for not completing the side job.
10. The Project Manager did not intend to discipline the claimant for not completing the side job.
11. On March 8, 2019, the Project Manager held a meeting with the laborers, including the claimant. During the meeting, the Project Manager notified the claimant and the laborers that the weather report called for a dusting to two inches of snow for the following Sunday (March 10, 2019). He notified them that he expected them to work at the commercial clients' location to remove snow on Sunday.
12. On March 9, 2019, the claimant's son, who resides with his ex-significant other, spent the night at his home. The claimant contacted his mother to ask if she could babysit his son the next morning so he could work, and the claimant's mother said she could not.
13. The claimant did not notify the Project Manager on March 9, 2019, that he did not have childcare and could not work on March 10, 2019.
14. It snowed on March 10, 2019.

15. The claimant overslept on March 10, 2019.
16. The claimant did not report to any of the employer's commercial locations on March 10, 2019, and did not report his absence to the Project Manager.
17. On March 10, 2019, the Project Manager called the claimant four or five times to ask why he had not arrived at work.
18. When the claimant woke up on March 10, 2019, he did not return the Project Manager's phone calls because he saw the snow had melted and believed the Project Manager did not need him.
19. On March 11, 2019, the Project Manager reassigned the claimant's duties to a different laborer.
20. When the claimant arrived at work on March 11, 2019, the Project Manager told him his daily duties had been reassigned and sent him home for the day. He told the claimant to "go the fuck home".
21. The Project Manager did not discharge the claimant on March 11, 2019.
22. The Project Manager did not intend to discharge the claimant on March 11, 2019.
23. On March 11, 2019, the claimant sent the Owner a text message stating, "Hi [the Owner] I want to work tomorrow should I come into work?"
24. The Owner responded to the claimant's text message by text message on March 11, 2019, stating, "[The claimant], You put me in a bad situation. I wen {sic} away. [Coworkers] were w (sic) me. You knew that. [The Project Manager] met w (sic) you Friday and told you what was going on, He was depending on you. I told him I was coming home sat (sic) night w (sic) all those guys. He said no don't. We got this. Then you decide not to answer his call? [A coworker] was w (sic) his wife having contractions and no [coworker]... That is just a big fuck you to [the Project Manager], me and your responsibilities to the company. I've tried to give you responsibility and move into a leadership role and you don't take it seriously. You drink, sleep and don't take your role seriously. I can't fix that. I can only give you so many opportunities. Now you have burned [the Project Manager] (again) and he wanted nothing to do w (sic) you, The plan was to keep you busy in the shop until the spring and put you back out into the field w excavating. He will not work w (sic) you and I can't blame him. What you did was selfish and irresponsible."
25. The claimant responded to the Owner's text message stating, "This is more than the snow, he asked me to help him out on a side job & I said no so now this is what I get".

26. The claimant did not report to work on March 12, 2019.
27. On March 12, 2019, the claimant quit his employment when he failed to report to work.
28. The employer had work available for the claimant in the shop with the Owner.

Credibility Assessment:

It was undisputed that the Project Manager told the claimant to “go the fuck home” on March 11, 2019, when he failed to report to work on March 12, 2019.

The Project Manager testified that the claimant quit when he failed to report to work on March 12, 2019. The Project Manager directly testified he did not discharge the claimant as he did not have the authority to do so. Also, he testified that he intended for the claimant to return to work on March 12, 2019. Even though the Owner sent the claimant a text message stating that the Project Manager did not want to work with him, it did not state that he was discharged, and work remained available in the shop. It is the Project Manager’s contention that the claimant ultimately quit without notice when he failed to arrive at work on March 12, 2019.

The claimant initially testified he was discharged on March 11, 2019, by the Project Manager, when he arrived at work for failing to report to work the previous day. However, he then admitted the Project Manager did not tell him he was discharged, but that the Owner told him to go home and that the employer had to let him go. The claimant then testified it was the text message from the Owner that caused his belief that he was terminated.

Based on the claimant’s vague and inconsistent testimony and the Project Manager’s consistent testimony over both the original and remand hearings, the totality of the employer’s testimony outweighs the claimant’s testimony. Therefore, the employer 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.

The review examiner initially denied benefits after analyzing the claimant’s separation under G.L. c. 151A, §§ 25(e) and 25(e)(1). G.L. c. 151A, § 25(e) provides, in pertinent part, as follows:

. . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

G.L. c. 151A, § 25(e)(1), provides in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . .] [f]or . . . 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

Under G.L. c. 151A, §§ 25(e) and 25(e)(1), it is the claimant's burden to establish that his separation was for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. Based on the employer's undisputed testimony at the initial hearing, the review examiner concluded the claimant had not met his burden. After remand, we also conclude that the claimant initiated his own separation and has not met his burden under the applicable provisions of the statute.

Both initially and after remand, the review examiner found that the claimant was not discharged but rather quit when he failed to report to work on March 12, 2019. *See Consolidated Findings ## 24 and 27.*

The review examiner found that, on Friday, March 8, 2019, the project manager met with the claimant and other laborers to inform them that snow was expected on Sunday, March 10, and that they would be expected to work performing snow removal for the employer's commercial clients that day. The claimant had performed snow removal tasks during his tenure with the employer. *See Consolidated Finding # 7.*

On Sunday, March 10, it snowed. *See Consolidated Finding # 14.* The employer had work to do clearing snow from its commercial clients, but the claimant did not report to any of the clients' sites and did not call the project manager because the claimant overslept. *See Consolidated Findings ## 15–16.* The project manager tried to call the claimant four or five times to ask why he was not at work, but the claimant did not return any of the phone calls because the snow had melted by the time he woke up, and he believed the employer did not need him. *See Consolidated Findings ## 17–18.*

On March 11, 2019, the project manager reassigned the claimant's duties to another laborer. When the claimant arrived at work, the project manager said his daily duties had been reassigned and sent him home for the day, telling the claimant, "Go the fuck home." *See Consolidated Finding # 20.* The review examiner found the project manager did not intend to discharge the claimant. *See Consolidated Finding # 25.* The project manager did not have the authority to discharge the claimant, whose daily job duties were overseen by the owner. *See Consolidated Findings ## 4–5.*

That evening, the claimant sent the owner a text message asking whether he should come to work the next day; the owner replied that the claimant had let him and the project manager down, and had been "selfish and irresponsible." *See Consolidated Finding # 24 and Hearings Exhibit 4.* The owner did not tell the claimant he was discharged. Instead, the claimant replied by accusing the

project manager of retaliating against him for previously declining to do a side job for him. *See Consolidated Finding # 25*. However, the review examiner found the project manager did not discipline (or intend to discipline) the claimant for declining to perform the side job. *See Consolidated Findings ## 9–10*.

The parties disputed who initiated the claimant's separation, but the review examiner explicitly found that the claimant quit. To support her findings, the review examiner provided a credibility assessment setting forth her reasons for accepting the employer's testimony over the claimant's with regard to the nature of his separation. Specifically, the review examiner noted that the claimant first alleged that he was told he was discharged by the project manager upon reporting to work on March 11. The claimant then admitted the project manager had *not* told him he had been discharged, but that the owner told him to go home and that the employer had let him go. Finally, the claimant alleged that it was the text message from the owner that led him to believe he had been terminated. The review examiner noted that the owner's text message did not state the claimant was discharged, and she determined that the claimant's vague and inconsistent testimony was less credible than the project manager's consistent testimony over the initial and remand hearings.¹ Such credibility assessments are within the scope of the review examiner's fact finding role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

In short, although the employer had work available for the claimant to perform, the claimant quit his job by failing to report to work on March 12, 2019. *See Consolidated Findings ## 27–28*. He abandoned his job. *See Olechnicky v. Dir. of Division of Employment Security*, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)).

Since the claimant contended that he was discharged, he did not present evidence that he left for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons. To establish good cause, he must show that the employer acted unreasonably. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). We see nothing in the consolidated findings that indicates that the employer acted unreasonably. There is also nothing to suggest pressing personal circumstances that caused him to leave his job. *Reep v. Comm'r of Department of Employment and Training*, 412 Mass. 845, 851 (1992).

Even if, *arguendo*, we view the claimant's separation as a discharge, he would not be eligible for benefits under G.L. c. 151A, § 25(e)(2), because the consolidated findings establish that he engaged in deliberate misconduct in wilful disregard of the employer's interest. Specifically, Consolidated Findings ## 13-18 show that, on March 12, 2019, he did not report for work, did not notify the employer that he would be absent, and, after he woke up, failed to return repeated calls from the Project Manager. Whether or not the claimant reasonably believed there was not enough snow to bother with plowing, such belief does not mitigate his failure to return phone calls. *See Grise v. Dir. of Division of Employment Security*, 393 Mass. 271, 275 (1984) (in order to

¹ We also note that the claimant's pretext for not being available to work as required on Sunday — lack of childcare for his son — was undercut by his admission that he overslept that morning. Further, neither lack of childcare nor oversleeping mitigates the claimant's failure to return the project manager's calls after he finally woke up that day.

determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior); Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28* (the absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest).

We, therefore, conclude as a matter of law that the claimant voluntarily left his employment without good cause attributable to the employer, and without urgent, compelling, and necessitous reasons. He is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending March 16, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



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DATE OF DECISION - April 15, 2020

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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until May 4, 2020². If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

² See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-1-20.

JPC/rh