

When the claimant failed to return to work following a leave of absence or to respond to the employer's attempts to contact him, he is deemed to have voluntarily quit his employment and is disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0052 2214 81

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 his position with the employer on September 7, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 1, 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 as of April 19, 2020, in a decision rendered on August 19, 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. 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's decision to send other staff home at the end of his shift because he was the only one who had access to their worksite did not constitute a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employing unit's interest, 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 as a team lead for the employer, a provider of improvement services to businesses, from 9/26/2019 until 09/07/2020.
2. The claimant's immediate supervisor was the operations manager (the OM).
3. On 04/27/2020, the claimant worked his last physical day for the employer.
4. On an unknown date around 05/04/2020, the claimant informed the OM that his neighbor, with whom he had contact, tested positive for the COVID-19 virus.
5. The OM suggested to the claimant that he request a leave of absence and quarantine.
6. On 05/04/2020, the claimant requested and was approved to take a leave of absence.
7. The claimant told the OM that he was going to remain home until the governor's stay at home order due to the COVID-19 pandemic was lifted.
8. On 08/12/2020, the employer sent the claimant a letter by regular mail and certified mail to his correct address requesting he return to work as soon as possible because his leave of absence ended. In the letter, the employer told the claimant if he could not return to work, to contact his manager by 08/27/2020 and that any absences after 08/27/2020 would result in disciplinary action as outlined in the employer's attendance policy.
9. The claimant did not respond to the 08/12/2020 letter.
10. On 08/27/2020, the employer sent an email to the claimant, the regional vice president (the RVP), and the OM stating that the claimant had not returned to work and had not requested an extension of his leave of absence. The email stated that the claimant's leave of absence had ended, and the employer returned the claimant's status to "Active". The email stated that any absences after 08/27/2020 were unexcused and subject to the employer's attendance policy.
11. On 09/01/2020, the OM called the claimant and asked him if he was going to return to work. The claimant told him he would call him back and let him know when he would return to work.
12. The claimant did not call the OM back on 09/01/2020 for an unknown reason.
13. On 09/02/2020, the OM called the claimant and did not receive a response.
14. It was unknown why the claimant did not answer the OM's call.

15. On 09/07/2020, the employer believed the claimant quit his employment when he failed to contact the employer and failed to return to work after his leave of absence ended. The employer removed the claimant from its computer system.
16. On 09/07/2020, the claimant quit his employment when he did not return to work after his leave of absence ended.
17. On an unknown date, the claimant filed a new unemployment claimant effective for 08/23/2020. In the claimant's application for unemployment benefits, he reported his last day worked for the employer as 05/04/2020.
18. The email address listed as the claimant's email address in his unemployment application matched the email address to which the employer sent the 8/27/2020 email.
19. The RVP did not discharge the claimant for being insubordinate by allowing his subordinates leave early from work.

Credibility Assessment:

The claimant testified at the initial hearing that he was discharged for what he believed was insubordination for sending his employees home early on an unknown date. However, upon review of the initial hearing record, the claimant offered vague testimony, such as not knowing his start date, last physical day worked and not knowing the date he was terminated. This review examiner relied on the dates in the claimant's responses to his fact-finding questionnaires when making the initial decision. Further, at the remand hearing, the claimant continued providing vague testimony that he could not recall his start date, end date and last physical date worked. At the initial hearing, the claimant testified that he had contact with his neighbor who had tested positive for COVID-19 and that he requested a leave of absence. However, at the remand hearing, the claimant contradicted the initial hearing testimony, stating that he did not recall telling the employer that he was potentially exposed to the COVID-19 virus and did not recall requesting a leave of absence. The claimant could not recall the date of the COVID-19 exposure or the results of the leave of absence request. During his testimony at the remand hearing, the claimant further stated that he did not recall receiving the letters the employer sent by regular and certified mail on 08/12/2020 and the email dated 08/27/2020.

The RVP testified he never discharged the claimant, directly rebutting the claimant's testimony. The RVP further testified that the claimant was on an approved leave of absence from 05/04/2020 until 08/27/2020. at which time he was recalled to work. Although the RVP offered the hearsay testimony of the OM about the 09/01/2020 and 09/02/2020, he did provide the 08/12/2020 letter and the 08/27/2020 email as documentary evidence.

Given the totality of the testimony and the vague and conflicting testimony of the claimant, the hearsay testimony together with the documentary evidence of the employer is deemed more credible than that of the claimant.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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 was not discharged for a knowing violation or deliberate misconduct.

While the review examiner initially determined that the claimant was discharged from his employment in April 2020, the evidence on remand indicated that the claimant quit his employment on September 7, 2020. *See* Consolidated Findings ## 15, 16, and 19. Therefore, the claimant's eligibility for benefits is governed by the provisions of G.L. c. 151A, § 25(e), 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 (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 the statute places the burden of proof upon the claimant.

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 appeal.

On August 12, 2020, the employer sent the claimant a letter informing him that his leave of absence had ended and instructing him to contact his supervisor by April 27, 2020. Consolidated Finding # 8. When the claimant did not reply to this letter, the employer sent a follow-up email on August 27, 2020, reiterating that the claimant's leave had ended and informing him that he would be subject to disciplinary action for any further unexcused absences. Consolidated Findings ## 9 and 10. The employer removed him from their active employee list on September 7, 2020, after he failed to respond to this email, or the two subsequent phone calls from his supervisor. Consolidated Findings ## 8–13, 15, and 16. Since the claimant's separation resulted

solely from his failure to contact the employer, we conclude that he quit his employment. 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)).

The claimant failed to establish any reasons which prevented him from responding to the employer's multiple attempts at communication, and as such, has not shown that he left his 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, under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week of April 19, 2020, and for subsequent weeks until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2021



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.

LW/rh