

The claimant was put on a performance improvement plan, which she tried her best to complete. Both parties agreed that the claimant was not meeting all of the goals of the plan, and the claimant quit her position, believing that she would soon be terminated. The claimant is eligible for benefits, because if she had been terminated, it would have been for non-disqualifying, performance-based reasons.

**Board of Review
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Issue ID: 0033 4818 63

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 job on December 31, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 4, 2020. 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 February 29, 2020.

Benefits were awarded after the review examiner determined that the claimant 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, 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 accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence regarding 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 to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant quit her position under the belief that she was soon going to be discharged for not meeting the goals laid out in a performance improvement plan.

Findings of Fact

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

1. The claimant was employed full time as a Senior Sales Development Representative for the employer, a software sales company, from July 15, 2019 until December 31, 2019.
2. The claimant's immediate supervisor was the employer's Sales Director of North America (the Director).
3. On November 18, 2019, the Director requested a meeting with the claimant.
4. During the meeting, the Director placed the claimant on a Performance Improvement Plan (PIP). The goals in the PIP was for the claimant to set 16 meetings within a four-week period; have a 70% attendance rate on meetings set; and completing 300 calls per week.
5. The PIP stated that if the claimant was unable to meet the PIP's goals, she could be terminated.
6. The claimant asked the Director during the meeting if she showed she worked hard to meet the goal within the allotted time, but missed the goals, could the deadline be extended. The Director told the claimant that member [sic] of management higher than him set the goal and the deadline and he did not have an answer to her question.
7. Prior to receiving the PIP, the claimant had been arriving at work early and leaving late from work to schedule meetings with prospective customers.
8. The claimant believed the goals in the PIP were unattainable because the typical number of meetings scheduled in a week based on the employer's volume was three to four meetings.
9. On November 26, 2019, the claimant met with the Director to discuss her progression towards meeting the goals set forth in the PIP.
10. As of November 26, 2019, the claimant was meeting the activity portion of the PIP, but not attaining the meetings portion of the PIP.
11. On December 11, 2019, the claimant met with the Director. During the meeting, the Director suggested to the claimant that if she chose to resign at that time, giving a three weeks' notice effective December 31, 2019, she would be paid for the following week and paid her commission.
12. The employer offered the claimant the option to give a three weeks' notice because she was not meeting the goals set in the PIP and was on target to be terminated. The employer felt this was the best possible outcome available for the claimant.

13. On December 11, 2019, the claimant accepted the terms of the employer's offer and submitted her resignation in writing to the Director, by email, effective December 31, 2019.
14. The claimant believed if she did not resign, she may not be paid her commission.
15. The claimant believed if she did not resign, that she would be terminated.
16. On December 31, 2019, the claimant resigned her employment rather than be discharged.
17. The claimant believed she completed her job to the best of her ability.
18. The CPO believed the claimant worked to the best of her ability.
19. On January 18, 2020, the claimant completed and submitted a "Quit-Other" questionnaire to the Department of Unemployment Assistance. In the questionnaire, claimant stated, "There were no options for me as far as career advancement. I wanted career growth" because she had been placed on the PIP, was not meeting the PIPs goals and was told by the Director he could not guarantee her that she the [sic] PIP could be extended, which she believed meant there was not career advancement.

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. As discussed more fully below, we conclude that the claimant is eligible to receive unemployment benefits.

There is no dispute that the claimant quit her position. She submitted her resignation on December 11, 2019, and the effective date of the resignation and separation was December 31, 2019. Consolidated Finding of Fact #13. In quit or resignation situations, the controlling section of law is G.L. c. 151A, § 25(e)(1), which provides, 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.

Under this section of law, the claimant has the burden to show that she is eligible to receive benefits. Crane v. Comm’r of Department of Employment and Training, 414 Mass. 658, 661 (1993).

The claimant resigned her position, because she was not meeting the goals of the performance improvement plan (PIP), and she believed that she was going to be terminated when the PIP expired in mid-December of 2019. Consolidated Finding of Fact #15. It is well-settled that an employee who resigns under a reasonable belief that they are facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. See Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2).¹ For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. See White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–599 (1981); Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion).

The review examiner found that the claimant was put on the PIP on November 18, 2019. The PIP included three metrics which the claimant had to complete within a four-week period: set sixteen meetings, have a 70% attendance rate at the meetings, and complete three hundred calls per week. Consolidated Finding of Fact # 4. Termination was a possibility if she did not meet the goals of the PIP. Consolidated Finding of Fact # 5. By late November of 2019, the claimant was not meeting all the goals of the PIP. Consolidated Finding of Fact # 10. By December 11, 2019, the employer saw that the claimant “was not meeting the goals set in the PIP and was on target to be terminated.” Consolidated Finding of Fact # 12. Indeed, during the remand hearing, the employer’s chief people officer testified that if the claimant did not meet all of her goals by December 16, 2019 (five days after the December 11, 2019 meeting date), she would have been terminated.² Thus, it was decided that the claimant would resign her employment and separate as of December 31, 2019.

The consolidated findings of fact show that the claimant reasonably believed that she was going to soon be terminated. The meeting on December 11, 2019, was held, at least in part, because the employer knew that the claimant was “on target to be terminated.” Consolidated Finding of Fact # 12. The claimant, on her own, felt that the goals of the PIP were going to be difficult to achieve, because the goals included specific numbers and metrics which were higher than the employer’s normal work volume. Consolidated Finding of Fact # 8. The chief people officer testified during the hearing that, as time went on, the claimant was getting further and further behind in meeting the PIP goals. Although the chief people officer admitted that he did not know if the claimant could have completed the PIP goals, since she quit prior to the anticipated PIP completion date, he testified that it was becoming less likely. Under these circumstances, the claimant could reasonably have believed that she was going to be terminated very soon.

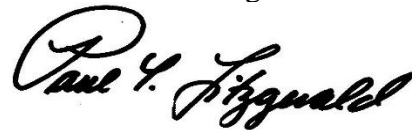
¹ Although the inquiry touches on G.L. c. 151A, § 25(e)(2), because the claimant quit, she still has the burden to show that her separation is controlled by the holding and reasoning of Malone-Campagna.

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

If the claimant had been terminated, it would have been for a performance-based reason. The claimant was not meeting the goals of the PIP, even though she was doing her best to meet the goals. Both parties agreed that the claimant was doing her job to the best of her ability. Consolidated Findings of Fact ## 17 and 18. However, the claimant was unable to satisfy the employer's demands. An inability to do the job to the employer's standards, despite her best efforts, is not a disqualifying circumstance. See Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is supported by substantial and credible evidence and free from error of law, because the claimant has shown that she resigned under the reasonable belief that she was going to be imminently discharged for non-disqualifying, performance-based reasons.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning December 29, 2019, and for subsequent weeks if otherwise eligible.



Paul T.

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DATE OF DECISION - May 28, 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 June 1, 2020³. 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

³ See Supreme Judicial Court's Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.

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.

SF/rh