The employer failed to prove that the claimant abandoned his job when he left for vacation. Instead, the review examiner found that the employer told the claimant not to return to his assignment with a client company. Because there is no evidence that the claimant engaged in any misconduct, he is eligible for benefits under G.L. c. 151A, § 25(e)(2).

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

Issue ID: 0032 5185 53

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 his position with the employer in August, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 7, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer's representative, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 23, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had abandoned his job and, thus, 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 further evidence from the employer directly and from the claimant. Only the claimant participated in 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 effectively abandoned his job when he failed to return to work from vacation, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings now show that the employer told the claimant not to return to work.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The employer is a staffing company. One of its clients requested a worker for a short-term project.

2. The claimant was signed up on a job board and the employer saw his resume and contacted him regarding the position their client wanted filled, as he had the skill set and experience that the client was looking for. The claimant informed the employer's recruiter that he was interested but that he would be taking a vacation starting in late August, 2019.

3. The employer recommended the claimant to its client without mentioning the claimant's vacation plans.

4. The claimant met with the client's CFO, staff accountant and the woman whose position he would be covering. He was told that if hired, he would be covering for this woman while she was on maternity leave and that she was expected to return to work in November. He was also told that the employer might need his services through sometime in January 2020. During these three interviews, the staff accountant commented that she had just returned from vacation and the claimant responded that he would leaving on a vacation at the end of August.

5. The client chose the claimant to fill the temporary position. He started work on or about August 12, 2019, at which time he went through an orientation.

6. On Friday, August 16, 2019, the claimant contacted the employer to tell them that the first week had gone well and to make sure they had discussed his vacation plans with the client. The person he spoke with indicated that they had informed the client and wished the claimant a good vacation.

7. While the claimant was on vacation, he received a phone call from the employer informing him that the client had decided to get someone else to fill the position, as they needed someone who was able to work immediately. The claimant was told not to return to the client after his vacation.

8. On October 16, 2019, the claimant filed his 2019-01 claim for unemployment benefits, effective October 13, 2019.

9. The claimant requested benefits for the weeks ending October 19, 2019, October 26, 2019, and November 2, 2019. He received wait week credit for the first week and benefits for the next two weeks. As of January 14, 2019, the claimant had not claimed any additional benefits.

10. On December 7, 2019, DUA issued Notice of Approval 0032 5185 53-01, stating that the claimant was approved to receive benefits under Section 25(e)(2) of the law starting August 11, 2019, if all other eligibility requirements are met.

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. However, as discussed more fully below, the consolidated findings do not support the review examiner's legal conclusion that the claimant is ineligible for benefits.

In her original decision, the review examiner found that the claimant left for vacation and never attempted to return to his position. [1] On this basis, she concluded that the claimant voluntarily left his employment and she analyzed his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1). After remand, the consolidated findings now state that it was the employer who told the claimant not to return to the client assignment after his vacation, because the client had decided to get someone else to fill the position. *See* Consolidated Finding # 7.

Since the decision to stop working came from the employer, we treat his separation as an involuntary termination, and this case is properly analyzed 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).

As a threshold matter, the employer must prove that the claimant engaged in some misconduct, which either violated a policy or an employer expectation. In this case, the employer ended the claimant's assignment while he was on vacation. There is no indication in the consolidated findings that he engaged in any misconduct in taking that vacation. The review examiner found that the claimant notified his employer in advance that he planned to take a vacation in late August, both at the time of hire and again on the Friday before he left. *See* Consolidated Findings ## 2 and 6. He also mentioned it to one of the people in the client company during his interviews. *See* Consolidated Finding # 4. Thus, the employer knew about his vacation plans and there is no evidence that anyone told him not to go. Absent evidence suggesting the claimant did anything wrong by taking the time off, and we see none, we cannot conclude that misconduct caused the claimant's separation.

We, therefore, conclude as a matter of law that the claimant was discharged from his position with the employer. We further conclude that the employer has failed to demonstrate that the discharge

[1] *See* Remand Exhibit 1, the original hearing decision, dated January 23, 2020, Finding of Fact # 6.

was due 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. The claimant may not be disqualified under G.L. c. 151A, § 25(e)(1) or (2).

The review examiner's original decision is reversed. The claimant is entitled to receive benefits for the week beginning August 11, 2019, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS Charlene A. Stawicki, Esq.
DATE OF DECISION - June 25, 2020 Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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 July 1, 2020[2]. 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.

AB/rh

[2] *See* Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.