

After walking off the job when the employer asked her to take a drug screen, the claimant failed to call or respond to the employer's inquiries for more than three days. Held she voluntarily abandoned her job and did not meet her burden to show that she left for good cause attributable to the employer or due to urgent, compelling, and necessitous circumstances. The claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0046 2951 88

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 her position with the employer on January 14, 2020. She filed a claim for unemployment benefits with the DUA, effective May 31, 2020, which was approved in a determination issued on July 22, 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 February 24, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, she 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 afford the claimant an opportunity to participate in the hearing. 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 was ineligible for benefits because she walked off her job after refusing a drug test and failed to respond to the employer's efforts to reach her, 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 as a full-time residential counselor for the employer, a behavioral health agency, from December 11, 2019, until January 10, 2020, when she separated.
2. The claimant's immediate supervisor was the TSS manager (manager).
3. The employer has a drug and alcohol screening policy. If a manager suspects that an employee may be under the influence, the manager must seek corroboration from another manager and if corroborated, the manager meets with the employee privately and informs the employee they will be required to undergo a fitness for duty evaluation involving a drug and alcohol screening at a hospital. The employee is then sent by taxi to the hospital for the screening.
4. On January 10, 2020, the manager observed the claimant at the workplace and believed the claimant was under the influence of an unknown substance. The manager sought corroboration from another management employee and determined the claimant should be sent for a drug and alcohol screening per employer policy.
5. The manager met with the claimant and told the claimant she would be required to submit to a drug and alcohol screening and would be sent by taxi to the hospital for same.
6. The claimant was not told she was discharged or in danger of being discharged during the meeting.
7. The claimant was very upset and denied that she was under the influence of any substance. The claimant walked out of the meeting with the manager and went into the break room, put down her keys and her employee badge and left the building.
8. The vice president for human resources attempted to reach the claimant by telephone on January 10, 2020, and January 13, 2020, and left voicemails for the claimant. The claimant did not respond.
9. The employer processed the claimant's separation as a voluntary quit for job abandonment on January 14, 2020.
10. The employer did not discharge the claimant for refusing a drug and alcohol screening.
11. The claimant was not in danger of being discharged at the time she walked out of the workplace.
12. If the claimant had undergone the drug and alcohol screening and tested negative, she would have been immediately returned to her employment.

13. If the claimant had undergone the drug and alcohol screening and tested positive, the claimant would not have been terminated but would have been offered support and the opportunity to seek treatment.
14. Continuing work was available to the claimant when she walked out of the workplace.

Credibility Assessment:

In this case, there was a dispute between the parties as to whether the claimant quit or was fired. It is undisputed that the claimant was asked to undergo a drug and alcohol screening by the employer and that in response, the claimant put down her keys and employee badge and walked out of the building. The vice president of human resources credibly testified that the claimant was contacted twice after she left the building, but the claimant neither returned the calls nor contacted the employer. During the remand hearing, the claimant asserted that she did return one of the employer calls but was vague and inconsistent about the date on which she returned the call, and later stated that when she did speak to someone in human resources, she was told her employment had been terminated. It is more likely than not that the claimant did not return any of the employer's calls until on or after January 14, 2020, at which point the employer had already processed the claimant's separation for job abandonment.

During the hearing, the claimant asserted she believed she was being discharged because she was being asked to undergo a drug and alcohol screening. The claimant's belief is not reasonable. It is undisputed that the claimant was not told she was being discharged or in danger of being discharged at the meeting in which the claimant was asked to undergo screening. Moreover, the vice president for human resources credibly testified that even had the claimant undergone the screening and tested positive, the employer would not have terminated the claimant, but would have offered her support and the opportunity to seek treatment. The claimant asserted during the remand hearing that an unknown female manager was present at the meeting, followed the claimant to the breakroom where the claimant put down her keys and employee badge, and told the claimant, "Just leave," and because of this alleged statement, the claimant believed she was fired. The claimant was unable to identify the name or title of the female manager who allegedly followed her and told her to leave. The review examiner finds the testimony of the vice president for human resources more credible than the claimant's testimony.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Although Consolidated Finding # 1 indicates that the claimant separated on January 10, 2020, we accept the date of January 14, 2020, as her separation date as Consolidated

Finding # 9 shows that this was when the employer ended her employment. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we believe the record after remand supports the review examiner's legal conclusion that the claimant is ineligible for benefits.

We must first decide whether the claimant separated voluntarily or involuntarily. The claimant asserted that she was being discharged at the meeting on January 10, 2020, where her manager directed her to go for a drug screen. The employer instead contended that the claimant effectively resigned three days later by abandoning her job. The review examiner found that the claimant was neither discharged nor in danger of being discharged on January 10, 2020. *See Consolidated Findings ## 10 and 11.* In so finding, the review examiner accepted the employer's account of what happened.

“The review examiner bears ‘[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .’” Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless such assessments 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). “The test is whether the finding is supported by “substantial evidence.” Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” *Id.* at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

In her credibility assessment, the review examiner explains several reasons for accepting the employer's testimony as more credible. This includes that the claimant was vague and inconsistent about when, after January 10th, she returned a call to human resources, which we believe to be a reasonable characterization of the claimant's testimony.

The review examiner further explains that the claimant's belief that she had been discharged was not reasonable for three reasons. One was that the employer testified that it would not have fired the claimant even if she had tested positive in the drug screen but would have been given an opportunity to seek treatment. We reject this basis for discrediting the claimant's belief, as there is nothing in the record to establish that the claimant was aware of this at the time she walked out of the meeting. Nonetheless, we believe that the other two stated reasons, that no one told the claimant that she was being fired and that the claimant could not identify the name or title of the manager who allegedly told her to “just leave,” constitute substantial evidence to support the review examiner's finding that the claimant was not discharged.

Because we agree that the claimant left her job voluntarily, her eligibility for benefits is properly analyzed pursuant to the following provision under G.L. c. 151A, § 25(e), which provided, in pertinent part:

[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.

The express statutory language of these provisions places the burden of proof upon the claimant.

The consolidated findings show that it was not the claimant's refusal to submit to the drug screen that caused her separation, but that she failed to contact the employer or respond to its efforts to get in touch with her after leaving the workplace on January 10, 2020. *See Consolidated Findings ## 8–10.* A claimant who fails to report for work or contact her employer is deemed to have voluntarily abandoned her job. 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)).

We next consider whether the claimant has presented good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving her job. Since the claimant contended that she was discharged, there is scant evidence to show that she left for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons.

To establish good cause, she must show that the employer acted unreasonably. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). We see nothing in the consolidated findings that indicates that the employer acted unreasonably. During the hearing, the claimant did assert that she felt retaliated against for reporting a coworker's mistreatment of clients the day before. The employer's human resources witness testified to having no record of such a complaint. The absence of any finding about the claimant's assertion indicates that the review examiner did not assign much weight to her testimony.

However, even if she felt retaliated against and this drove her decision to walk out, an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). Here, as the record shows, the claimant made no attempt to reach out to a manager or to respond to attempts by human resources to contact her for more than four days. *See Consolidated Finding # 8.*

We also think the claimant has not met her burden to show urgent, compelling, and necessitous circumstances that caused her to walk off the job and not respond to the employer's efforts to reach her. Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992). In this case, the claimant testified that she believed that her daughter had a severe asthma attack and she was tied up with that. Given the ambiguous nature of her testimony and the lack of any corroborating evidence such as medical

records to show the urgency of her daughter's condition, we are not persuaded that the claimant was dealing with circumstances that were so pressing that she could not notify the employer.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from her employment without establishing good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving, as meant under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning May 31, 2020, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 2022



Charlene A. Stawicki, Esq.
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 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.

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