

Though the claimant driver believed the employer was upset with him for swearing and then returning to the lot to check on gas at the exact hour he was supposed to be picking up customers, the employer never stated that he was fired. Because the claimant failed to call dispatch for more work, held the claimant walked away from his job voluntarily without good cause attributable to the employer.

**Board of Review
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Issue ID: 0031 2480 46

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 affirm.

The claimant separated from his position with the employer on May 22, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 27, 2019. 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 August 14, 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, he 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 obtain more evidence about whether the claimant quit or was discharged and whether the separation was due to family circumstances. Both parties 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 did not discharge the claimant, but that he left voluntarily without good cause attributable to the employer after an incident involving the use of foul language, is supported by substantial and credible evidence and is free from error of law.

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 driver for the instant employer, an airport shuttle service, from 05/22/15 until 05/22/19.
2. In March of 2019, the claimant spoke to his manager about potentially moving to Florida to support his nephew if a job came up. The claimant's nephew struggles with substance abuse.
3. The job fell through and the claimant never relocated to Florida. The claimant would not have left the job to move to solely to be with his nephew, he only would relocate if he had been offered the job.
4. The employer issues the driver's daily schedules. The claimant is required to contact dispatch during the hours of 3 p.m. and 7 p.m. to find out what his schedule will be for the following day.
5. During the week ending 05/25/19, the claimant's availability was between 1 p.m. and 10 p.m.
6. On 05/19/19, the claimant worked from 2:21 p.m. until 12:55 a.m.
7. On 05/20/19, the claimant worked from 1:25 p.m. until 12:31 a.m.
8. On 05/21/19, the claimant worked from 2:24 p.m. until 12:55 a.m.
9. On 05/22/19, the claimant was scheduled to report to work at 2:15 p.m. and work until approximately 10 p.m. He reported to work at 2:13 p.m., was given a schedule, and assigned a vehicle.
10. The claimant was scheduled for 2 trips. He was scheduled for a 3 p.m. and 3:15 p.m. pick up in [City A], MA to transport to Logan airport.
11. The claimant was also scheduled to transport individuals back from Logan airport at 5 p.m. after the drop off.
12. After inspecting the vehicle, the claimant found the vehicle wasn't working properly and had to get assigned to another vehicle.
13. This caused the claimant to be running a bit behind schedule.
14. The claimant went to leave and there was passenger in a car that was blocking the access area he would leave from.

15. The claimant said to the passenger that she [sic] couldn't go through the stop sign because she was blocking him from getting out. The passenger responded, "fuck off."
16. The claimant was frustrated because he was running late and responded, "go fuck yourself, you cunt."
17. The front door of the office was open and the claimant's interaction was overheard by the Treasurer in the office.
18. The claimant called the office to check on his fuel and the Treasurer asked to speak to the claimant.
19. The Treasurer got on the phone and asked the claimant if he just swore at someone and the claimant denied it. The Treasurer told the claimant that if he found out on video that you swore he would fire him right away. The claimant realized he was on the phone with the Treasurer and confirmed that he did swear at someone.
20. The claimant was still concerned about his fuel level and turned around to go back to the office. The claimant returned to the office at 3 p.m.
21. The Treasurer confronted the claimant in the office and asked what he was doing and the claimant apologized for swearing.
22. The Treasurer immediately told dispatch to get someone on the claimant's route because he knew that the customers needed to be picked up in a timely manner to get to the airport. The other driver would now also be responsible for the return trip from airport.
23. The Treasurer and the claimant spoke briefly about the claimant's language and the Treasurer walked away because he was frustrated by the claimant's behavior and wanted some time to cool off before addressing the situation.
24. The Treasurer did not tell the claimant anything about his remaining assignments for the day or about his employment status. The claimant left for the day.
25. On 05/22/19, the Treasurer spoke to the claimant's manager in person. The Treasurer indicated that the claimant had cursed at a woman and had come back to the office. They did not reach a resolution about the claimant's employment status.
26. The manager went to speak to the claimant but he had already left. The employer did not make any additional attempts to contact the claimant on 05/22/19.

27. On 05/22/19, at approximately 3:41 p.m., the claimant called to speak with the manager to discuss his status. The manager was busy and unable to speak with the claimant. The claimant did not contact dispatch for his schedule on 05/23/19.
28. On 05/23/19, at approximately 4:20 p.m., the claimant called the manager and asked if he could come to the office to speak about his employment status. The manager agreed but they did not schedule a specific time.
29. On an unknown date, the claimant prepared a letter to the employer that stated in part:
- “I would first like to apologize for the unnecessary use of foul language. I would also like to say although some extended family matters have recently become apparent and my employment was not likely to be much longer, I have nothing but good experiences with the company and thank those who offered me work.”
30. The claimant prepared the letter because he wanted to apologize for his language and clear the air to avoid any animosity.
31. On or about 05/23/19, at approximately 5 p.m., the claimant went into work to speak to the manager but he was unavailable.
32. On an unknown date, the claimant went back to the employer and handed the letter to dispatch and they left the letter in an envelope on the corkboard.
33. On or about 05/27/19, the claimant’s supervisor received the letter and assumed that the claimant had quit his job.
34. The employer’s assertion that the claimant quit his job was a result of receiving the letter from the claimant.
35. The claimant’s assertion that he was discharged from the job was because he used foul language and the treasurer said he would fire him right away if he wasn’t truthful about swearing at the individual.
36. On 07/03/19, the claimant sent an email to his supervisor asking for his personnel records.

Credibility Assessment:

The employer contends that the claimant quit his job and the claimant believes that he was discharged. It is reasonable to conclude that the Treasurer/Owner could’ve have [sic] terminated the claimant on the spot if he felt it was appropriate which didn’t take place. Further, the only discussion about being terminated was if the claimant didn’t tell the truth, which the claimant complied

with and told the employer the truth about what took place. The claimant was never directly told that he was discharged. These facts coupled with the letter prepared by the claimant establishes that the claimant's belief that he was discharged was not reasonable and the employer's testimony is still found more reliable.

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question we must decide is whether the claimant resigned or was discharged. In this case, because no one actually stated "you're fired" or "I quit," we must view the record as a whole and draw reasonable inferences from the evidence.

The consolidated findings state that the claimant believed that he had been discharged, because he had used foul language, and, after denying doing so, the treasurer told him that he would fire him right away if the video showed that he had. Consolidated Finding # 35. We have also considered that, after the claimant returned to the office at 3:00 p.m., the Treasurer had dispatch give the claimant's assigned route for the day to someone else, spoke to the claimant about his foul language, and walked away from him. Findings of Fact ## 20-23. Although these events do indicate that the Treasurer was not happy with the claimant at that point, they fall short of demonstrating that he had been fired or would be fired.

First, we believe that Consolidated Finding # 35 accurately interprets the treasurer's warning to the claimant as a threat to fire him if he were not truthful about swearing. This is because the warning came on the heels of the claimant initially denying that he swore. *See* Consolidated Finding # 19. Moreover, after confessing the truth, the Treasurer apparently allowed the claimant to continue to work. *See* Consolidated Findings ## 19 and 20.

Second, it was only after the claimant returned to the office to check on his fuel level at 3:00 p.m., the appointed time for picking up his customers, that the Treasurer gave his route to another driver. *See* Consolidated Findings ## 20-22. We can reasonably infer that the Treasurer did this to ensure that the customers would get to the airport. If the employer had then refused to give the claimant any more work, we would agree that the claimant could believe that he had been terminated. However, there is no evidence of this.

This employer assigned work by having drivers call dispatch each afternoon to request assignments for the following day. *See* Consolidated Finding # 4. Presumably, the claimant was well aware of this procedure, as he had worked for the employer for four years. *See* Consolidated Finding # 1. Yet, he did not contact dispatch for the next day's schedule on May

22nd, or thereafter. Consolidated Finding # 27. We believe that the claimant was genuinely concerned that he had upset the employer. However, the employer seemed willing to address his concerns, as the manager agreed to speak with him. *See* Consolidated Finding # 28. There is simply nothing in the record to indicate that the claimant could not have kept driving for the employer while they worked this out. Because the claimant chose not to call dispatch for more work, we agree that he abandoned his job.

Having concluded that the claimant separated from his employment voluntarily, we analyze his eligibility for benefits pursuant to 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.

These provisions of law place the burden of proof upon the claimant.

To determine whether the claimant has shown good cause attributable to the employer to resign, 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). Here, we see nothing unreasonable about the employer's conduct on May 22, 2019, or in the subsequent days. The Treasurer's initial threat to fire the claimant for dishonesty was an appropriate response, since the Treasurer knew that the claimant was lying. We think he also had a valid business concern about customer service in promptly re-assigning the claimant's route when he saw the claimant back at the office at 3:00 p.m. Furthermore, the claimant's manager seemed willing to listen to the claimant's concerns, and, again, nothing in the record suggests that dispatch would not have assigned more work, if the claimant had asked for it.

Finally, because the claimant's letter alludes to the fact that his employment was not likely to be much longer due to family matters, we remanded to explore whether such family matters actually drove his separation. *See* Consolidated Finding # 29. "[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). After remand, the consolidated findings show that, although the claimant did have a nephew struggling with a substance use disorder in Florida, the claimant had no plan to relocate until he found another job. *See* Consolidated Findings ## 2 and 3. Under these circumstances, we cannot conclude that there was an urgent need for the claimant to leave.

We, therefore, conclude as a matter of law that the claimant separated from his employment voluntarily without showing a reasonable belief of imminent discharge or good cause attributable to the employer. He is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending May 25, 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 - December 19, 2019



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.

AB/rh