

Where the claimant failed to work out a satisfactory regular schedule, seek any per diem shifts, or contact his director, he is deemed to have voluntarily left his employment. A credibility assessment rejecting the claimant's assertions that his failure to work was the employer's fault was reasonable and supported by substantial evidence. Held the claimant was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0071 1686 18

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 filed a claim for unemployment benefits with the DUA, effective July 4, 2021, which was denied in a determination issued on September 25, 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 overturned the agency's initial determination and awarded benefits in a decision rendered on January 15, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violating a reasonable and uniformly enforced rule or policy of the employer. Thus, she concluded that he 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 consider documents presented with the employer's Board appeal and to address questions pertaining to the claimant's separation in light of those documents. 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 was discharged, is supported by substantial and credible evidence and is free from error of law, in view of consolidated findings which now show that the claimant failed to contact the employer to arrange a regular schedule or to sign up for per diem shifts.

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 as a full-time security officer for the employer, a senior residential facility, between May 1, 2019, and September 10, 2021, when he separated.
2. The claimant's immediate supervisor was the security officer manager (supervisor).
3. When the claimant was hired, he worked Sundays through Thursdays from 3:00 p.m. until 11:00 p.m., earning \$18.00 per hour.
4. The claimant was the employer's only night gate officer.
5. The employer's schedules are accessible on the employer's web-based application.
6. The claimant lived fifteen (15) minutes away from the workplace.
7. In October, 2020, the claimant was enrolled full-time in a nursing program. The claimant took classes online from 7:00 a.m. until 2:30 p.m.
8. Between February, 2021, and March, 2021, the employer asked the employees, including the claimant, what shifts they were interested in working.
9. In early March, 2021, the claimant had a meeting with his supervisor to talk about the hours and shifts that he wanted to work.
10. In March, 2021, based on the conversation between the claimant and the supervisor, the claimant's schedule was changed to Sunday through Tuesday 5:00 p.m. until 3:00 a.m.
11. The new schedules were finalized in March, 2021 and set to take effect on May 2, 2021.
12. There was no discussion around the claimant working per diem between March, 2021 and May, 2021.
13. During the last week of April, 2021, the claimant started doing in-person clinicals for school in Rhode Island. The classes began at 7:00 a.m. on Thursdays. The claimant had to leave home by 4:00 a.m. to get to school on time.
14. In May, 2021, as more people began getting vaccinated, the claimant started picking up more in person classes at school.
15. On May 11, 2021, the claimant was tardy to work.

16. On May 18, 2021, May 23–25, 2021, and June 1, 2021, the claimant called out and did not attend work for his scheduled shifts.
17. Prior to June 3, 2021, there was no discussion of the claimant working per diem.
18. The claimant, the employer's assistant manager (manager), and the employer's assistant director of general services (director) had a meeting on June 3, 2021, because of the claimant's absences and tardiness.
19. During the meeting on June 3, 2021, the parties discussed whether the claimant should start working per diem, in another position, or on other shifts, since he had so many call outs.
20. At no time was the claimant told that he had to work a four-day shift or resign.
21. At the end of the meeting on June 3, 2021, there was a follow-up meeting scheduled for June 7, 2021. The meeting was not held because the claimant was late. The meeting was rescheduled to June 23, 2021. The claimant was aware of the rescheduled meeting.
22. After the meeting on June 3, 2021, the claimant continued to call out of work.
23. After June 3, 2021, the claimant worked on June 7, 13, 20, 21, and 22, 2021 from 5:00 p.m.-3:00 a.m.
24. The claimant's last day at work was June 22, 2021.
25. The claimant was not scheduled for work on June 23, 2021.
26. The claimant was a no-call no-show for the meeting on June 23, 2021.
27. On June 23, 2021, the director attempted to contact the claimant several times to see why he was not present for the meeting, but the claimant did not respond to him.
28. On June 24, 2021, the employer's senior human resources manager (HR) sent a letter to the claimant's mailing address, informing him that he should get in touch with the manager and the director by July 1, 2021. The claimant was also informed that if they did not hear from him, the employer would proceed with changing his employment status to per diem effective July 1, 2021, as discussed in earlier meetings.
29. Since working with the employer, the claimant had received mail from the employer at the address to which the letter was sent.
30. The claimant did not contact the manager or the director by July 1, 2021.

31. The employer's human resources department does not make any decision regarding employees scheduling.
32. There was no meeting between the employer's human resources department and the claimant on June 27, 2021, nor was there any agreement between the human resources department and the claimant regarding his schedule.
33. After the claimant failed to contact the supervisor or the director, his employment was changed to per diem effective July 1, 2021.
34. The claimant was not informed of the change in employment other than by the letter dated June 24, 2021.
35. The employer requires per diem employees to pick up at least one shift every sixty (60) days.
36. Per diem employees, including the claimant, are made aware of available shifts by text messages and emails.
37. At no time on July 11, 2021, did the supervisor tell the claimant that he was discharged.
38. The supervisor had no authority to discharge the claimant.
39. Between July 1, 2021, and September 2, 2021, the employer considered that the claimant was still employed as a per diem staff in good standing.
40. It is unknown if, between July 1, 2021, and September 2, 2021, the employer contacted the claimant about picking up available shifts as a per diem employee.
41. The claimant did not pick up any shifts between July 1, 2021, and September 2, 2021.
42. On September 2, 2021, the employer's [sic] resources manager sent a letter to claimant informing him that as a per diem employee, he was expected to pick up at least one shift every sixty (60) days and that he had not since picked up any shift. He was also informed that he should contact his manager about picking up a shift, and if he did not pick up a shift by September 10, 2021, the employer would consider him to have voluntarily resigned.
43. The claimant did not contact the manager, nor did he pick up any shifts by September 10, 2021.
44. On September 10, 2021, the employer processed the separation of the claimant as a voluntary resignation.

Credibility Assessment:

At the remand hearing, copies of the letters dated June 24, 2021, and September 2, 2021, that were sent to the claimant by the employer, were entered into record as Remand Exhibits 5 and 6, respectively.

During the remand hearing, the claimant was not a credible witness as he provided vague and uncertain testimony regarding the dates and events leading up to his separation. While the director testified that the changes regarding the schedule were made in March, 2021, and the final changes effective May 2, 2021, the claimant testified that he met with the supervisor in May, 2021 regarding the changes. The director's testimony is being accepted as more credible than the testimony offered by the claimant as it was more consistent with the entirety of the record.

During the remand hearing, the claimant testified that he had an agreement with the supervisor to work Sunday through Tuesday from 5:00 p.m. until 3:00 p.m. [sic] and then pick up a per diem shift on Wednesdays, but the director told him that he had to work four-day shift from Sunday until Wednesday or resign. He also testified that they kept scheduling him for the four-day schedule. However, if this was the agreement, the evidence established that at no time did the claimant work a per diem shift and he also testified that the employer did not call him to pick up any per diem shifts. Furthermore, the dates on which the claimant was absent from work were between Sundays and Tuesdays. Therefore, it is more likely that he was never scheduled to work on Wednesdays since there were no absences or calls outs reported for those days.

The claimant also testified that he met with HR but was unsure of the date but stated that it was in July, 2021. The claimant testified that he was told by the human resources representative that he could not work without having a meeting with the director. The claimant stated that after that, he focused more on calling the dispatcher to see if he was on schedule. However, the claimant testified that it was the director who took him off the schedule, so it would have been more reasonable for the claimant to try and contact the director. He stated that he attempted to contact the director twice but was not aware of the dates. He also stated that he called the supervisor, the manager and the director but was unable to get through to them and was again unsure of the dates. He testified that on July 11, 2021, dispatch forwarded his call to the supervisor who told him that he was discharged. This was the only date that the claimant remembered. This testimony is not accepted as credible, given the overall lack of certainty with the testimony and the other available evidence in the record.

Furthermore, during the first hearing, the claimant testified that the supervisor called him and told him that he was discharged because the employer could not work with his schedule and had found another employee who was able to work that schedule. During the remand hearing, the claimant testified that he called dispatch and [sic] transferred him to the supervisor and the supervisor told him that he was discharged but he was never told that [sic] why he was discharged. However, both

employer's witnesses provided sequestered testimony that the supervisor was not authorized to discharge the claimant. Additionally, the evidentiary [sic] evidence established that the claimant was [sic] considered separated until September 10, 2021. The employer's testimony in this regard is accepted as more credible than the claimant's inconsistent testimony.

During the remand hearing, the claimant also testified that he did not receive any of the letters that were sent by the employer. However, he also testified that he has previously received mail from the employer at this address and there were no issues with him receiving mails at his address. It is concluded that the testimony that he did not receive the letters is not credible.

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. Given these new consolidated findings, we reject the review examiner's conclusion that the claimant is eligible for benefits, as outlined below.

The first question we must decide is whether the claimant separated voluntarily or was discharged. Based only upon hearing the claimant's testimony at the original hearing, the review examiner concluded that the employer discharged the claimant on July 11, 2021. However, after considering the employer's testimony and documentary evidence during the remand hearing, the consolidated findings now provide that the claimant was not discharged on July 11, 2021. *See Consolidated Finding # 37.* Instead, the employer deemed him to be an employee in good standing until September 10, 2021, and only severed the employment relationship because the claimant had failed to work any shifts for over 60 days. *See Consolidated Findings ## 41-44.*

The employer characterized this separation as a voluntary resignation. We agree. In Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950), the Supreme Judicial Court upheld 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).

In the instant case, the claimant last performed work on June 22, 2021. Consolidated Finding # 24. The consolidated findings provide that the director had tried to reach the claimant several times on June 23, 2021, when the claimant failed to show up for a meeting. Consolidated Findings ## 26 and 27. Unable to reach the claimant, the human resources department sent him a letter on June 24, 2021, with instructions to contact his manager and the director, and notifying him that he would be placed on a *per diem* status on July 1, 2021, if they did not hear from him. Consolidated Finding # 28. The claimant did not contact his manager or the director by July 1, 2021. Consolidated Finding # 30.

Nor did he sign up for any *per diem* shifts after July 1, 2021. *See Consolidated Findings ## 41 and 43.* In all fairness, the employer may not have contacted the claimant to pick up available shifts between July 1 and September 2, 2021. *See Consolidated Finding # 40.* However, we know that the employer did send a letter on September 2, 2021, notifying the claimant that he was expected to contact his manager and pick up a shift by September 10, 2021, or he would be deemed to have resigned. *See Consolidated Finding # 42.* When the claimant did not, the employer formally ended the employment relationship on September 10, 2021. *See Consolidated Finding # 44.*

In our view, these facts demonstrate that the employer had work available, but the claimant chose not to work. In effect, he abandoned his job, and we treat his separation as a voluntary resignation. G.L. c. 151A, §§ 25(e)(1), 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.

These provisions expressly place the burden of proof upon the claimant.

We consider whether the claimant has shown good cause attributable to the employer or urgent, compelling, and necessitous reasons for not working any shifts. The claimant did not present any evidence to indicate there were urgent, compelling, and necessitous reasons for his failure to work.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). During the hearing, the claimant asserted various reasons why his failure to work was the employer's fault. He asserted that the director forced him to work on Wednesdays, when his supervisor told him that he would not have to do so. He claimed human resources would not let him work until he met with the director, and that he tried but could not reach the director. He also testified that he did not receive either the June 24, 2021, or September 2, 2021, letters, and that, on July 11, 2021, a supervisor told him he had been fired.

In a detailed credibility assessment, the review examiner explained why she did not find his testimony to be credible. 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). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of*

Boston, 383 Mass. 456, 466 (1981) (further citations omitted). We believe that her assessment and the resultant consolidated findings are reasonable and supported by substantial evidence.

We, therefore, conclude as a matter of law that the claimant voluntarily left his employment. We further conclude that, because the claimant has failed to demonstrate that his resignation was for good cause attributable to the employer or urgent compelling and necessitous circumstances, he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits as of the week beginning July 4, 2021, 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 29, 2022



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

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