

Claimant did not abandon her job when she contracted COVID-19 and was unable to work, provided medical documentation, and made repeated efforts to return to work after receiving medical clearance. The employer directed the claimant to stop calling and wait to hear back from it. Because the employer never contacted the claimant again, the claimant did not initiate the separation. Lacking evidence of any wrongdoing, the claimant is not disqualified under either G.L. c. 151A, § 25(e)(1) or (2).

**Board of Review
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Issue ID: 0037 6799 42

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 her position with the employer on or about March 23, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 27, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 14, 2021. 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 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 give the claimant an opportunity to participate in the hearing. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 abandoned 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. On 06/01/19, the claimant began working approximately 32 hours per week as a Food Prep Worker and Cashier at this employer's hamburger restaurant.
2. In February of 2020, the claimant became ill with what she later understood to be COVID-19.
3. The claimant could not go to the restaurant with her doctor's note as she was sick, so on Thursday, 03/12/20, she had her coworker [A] deliver her doctor's note to her restaurant Manager, [B].
4. The claimant called her Manager on 03/12/20 to confirm that he had received her doctor's note and her Manager confirmed that he had.
5. On 03/19/20, the claimant was sent a document from the Commonwealth of Massachusetts Department of Public Health from [C] DVM MSC MPH State Epidemiologist clearing the claimant to return to work as of the date of the letter (03/19/20).
6. On 03/19/20, the claimant contacted her Manager ([B]) seeking to return to work. The claimant was told that business was slow, and she should keep calling and he will put her on the schedule if business improves.
7. After 03/19/20, the claimant made several calls to her Manager seeking to return to work without success.
8. On 03/23/20, the claimant made her final call to her Manager, [B]. During this call[,] the Manager [B] told the claimant to stop calling him and that he would call her if any work became available.
9. The claimant waited to be called but she was never contacted again by the employer.
10. On 04/10/20, the claimant filed a claim for unemployment benefits effective 04/05/20.

Credibility Assessment:

The claimant's testimony about her communications with her restaurant Manager, [B], was unrefuted by anyone with direct knowledge of those communications and was accepted as credible. The claimant's Manager did not attend the hearing and the employer's witness, the District Manager (Mr. [D]), had no personal knowledge of the conversations between the claimant and her Manager, [B], about why the claimant was not returned to the schedule following her illness.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the circumstances surrounding the claimant's separation are governed by G.L. c. § 25(e)(1), and that the claimant abandoned her job. We conclude instead that the claimant was discharged within the meaning of G.L. c. 151A, § 25(e)(2).

The first issue we must decide is whether the claimant's separation is to be analyzed as a voluntary or involuntary separation.

Technically, the employer fired the claimant. *See Consolidated Finding # 9*. However, the review examiner deemed the claimant to have quit her job by abandonment and analyzed her separation under the following provisions of G.L. c. 151A, § 25(e)(1):

[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 establishes 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 express language of the above sections of law places the burden of proof upon the claimant.

The parties presented conflicting evidence about the events that resulted in the claimant's separation. At the initial hearing, the employer testified that the claimant simply stopped reporting to work and did not contact the employer again. At the remand hearing, however, the claimant testified that she notified her immediate supervisor, the store manager, that she was unable to work because she contracted COVID-19. The claimant also presented a witness, a former coworker, who delivered the claimant's doctor's note to the manager, in support of her testimony. The claimant also testified that she made repeated efforts to be placed back on the work schedule, and even asked to be reassigned to a different store location if necessary.¹ None of the claimant's testimony was refuted by the employer, who, as the review examiner noted, did not present any witnesses with first-hand knowledge of the events.

After considering the testimony from both parties, the review examiner made a credibility assessment finding the claimant's version of events to be more credible. At this stage of the administrative process, "[t]he responsibility for determining the credibility and weight of that testimony rests with the hearing officer," not with the Board. Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31 (1980). Such assessments are within

¹ 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).

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). Here, after consideration of the record, the review examiner issued consolidated findings that the claimant notified the employer about her illness (*see Consolidated Findings ## 3–4*), and immediately upon receiving medical clearance, made numerous unsuccessful attempts to return to work (*see Consolidated Findings ## 6–8*). It is apparent from these findings that the examiner credited much of the claimant's testimony, where it conflicted with that of the employer. Since the review examiner's credibility assessment is supported by the claimant's testimony during the remand hearing, we discern no reason to disturb the review examiner's consolidated findings of fact.

Underlying the review examiner's conclusion is a Supreme Judicial Court (SJC) decision, which noted that the word "voluntarily," as used in the above provision, is a term of art that must be read in light of the statutory purpose of providing "compensation for those who are thrown out of work through no fault of their own." *See Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002, 1003 (1985) (rescript opinion) (employee deemed to have quit voluntarily when he lost his driver's license through his own fault and as a result could not get to work). We have held that, where a claimant is fired for failing to notify the employer of the reason for absence, the separation is to be treated as 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)).

Here, the evidence suggests that the claimant remained away from work after what she believed was notice to and tacit permission from the employer that she was waiting to be placed back on the work schedule. After the remand hearing, the review examiner found that the claimant made several unsuccessful calls to her manager seeking to return to work, and that, during her final call, the manager told the claimant to stop calling him and that he would call her if any work became available. *See Consolidated Findings ## 7–8*. The findings further show that the claimant waited to be called but was never contacted again by the employer. *See Consolidated Finding # 9*.

Since the consolidated findings of fact indicate that the claimant did not abandon her job, the record supports a conclusion that the employer discharged the claimant. Consequently, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which states, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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

Under the foregoing provision, it is the employer's burden to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy or for deliberate misconduct in wilful disregard of the employer's interest. "[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).

We conclude that the employer has not met its burden. Since the employer took the position that the claimant had quit and had not been discharged, the employer has established no relevant policy or expectation that was violated by the claimant, nor has it provided any evidence of knowing or deliberate wrongdoing by the claimant. Consequently, it has not met its burden of proof, under G. L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the initial conclusion that the claimant voluntarily separated from the employer under G.L. c. 151A, § 25(e)(1), is not supported by substantial evidence, because the consolidated findings establish that the employer discharged her, and it did not carry its burden to show that the claimant is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 29, 2020 and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

JMO/rh