

**The claimant did not resign in her email to the employer. Nonetheless, the employer treated the email as a resignation and severed the employment relationship. There was no evidence of misconduct. Rather, the claimant's decision not to return to work was based on a reasonable belief that returning to work posed a substantial risk to her and her husband's health and safety.**

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

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0046 5652 58**

### 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 June 12, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 8, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 28, 2020. 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 or urgent, compelling, and necessitous reasons 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 additional evidence relating to the claimant's efforts to preserve her employment. 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 did not make a reasonable attempt to preserve her employment prior to resigning, 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 for the instant employer as Customer Service Representative from 2003 until her last physical day of employment on 3/13/2020.
2. After last working on 3/13/2020, the claimant spoke with her son, who is a physician.
3. The claimant's son told her that due to her husband's health conditions, specifically due to Stage 4 kidney disease, high blood pressure and heart disease that she should not report to work which could expose her husband to COVID-19.
4. The claimant's son was also concerned for the claimant who is a two time breast cancer survivor, has high blood pressure and a mitral heart valve obstruction.
5. The claimant was concerned that she could be exposed to COVID-19 through contact with clients and other employees.
6. The Office Manager allowed the claimant to remain out of work as requested.
7. The employer continued to pay the claimant her regular salary while she remained out of work. The claimant was not required to use her accrued vacation time.
8. The employer shut down the business, an insurance company business, to the public and continued to have employees work socially distanced.
9. The employer's office is 2900 square feet with a 9 to 11 employees maximum.
10. The Office Manager was ensuring sanitation with proper social distancing as directed by the government.
11. The claimant did not ask the Office Manager to work from home prior to leaving on 3/13/2020.
12. The employer does not have the capability for the claimant to perform her [sic].
13. On 5/7/2020, the Office Manager sent the claimant [sic] that the employer planned to reopen to the public at the end of May as directed by the governor and that the employer wanted to confirm her return when the office opens.
14. The claimant spoke with her son and decided that she did not want the potential exposure to COVID-19 by working at the employer's location and that she would not return to work again since she did not know how long COVID-19 would last.
15. The claimant assumed the workplace was not safe for exposure purposes.

16. The claimant did not contact the Office Manager to request to work from home or remotely.
17. The claimant did work from home remotely performing a few of her assigned tasks in 2015 when there were blizzards during the winter.
18. The claimant could not have worked from home because the employer only has the capability for the claimant to perform limited job tasks remotely as the employer's business is not set up for regular remote operations.
19. The claimant had not worked remotely after 2015.
20. The claimant emailed the Office Manager on 5/11/2020 stating that she could not return to the environment at that time due to her health issues and her husband's health issues.
21. The claimant did not intend to resign when sending such email rather she hoped the Office Manager would offer to [sic] leave or another arraignment.
22. The claimant still had four weeks of accrued vacation leave effective 5/11/2020.
23. The Office Manager received the claimant's email and assumed that the claimant was resigning since she stated that she could not return to work.
24. The employer would have limited the claimant to working 20 ft. away from other employees who wore masks with no need to handle any documents as they would be scanned.
25. The claimant did not ask the employer about any COVID-19 safeguards prior to deciding not to return to work and was not aware of the safeguard the employer was undertaking to ensure sanitation.
26. The claimant did not confer with her physician prior to emailing the Office Manager about her decision not to return to work.
27. The employer would have allowed the claimant additional time off if she had requested however no additional time off was requested. A leave of absence would have been available when the employer's office reopened.
28. On 5/12/2020, the Office Manager emailed the claimant the following, "Thank you for your email of 5/11/2020, informing me that you have decided not to return to your position with the "employer name"; therefore, your last day of employment will be June 12, 2020 which coincides with the end of your accrued vacation."

29. The claimant received the email from the Office Manager and assumed that she was terminated as she never offered her resignation.
30. The claimant never contacted the Office Manager to dispute her separation or ask for additional time off because she had been terminated based in the Office Manager's email.
31. The claimant was paid her accrued vacation pay through 6/12/2020.

#### Credibility Assessment:

The Office Manager's testimony is accepted as credible in all contested area since she was forthright in giving detailed testimony with her version of the events made more logical sense [sic]. The claimant's testimony was vague at times and inconsistent thus causing the claimant's testimony to be less credible in all contested areas.

#### 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 note that Consolidated Finding # 12 is incomplete. However, based upon the record and Consolidated Finding # 18, we believe that the review examiner intended to find that the employer does not have the capability for the claimant to perform her work from home. 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 claimant was ineligible for benefits under the provisions of G.L. c. 151A, § 25(e)(1).

Initially, we note that we need not address the claimant's eligibility for benefits prior to June 14, 2020, the effective date of the claim before us.<sup>1</sup>

In his original decision, the review examiner concluded that the claimant resigned on May 11, 2020, when she informed the employer's office manager that she did not feel comfortable returning to work.<sup>2</sup> Upon hearing additional testimony from both parties at the remand hearing, the review examiners consolidated findings now show that the claimant did not resign her employment. Rather, in her May 11, 2020, email, the claimant explained that she could not return to work at that time due to the risk COVID-19 posed to both her and her husband's health and safety. Consolidated Finding # 20. She did not intend to resign in this email, and nothing in the email

---

<sup>1</sup> Although the effective date of this claim is currently listed as June 21, 2020, the claimant's UI online records show that the claimant was found eligible to predate her claim to June 14, 2020. See DUA Issue ID 0046 8068 35.

<sup>2</sup> The original hearing decision is in evidence as Remand Exhibit # 1.

itself suggests otherwise.<sup>3</sup> Consolidated Finding # 21. Despite this, the office manager assumed the claimant's email to be a resignation and informed the claimant that her last day of work would be June 12, 2020. Consolidated Findings ## 23 and 28. As such, the office manager's email, not the claimant's, severed the employment relationship. *See* Consolidated Findings ## 23 and 28. Further, the fact that the employer may have granted the claimant additional time off is immaterial, since no such offer was made before the employer severed the employment relationship. *See* Consolidated Findings ## 27 and 28.

As it was the employer's action that severed the employment relationship, the claimant's separation must be analyzed as a discharge 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 establish that the claimant's discharge was attributable to a policy violation or other misconduct. There is no such evidence in this case. Although the employer asked the claimant to return to work in May, the claimant's decision not to return as requested was based on reasonable concerns for her and her husband's health and safety. Nothing in the record suggests that the employer believed the claimant's decision was contrary to any employer policy or expectation. Absent such evidence, the employer has not met its burden to show that the claimant either violated a policy or engaged in misconduct.

We, therefore, conclude as a matter of law that the claimant was involuntarily terminated from her employment, and is not disqualified under G.L. c. 151A, § 25(e)(2).

---

<sup>3</sup> This email is in evidence as Remand Exhibit # 7. 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 review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 14, 2020, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 16, 2020**



Charlene A. Stawicki, Esq.  
Member



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](http://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.

LSW/rh