

The employer approved an extension of the claimant's maternity leave and there is no indication the claimant quit. Since the employer did not respond to the claimant's request to return to work, the claimant is deemed to have been discharged. Because there is no indication that the claimant's request for an extension of her maternity leave was contrary to policy or an expectation, the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
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: 0066 8252 78

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 2, 2021. 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 July 27, 2021. 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). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to benefits because she quit her employment after concluding that she would not have childcare available due to the COVID-19 pandemic, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant worked part-time as a secretary for the employer's tattoo and piecing [sic] studio from 7/29/20 until 10/31/20. The claimant worked a varied schedule, averaging 20-25 hours per week and was paid \$15 per hour.

2. At the time of hire, the claimant notified the business owner that she was expecting a baby. The business owner is the claimant's sister-in-law. The business owner and claimant agreed that the claimant would go on leave when she had the baby and would return sometime in the future. The parties did not agree to a deadline for the claimant's leave. The business owner told the claimant to let her know when she (the claimant) was ready to return.
3. The claimant commenced a leave on 10/31/20. The claimant's baby was born on 12/18/20. Sometime in mid-January 2021, the business owner contacted the claimant and asked if she was ready to return to work. The claimant said no. The business owner again told the claimant to let her know when she (the claimant) was ready to return and there would be a spot for her.
4. During a family gathering, the claimant informally asked the business owner about her work. The claimant learned that the business owner hired someone to work 2 days per week. The claimant did not ask the business owner if she held the claimant's position.
5. On or about 2/6/21, the claimant sent a text message to the business owner. The business owner did not respond. The claimant did not call the business owner or go to the workplace to request reinstatement.
6. The claimant filed an initial claim for unemployment insurance benefits, effective 3/15/21. The claimant notified the DUA that she was laid off from her position with the employer.
7. On 3/30/21, the employer returned the completed Lack of Work Notification form, indicating that the claimant quit her work for domestic circumstances.
8. On 3/31/21, the employer completed a DUA fact-finding questionnaire, indicating that the claimant quit and that she had no desire to return to work following a leave of absence.
9. On 3/31/21, the claimant completed a DUA fact-finding questionnaire indicating that she gave notice on 10/15/20 that she was resigning and that 11/1/20 was her last day of work. The claimant reported that she quit because she was pregnant and would not have childcare due to COVID-19.
10. On 4/2/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 25(e)(1) of the law for the week beginning 10/25/20 and indefinitely thereafter.
11. On 4/2/21, the claimant appealed the Notice of Disqualification.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for the entire period on appeal.

The claimant was out of work on an approved maternity leave as of October 31, 2020. Findings of Fact ## 2 and 3. However, the record shows that the claimant separated from the employer at some point prior to filing for benefits. *See* Findings of Fact ## 6–9. As the claimant separated from employment prior to the effective date of her claim, we need only consider whether she was eligible for benefits based on her separation from the instant employer.

A key question in this appeal is whether the claimant's employment ended voluntarily or involuntarily. Upon review of the record in its entirety, we believe the evidence shows that the employer discharged the claimant. We reach this conclusion based upon the following.

Sometime in mid-January, 2021, the employer requested that the claimant return to work from maternity leave. While the claimant declined to return to work, the employer approved an extension of her maternity leave. Finding of Fact # 3. There is no indication from the record that she separated from the employer at that time.

Sometime thereafter, the claimant spoke with her supervisor at a family gathering and learned that the employer had hired a new part-time employee. Finding of Fact # 4. The employer's decision to hire another part-time worker may have indicated that the employer was no longer holding the claimant's position in anticipation of her return from maternity leave. However, because the claimant failed to follow-up with her supervisor about the status of her position, we cannot affirmatively conclude that the claimant separated from employment at this time. *See* Finding of Fact # 4.

On February 6, 2021, the claimant informed the employer that she was ready to return to work. The employer never responded to this request. Finding of Fact # 5. As the employer had already hired another part-time employee, we believe the employer's failure to respond to the claimant's request to return to work is what ultimately caused the claimant's separation. For this reason, we decline to treat her separation as voluntary.

Instead, we view the decision to discharge the claimant's employment to have been made by the employer on or before February 6, 2021. Where a claimant is discharged from employment, her eligibility for benefits is governed by 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).


While the employer did not attend the hearing, we must still consider whether the evidence submitted by both parties shows that the claimant was discharged either for a knowing violation of a uniformly informed policy or for deliberate misconduct in wilful disregard of the employing unit's interest. There is no such evidence in this case.

In mid-January, the claimant requested, and the employer approved, an extension of the claimant's maternity leave. Finding of Fact # 3. Nothing in the record suggests that the employer objected to this extension or otherwise indicated that such a request was contrary to any employer policy or expectation. Because this is the only communication the claimant had with the employer prior to February 6, 2021, we conclude the employer has not met its burden to show that the claimant either violated a policy or engaged in deliberate misconduct.

We, therefore, conclude as a matter of law that the claimant's separation from employment was involuntary. We further conclude that it was not due to a knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 15, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 26, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh