

After claimant sent an email reporting her last day of work in response to her supervisor's request to put down a date *if* she was going to resign, the employer gave the claimant's job to someone else. Given findings and evidence that this was not intended to be a resignation, held the claimant was discharged. Since there was no misconduct, she may not be denied unemployment benefits under G.L. c. 151A, § 25(e)(2).

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Issue ID: 0031 8036 83

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 affirm.

The claimant separated from her position with the employer on July 19, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 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 September 27, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged from employment, and, because she 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, 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 obtain further evidence about the circumstances of the claimant's separation from employment. 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 decision, which concluded that the claimant separated involuntarily from her job, 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 full-time as a Call Service Representative for the employer from 01/14/19 until 07/19/19.
2. Some employees in the claimant's department work from home.
3. On 06/27/19, the claimant sent a text to her supervisor indicating she was thinking of moving to Oregon and was wondering if she could work from home. The text stated:

So I may be forced to move across the country to Oregon. It is not set in stone at all but it is talked about due to some family stuff. I love my job. I finally found somewhere I am super happy to go to work and I am actually really decent at doing but there are no offices in Oregon and the closest agency there is about 45 miles away.

And I don't want to lose this job at all. I don't even want to leave this state never mind we will be across the country but yet again I may be forced to in a month or so or less. Nothing is set yet.

I know that usually we can't work from home until a year after starting sometime less depending on the numbers which I know my numbers are super good but again that's all the way across the country.

One huge thing for me trying to make sure I stay with this job so I'm not sure if there is any way I can work from home if it does come down to me having to move but it would be really amazing if I could bring the job with me if I had to go.

I would be completely willing to do whatever it takes for me to be able to do that if it is even possible and that includes flying back whenever needed to come into the office but again I do not want to lose this job I am finally super happy where I am and me possibly having to let it go is making my anxiety go through the roof and I just don't know what to do so I am reaching out to you to let you know what is happening and see if there are any options.

4. The claimant believed she made it clear to her supervisor that she had not decided to move yet.
5. At the time, the claimant's husband was working in Oregon. The claimant was pregnant and she planned to raise her child in Oregon if she could work from home for the employer.
6. The supervisor replied via text indicating that she would discuss it with her manager. She indicated that she knew they had done it in the past for others

but that it did not work out well. She further indicated she would speak to her manager when she returned from vacation. The supervisor was scheduled to return from vacation on 07/08/19.

7. On 07/02/19, the claimant texted her supervisor:

Just an update. If I am leaving, which I will know by next week, I will have to leave by the 20th. I have vacation time that following week. That Monday I am supposed to work but if I leave then I don't know what I will do for that day because I don't have time to use if I can take the job with me.

8. The supervisor was aware that the claimant hadn't decided to move yet, but she asked the claimant to put the day that she planned on leaving (if she was going) in an email.
9. On 07/11/19, the claimant sent her supervisor an email stating, "Just sending an email to confirm with you that my last day will be July 19, 2019 as I will be moving away."
10. The claimant did not believe that she was giving her notice of resignation. She felt it was still "up in the air" at that point because she did not know if she could work from home yet and knew that if her request to work from home was denied that it would be very hard for her to get a new job in a new state because she was pregnant.
11. If the employer approved her request to work from home in Oregon, the claimant would have moved there. She had the week of 07/22/19-07/26/19 scheduled off and thought that she would spend that time setting up her new home office if her request to work from home in Oregon was approved.
12. On 07/12/19, the claimant's supervisor advised her that her request to work from home in Oregon was denied. The claimant's supervisor stated that her last day would be 07/19/19.
13. The claimant's position was filled almost immediately because a new hire class of candidates was available for any job openings within the company.
14. That same day the claimant texted her supervisor and advised her that she was not moving and that she therefore was not resigning.
15. The claimant's supervisor had no previous experience with employees who resigned from the company so she sought Human Resource Business Partner's (HRBP) advice on the matter.
16. The HRBP indicated that the employer could consider rescinding the resignation if the position was still available or if there were any other open positions.

17. The claimant's supervisor determined the claimant's position was no longer available and that there were no other open positions she could transfer to. The claimant's supervisor notified the claimant that she had already been replaced and that her last day would be 07/19/19.

18. The claimant did not move to Oregon.

19. The claimant tried to immediately enroll in the employer's class of candidates for open positions but was unable to do so.

Credibility Assessment:

Although the email of 07/11/19 states that the claimant was moving away, her testimony that she did not intend to quit and move to Oregon unless she could work from home is deemed credible, because it was supported by her text messages, the fact that she did not move to Oregon, and by the supervisor's own testimony. It appears that the claimant typed the 07/11/19 email with information that she perceived her supervisor wanted her to write, and not with information that reflected what she planned on doing unless her request to work from home in Oregon was approved.

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 eligible for benefits.

The first question we must decide is whether the claimant's separation from employment came about as a result of a voluntary resignation or an involuntary discharge. The review examiner concluded that the employer discharged the claimant and analyzed her separation under G.L. c. 151A, § 25(e)(2), which provides, in pertinent 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).

On its face, the wording of the claimant’s July 11, 2019, email would seem to be a clear communication confirming that the claimant was resigning. She wrote, “. . . my last day *will be* July 19, 2019 as I *will be* moving away.” See Consolidated Finding # 9 (emphasis added). The employer treated it as such and immediately filled the position. See Consolidated Findings ## 12, 13, 16, and 17. If it was a resignation, then the employer was not obligated to honor the claimant’s request to rescind that resignation. See LeBeau v. Comm’r. of Department of Employment and Training, 422 Mass. 533, 536 (1996) (collecting cases from other jurisdictions and adopting the majority rule that an offer to resign, once made and accepted, cannot be retracted for purposes of unemployment insurance eligibility); see also Abramowitz v. Dir. of Division of Employment Security, 390 Mass. 168, 173 (1983) (substantial evidence supported the hearing officer’s conclusion that the claimant had voluntarily resigned, causing his own unemployment, and subsequent letters from his attorney to say the claimant had not intended to resign were of no effect).

However, other consolidated findings present a context for reading the claimant’s July 11, 2019, email differently. Consolidated Findings ## 8 and 10 provide that, at the time, the claimant had not yet decided to leave, did not believe she was giving her notice, and sent the communication only in response to her supervisor asking for an email confirming her last day *if she was going*. As noted in the review examiner’s credibility assessment, the claimant’s supervisor provided testimony that supported this view of the evidence.¹ In light of this record, we agree with the review examiner. Substantial evidence shows that the decision to terminate the claimant’s employment came from the employer.

Since the employer terminated her employment, it had the burden to show that such discharge was due to either a knowing policy violation or deliberate misconduct in wilful disregard of its interest. Since nothing in record shows that the claimant violated a policy or engaged in any misconduct, she may not be disqualified from receiving unemployment benefits under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant’s separation from employment was involuntary. We further conclude that it was not due to a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer’s interest within the meaning of G.L. c. 151A, § 25(e)(2).

¹ During the hearing, the review examiner asked the claimant’s supervisor whether she thought at the time she requested that email that the claimant was really leaving, or that it was still up in the air. The supervisor responded that she felt like it was still up in the air. While not explicitly incorporated into the review examiner’s findings, this testimony is 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).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning July 14, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 4, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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