Fast food restaurant shift manager was a no-call, no-show. Although he was absent due to the birth of his child, he failed to seek time off and just stopped reporting for work. He is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0030 9796 04

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 award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer in May, 2019. He filed a claim for unemployment benefits with the DUA, effective May 5, 2019, which was denied in a determination issued on October 29, 2019. 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 27, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged and that he had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 obtain evidence from the employer about the circumstances of the claimant's separation. 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 employer had discharged the claimant for taking time off for the birth of his child, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant never notified the employer that he would be out and stopped reporting for work.

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 full time as a shift lead for the employer, a restaurant, from December, 2013, until 03/01/19. The claimant was paid $13.50 per hour.

2. The claimant's supervisor worked approximately three (3) days per week with the claimant.

3. The claimant's supervisor was very flexible with the claimant and gave him more chances than she should have under company policy to continue working after he was continually absent and tardy and had No Call/No Shows.

4. In early 2019, the claimant's supervisor was aware that his girlfriend was pregnant. The claimant's supervisor knew who his girlfriend was because she also worked for the employer but at a different location.

5. The claimant was scheduled to work on 03/02/19, 03/03/19, and 03/04/19.

6. Instead of going to work those days, the claimant went to the hospital with his girlfriend because she was being induced.

7. The claimant did not ask his supervisor for time off to be with his girlfriend or newborn; he just stopped coming to work. The claimant's supervisor found other employees to cover the shifts on his schedule.

8. The claimant's supervisor would have approved his request for time off because she was aware that it was important for him to be with his infant and girlfriend at that time.

9. At the end of the week, the claimant returned to the workplace to pick up his check. While he was there, he told coworkers that he quit for another job.

10. The claimant's supervisor was there when he picked up his check, but he never spoke to her or gave her any reason as to why he stopped coming to work. He also never spoke to her about any concerns he may have had prior to quitting.

11. The claimant never asked his supervisor for a raise and never mentioned that any other supervisor had promised him a raise.

12. The claimant's supervisor never promised the claimant a raise.

13. Shift leads were all paid similarly to the claimant - $13.50 per hour and all received an annual raise.

14. The claimant abandoned his job.

15. The claimant's supervisor never texted the claimant to tell him he no longer had a job.

Credibility Assessment:

In the initial hearing, the claimant testified that he stopped going to work because he was upset about not getting the raise which had been promised to him by his supervisor and that around the same time, he had asked for and was denied time off to be with his girlfriend and newborn child. He further testified that his supervisor texted him and told him that he had abandoned his job because he No Call/No Showed. The claimant did not attend the remand hearing.

At the remand hearing, the claimant's supervisor testified that she never promised him a raise and that he never mentioned any issues about his pay prior to abandoning his job. She further testified that he never asked for time off to be with his girlfriend and newborn child and she denied ever texting him to tell him that he no longer had a job.

The evidence established the claimant abandoned his job. The supervisor's testimony is deemed more credible than that of the claimant. The supervisor worked with the claimant several times a week and was very familiar with him and his pregnant girlfriend and testified that she would have approved him for time off had he asked for it. She presented as sincere witness who had given the claimant more chances than she should have to keep his job when he was late or absent.

Therefore, her testimony that she never texted the claimant to notify him that he was no longer an employee is also credible. The claimant never provided a copy of the text for the record.

Further, the supervisor's testimony that he never asked her for a raise prior to quitting is logical considering all Shift Leads were paid [similarly] and received raises on an annual basis.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 14 is not a finding of fact, but a conclusion of law. At this point in the appeal process, the Board of Review and not the review examiner,

renders conclusions of law.[1] In adopting the remaining findings, we deem 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

In her original decision, the review examiner found that the employer told the claimant not to come into work anymore, and analyzed his eligibility for benefits as a discharge pursuant to G.L. c. 151A, § 25(e)(2). After hearing the employer's testimony at the remand hearing, her consolidated findings of fact now reflect that the claimant was not discharged, but that he walked away from his job. *See* Consolidated Findings ## 5-7, 9 and 15.

Where an employee fails to show up for work or report the reason for an absence, the no-call, no-show is tantamount to a voluntary resignation. 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)). The consolidated findings provide that instead of reporting to work on March 2, 3, and 4, 2019, the claimant went to the hospital to be with his girlfriend while she was induced into labor. *See* Consolidated Findings ## 5 and 6. He did not ask for time off or, apparently, even notify his supervisor that he was not coming into work.[2] He simply stopped reporting to work. *See* Consolidated Finding # 7.

Since the claimant's separation is treated as a voluntary separation, his eligibility for benefits is properly analyzed under a different subsection of G.L. c. 151A, § 25(e), which states, 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 (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 explicit language in this section of law places the burden of proof upon the claimant.

In order to show 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). There is nothing in the consolidated findings

[1] *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

[2] Although not explicitly stated in the consolidated findings, it is evident from the review examiner's credibility assessment that she believed the supervisor's testimony that the claimant was a no-call, no-show beginning March 2, 2019. 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). We believe her assessment is reasonable in relation to the evidence presented.

which suggests that the employer acted unreasonably. In fact, they indicate that the claimant's supervisor would have granted him time off to be with his girlfriend and newborn, had he asked for it. *See* Consolidated Findings ## 7 and 8. Thus, the claimant has not shown good cause attributable to the employer for leaving his job.

The record also fails to show that the labor and delivery of his child created an urgent, compelling and necessitous basis for resigning. It is understandable that the claimant had a compelling reason to be absent from work and present at the hospital while his girlfriend was being induced. However, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve [his] employment' as would indicate the claimant's 'desire and willingness to continue [his] employment.'" Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009), *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–98 (1974). Here, the claimant not only failed to seek permission to have the time off, he never returned to his job. *See* Consolidated Finding # 7.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from employment. We further conclude that he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), due to job abandonment.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 5, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 11, 2020

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 (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