

Although the claimant alleged that she quit because the employer ceased communications with her and did not allow her to transfer to a different position while she was on FMLA leave, the review examiner found that she resigned so that she could continue collecting unemployment benefits. Therefore, the claimant is disqualified under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0053 8453 04

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 resigned from her position with the employer on September 18, 2020. Prior to her resignation, the claimant had filed a claim for unemployment benefits with the DUA and received weekly benefit payments. However, benefits were denied in a determination issued on November 7, 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 the agency's initial determination and denied benefits in a decision rendered on January 13, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant left her 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 for additional evidence regarding the circumstances leading up to the claimant's separation. Only the claimant 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 voluntarily resigned from her position to continue receiving unemployment benefits, 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 are set forth below in their entirety:

1. The claimant worked as a part-time Traveling Orthodontist Manager for the employer, a dental corporation, between January 2019 and 09/18/2020, when she separated.
2. The claimant's immediate supervisor was the Regional Director (Director). The claimant's upper-level manager was the Regional Manager Supervisor (Manager).
3. The claimant's job duties required her to travel to different orthodontic offices.
4. On 02/21/2020, the claimant had a second surgery on her right knee.
5. The claimant went on a FMLA leave of absence due to having surgery on her right knee.
6. On 02/24/2020, the claimant completed her Family Medical Leave Act (FMLA) leave of absence request. The claimant does not know the day her FMLA began.
7. The claimant's estimated recovery time was six (6) weeks.
8. The claimant and the employer did not agree on a set return to work date. The employer would not allow the claimant to return to work until she was released to do so by her doctor.
9. The claimant was instructed to contact Human Resources when she was released to return to work by her doctor.
10. The claimant's FMLA was unpaid.
11. During the claimant's FMLA, the claimant continued to review emails she received on her work email. The claimant was responding to the emails that she received. The Director informed the claimant she did not have to respond to the emails she received because she was on FMLA.
12. The employer did not instruct the claimant to remain in contact with the employer. The employer did not instruct the claimant how to remain in contact with the employer during her leave.
13. During the claimant's FMLA, the claimant continued to contact and attempt to contact her Director and Manager in the same ways she contacted them while employed, through text message, email, and telephone.
14. The employer closed from March 2020 through July 2020 as a direct result of COVID-19.
15. The claimant received group emails from her employer stating that employees should file for unemployment due to COVID-19.

16. The claimant filed for unemployment benefits with an effective date on [sic] 03/15/2020. The claimant filed for benefits because she was out of work due to her knee surgery and not receiving any pay.
17. The claimant certified for unemployment benefits weekly.
18. The claimant read on the Department of Unemployment Assistance (DUA) website that claimants are required to remain in contact with their employer [sic] to be eligible to receive benefits.
19. In July 2020, the claimant received a telephone call from her assistant asking her about coming in for a meeting to get fitted for a mask. The claimant questioned the assistant about the meeting, but the assistant was unable to give her any additional information.
20. The claimant contacted the Director but was unable to reach her.
21. The claimant contacted the Manager who returned her call the day of the meeting. The Manager informed the claimant she did not have to come into the meeting and that she could get fitted for her mask at another time prior to her returning to work. The claimant does not know the date of the call or the meeting.
22. During the call with the Manager, the claimant provided the Manager with her new cell phone number.
23. Later in time, the claimant spoke with the Director on the telephone. The Director informed the claimant she received the claimant's mask and that she did not need to be fitted for the mask because she believes [sic] it will fit her.
24. The claimant does not have any text messages between her and the employer as she has a new cell phone and does not have the messages from her old phone.
25. During the claimant's FMLA, the claimant was locked out of her email on several occasions beginning in February 2020 through July 2020.
26. The claimant received messages detailing her email was at capacity and was required to delete content to enable her to send and receive emails.
27. The claimant attempted to contact the Director and the Manager from her personal email. Each time she sent an email from her personal email account, she received a message stating the email "couldn't go through." The claimant believed this was because the employer blocked her email address.
28. The claimant contacted the Assistant Human Resources Representative (HR Rep) and informed him she was unable to access her email. The HR Rep

- informed the claimant he would contact the IT Department for assistance to get back into her email.
29. The claimant was able to access her email after being locked out each time. The claimant does not know how her email became unlocked each time it locked her out.
 30. The claimant believes that the Director locked her email account because she was the only person who did not get back to her when trying to contact them about her email.
 31. The claimant was not instructed to use her work or personal email to contact the employer when on her FMLA.
 32. The claimant attended many virtual meetings when she was on FMLA. The claimant is not aware of the number of meetings she participated in.
 33. The claimant became aware of the meetings through her email and through the conference calendar located in her email.
 34. The claimant remained in contact with the Assistant Human Resources Representative regarding her FMLA paperwork. The claimant does not know the date of her last contact with the Assistant Human Resources Representative.
 35. At the end of August 2020, the claimant began being unable to contact the employer.
 36. On 09/18/2020, the claimant resigned from her employment because she was unable to remain in contact with her employer as required by the DUA website and wanted to continue to collect unemployment benefits.
 37. The claimant did not want to certify for benefits when she was required to remain in contact with her employer since she was not able to remain in contact with them.
 38. The claimant did not notify anyone from the employer that she was resigning on 09/18/2020 because she believed unemployment would inform the employer that she resigned from her position.
 39. In November 2020, the claimant was released to return to work by her doctor.
 40. Prior to the claimant's FMLA, the claimant asked the Director if she could work another position as a coordinator, which was a desk job. The Director informed her the job was a reduction in pay and the Manager did not want the claimant to work the new position due to the reduction in pay.

41. The claimant requested the transfer to the coordinator position due to a previous knee surgery. Due to that surgery, the claimant was working less hours.
42. Prior to the claimant's second surgery, the claimant requested to work a Manager's position. The claimant was informed that she was not qualified for the Manager's position. The claimant also applied for the Manager's position through a temporary staffing website utilized by the employer. The claimant did not receive a response from the temporary staffing agency and withdrew her application after one (1) month.

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. As discussed more fully below, we believe these findings sustain the review examiner's initial conclusion that the claimant is not entitled to unemployment benefits.

The record establishes that the claimant resigned from her position with the employer on September 18, 2020. G.L. c. 151A, § 25(e)(1), which governs eligibility for claimants who resign from employment, provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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

Under this section of law, the claimant has the burden to show that she is entitled to benefits. After the initial hearing, the review examiner concluded that the claimant did not carry her burden. Following our review of the record, including the consolidated findings, we agree.

The review examiner found that the claimant quit her position on September 18, 2020, because she was unable to remain in contact with her employer and wanted to continue to receive unemployment benefits. *See* Consolidated Finding # 36. The claimant alleged that the employer stopped communicating with her and did not allow her to work in different positions while on FMLA because the employer no longer wanted her to continue working for the company. Because the review examiner made Consolidated Finding # 36, it is reasonable to infer that she rejected that reason. 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). We believe it is reasonable in relation to the record.

To determine if the claimant has carried her burden to show good cause under the above-cited statute, we must first address whether the claimant had a reasonable workplace complaint. *See*

Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985). In this case, the consolidated findings do not show that the employer did anything to cause the claimant to quit her job. Although the claimant frequently encountered difficulties in accessing her work email, this had been a common occurrence throughout her employment and was resolved whenever the employer's IT department unlocked the account. *See Consolidated Findings ## 25, 29.* Similarly, the employer provided explanations to the claimant when it denied her requests to transfer to the coordinator and manager positions. *See Consolidated Findings ## 40, 42.* Therefore, we do not believe that the claimant presented sufficient evidence of a reasonable workplace complaint.

Even if the claimant had a valid workplace complaint, she must make reasonable attempts to preserve her job prior to resigning or show that such efforts would have been futile in order to be eligible for benefits under G.L. c. 151A, § 25(e)(1). *See Kowalski v. Dir. of Division of Employment Security*, 391 Mass. 1005, 1006 (1984) (rescript opinion). Here, there is no evidence that she made any efforts to preserve her employment prior to resignation. Although there are findings that the claimant communicated with her managers and the employer's Human Resources department about her email issues and FMLA paperwork, there are no findings that she notified any person in the employer's chain of command about any of her concerns prior to quitting on September 18, 2020. Instead, the findings indicate that, after August 2020, the claimant chose not to communicate with the employer again. *See Consolidated Findings ## 35 and 38.*

We, therefore, conclude as a matter of law that, because the claimant did not establish a reasonable workplace complaint and did not take reasonable steps to preserve her employment, she is disqualified pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 23, 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 - May 21, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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