

After the claimant told her employer that she was ill and tested positive for COVID-19, she failed to submit negative test results, as the local Board of Health required, or to respond to the employer’s communications. Though eventually fired, the Board held her separation to be voluntary and without good cause attributable to the employer or due to urgent, compelling, and necessitous circumstances. She was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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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 reverse.

The claimant separated from her position with the employer on or about July 15, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 10, 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 affirmed in part and reversed in part the agency’s initial determination and awarded benefits effective July 12, 2020, in a decision rendered on August 20, 2021. We accepted the employer’s application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer’s interest or knowingly violate 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 remanded the case to the review examiner to obtain additional information pertaining to the circumstances surrounding the claimant’s separation from employment. Only the employer 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 employer’s requirement to have the claimant produce a negative COVID-19 test following her vacation as the only means for her to return to work was unreasonable, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings and credibility assessment are set forth below in their entirety.

1. On October 17, 2019, the claimant began working full time for the employer, a restaurant, as a cook. The claimant worked Sundays through Thursdays, from 3:00 p.m. until 10:00 p.m. She was supervised by the Kitchen Manager and the Front End Manager. She was paid \$18.00 per hour.
2. On March 17, 2020, the restaurant closed as a result of the COVID-19 pandemic. All the employees were laid off. In late June of 2020, the restaurant reopened and the claimant was rehired.
3. While the claimant was laid off, she contracted COVID-19, and recovered.
4. Before the claimant returned to work, she was not required to produce a negative COVID-19 test.
5. The employer's establishment reopened on June 22, 2020 and the claimant returned to work.
6. After the employer reopened, the claimant requested to take July 5, 2020 off work in order to go on a camping trip.
7. The claimant's supervisor told the claimant that she could not take July 5, 2020 off work.
8. The last date that the claimant physically worked for the employer was June 29, 2020.
9. The claimant called out sick on June 30, 2020.
10. On July 1, 2020, the claimant texted the employer and informed them that she was suffering from a fever and vomiting and was going to the doctor.
11. On July 4, 2020, the claimant texted the employer and informed them that she had tested positive for COVID-19 and needed to quarantine for 14 days.
12. On July 4, 2020, after the claimant informed the employer that she had tested positive for COVID-19, the employer contacted the [City A's] Board of Health (the Board) to inquire about the appropriate course of action to take when an employee tests positive for COVID-19.
13. The Board told the employer that they would have to close their establishment for cleaning and sanitizing and that the claimant could not return without calling the Board in order to determine with whom she came into contact.

14. Per the Board's protocol, if the claimant did not call the Board, she would not be able to return to work.
15. The claimant did not show up for her scheduled shifts on July 2, 2020 and July 3, 2020. The employer believed that the claimant was going to the doctor.
16. On July 4, 2020, the employer shut down their establishment to be cleaned and sanitized.
17. On July 5, 2020, the employer reopened their establishment.
18. On July 5, 2020, the employer texted the claimant that she needed to speak to the Board.
19. On July 5, 2020, the claimant texted the employer that she was in the emergency room with her daughter. The claimant asked for the number for the Board. The employer sent the claimant the number.
20. From June 30, 2020 until July 5, 2020, the claimant went on a camping vacation, despite telling the employer that she had contracted COVID-19.
21. The employer did not schedule the claimant for any shifts for the week after July 5, 2020 because they believed her to be sick with COVID-19.
22. On July 15, 2020, the claimant texted the employer that she had taken another COVID-19 test and would have the results Friday, July 17, 2020.
23. On July 15, 2020, the employer texted the claimant that she needed to call the Board before she could enter the employer's establishment.
24. The claimant never called the Board.
25. The claimant never produced any COVID-19 test results to the employer, either positive or negative.
26. The employer never learned if the claimant tested positive for COVID-19.
27. A representative from the Board reached out to the employer and told them that the claimant had not yet gotten in touch with them and asked the employer for the claimant's contact information.
28. The Board told the employer that they had no record of the claimant testing positive for COVID-19.

29. Between July 15, 2020 and August 11, 2020, the claimant did not call the employer.
30. Between July 15, 2020 and August 11, 2020, the employer did not call the claimant because they were waiting for the claimant to call the Board.
31. On July 15, 2020, the claimant abandoned her position when she did not contact the Board or the employer.
32. On August 11, 2020, the claimant texted the employer stating that she did not quit, that she had all her COVID-19 tests, and that she was required by a doctor to quarantine for 6 weeks.
33. On August 11, 2020, the employer texted the claimant and told her that she still needed to get in touch with the Board before she could come back and that there was no record of her testing positive for COVID-19.
34. On August 11, 2020, the claimant texted the employer and told them that she would like her sick pay and that someone would pick up her belongings.
35. The claimant was not fired.
36. The claimant did not take any steps to preserve her position.
37. The claimant never asked for a leave of absence.
38. The claimant would have been eligible for a leave of absence.
39. The claimant did not ask for remote work.
40. The employer did not have remote work available for the claimant.
41. The claimant did not ask for a transfer to a different position.
42. The employer did not have another position available for the claimant.
43. The claimant was not in danger of being fired.
44. The employer had work available for the claimant.
45. Around the beginning of September, the employer removed the claimant from their records.
46. Approximately six months after the claimant left, the employer filled the position.

Credibility Assessment:

Only the claimant attended the initial hearing. Only the employer attended the remand hearing.

The employer and the claimant offered conflicting testimony on several topics. During the initial hearing, the claimant testified that from June 30, 2020, to June 5, 2020, she was on a camping trip. However, the employer provided documentary evidence showing that the claimant told the employer that she was sick, had tested positive for COVID-19 on July 4, 2020, and needed to quarantine. The claimant also told the employer through a text message that on July 5, 2020, she was in the hospital with her daughter who had hurt her leg.

During the initial hearing, the claimant contended that she was not allowed to return to work after her vacation without producing a negative COVID-19 test, and that the employer did not allow her to demonstrate that she did not have COVID-19 in any other manner.

But, the employer's contention to the contrary is assigned more weight where the employer credibly testified during the remand hearing, that because she reported that she had tested positive for COVID-19, they could not let her back into the building until the claimant had called the town's Board of Health, per local policy. The employer submitted documentary evidence demonstrating that they had informed the claimant on multiple occasions that she needed to contact the Board of Health before she returned to work and provided the claimant with the number she needed to call.

The overall testimony of the employer during the remand hearing is assigned more weight than the overall testimony of the claimant during the initial hearing session where the employer's testimony was more specific and easier to follow compared to the testimony of the claimant during the initial hearing.

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 claimant is eligible for benefits.

While the review examiner originally determined that the claimant was discharged from her employment, the evidence on remand indicated that the claimant effectively quit on July 15, 2020.

After receiving additional evidence, the review examiner conducted a comprehensive review of the entire record and found credible the employer's testimony regarding the circumstances leading up to the claimant's separation. Such assessments are within 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). Upon review, we see no reason to disturb the review examiner's credibility assessment.

On the basis of her credibility assessment, the review examiner rendered the following consolidated findings. The employer did not schedule the claimant for any shifts for the week after July 5, 2020, because, upon information provided by the claimant, they believed her to be sick with COVID-19. *See Consolidated Finding # 21.*

The claimant next informed the employer that she had taken a COVID test with the results being made available on Friday, July 17, 2020. *See Consolidated Finding # 22.*

On July 15, 2020, the employer texted the claimant stating, due to local regulations, the Board of Health needed to be contacted with the Covid test results before she could enter the employer's establishment, *see Consolidated Finding # 23.* The claimant, however, never contacted the Board of Health. *See Consolidated Finding # 24.*

On August 11, 2020, the employer sent a text message to the claimant, again informing her that, prior to returning to work, the Board of Health was to be advised of her COVID test results, pursuant to local regulations. *See Consolidated Finding # 33.* Also on August 11, 2020, the claimant informed the employer, via text message, of her request for any benefit sick pay owed, and that someone would be picking up her personal belongings at the workplace. *See Consolidated Finding # 33.*

Finally, in September of 2020, the employer removed the claimant from its records. *See Consolidated Finding # 45*

Because the claimant's separation resulted from her failure to come to work, to contact the employer, or to comply with the employer's requests or the local Board of Health regulations, we conclude that she quit her employment. *See 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)).

Therefore, the claimant's eligibility for benefits is governed by the provisions of G.L. c. 151A, § 25(e), which provide, 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 (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 language of these statutory provisions places the burden of proof upon the claimant.

In this case, the claimant failed to establish any credible reason preventing her from responding to the employer's attempts at communication or from complying with the Board of Health COVID-19 regulations prior to a return to work. As such, she has not shown that she left her employment for either an urgent, compelling, and necessitous reason or for good cause attributable to the employer.

We, therefore, conclude as a matter of law that the claimant is not entitled to benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning July 12, 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 - January 21, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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.

MJA/rh