

The claimant was discharged after the employer discovered her driver's license had been suspended because of an OUI. Her employer required all LPNs to have a valid driver's license. Because she created the statutory impediment to her continued employment, she is disqualified 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 July 9, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 18, 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 May 10, 2022. 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 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 about the claimant's job duties and responsibilities. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 not to inform her employer that her license was suspended did not constitute deliberate misconduct because she did not think having a license was mandatory for her position, 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 as a licensed practical nurse (LPN) for the employer, a social services agency. She was assigned to work at group homes for disabled

adults. The claimant began work for the employer in February 2019. She worked full-time and earned \$37 per hour.

2. The employer requires LPNs to have a valid driver's license and vehicle.
3. The policy's purpose is to provide transportation between program sites and work at other locations. A vehicle may also be necessary to drive individuals.
4. During orientation, the claimant listed her skills, including first aid certification. Her list also included a driver's license. The claimant reported in her orientation paperwork that her driver's license expired on July 13, 2023.
5. The claimant was aware of the policy and was provided a copy of her job description when she was oriented. The job description states: "A valid driver's license and vehicle are required."
6. The claimant was never required to take patients to and from appointments or drive during her employment.
7. In November 2019, the claimant's driver's license was suspended for driving under the influence.
8. The claimant did not report the suspension of her license to the employer.
9. On July 9, 2021, the claimant's supervisor called her after work. The supervisor told the claimant that the employer had a new insurance company, and they reviewed [sic] her driving record. She told the claimant they knew her license was suspended for driving under the influence. The supervisor told the claimant the employer was letting her go.
10. The employer discharged the claimant for having a suspended driver's license, an essential requirement of her employment and job function.
11. The claimant has not been diagnosed with Alcohol Use Disorder and has not sought treatment for alcohol dependency.

Credibility Assessment:

The claimant alleged that the employer's driver's license requirement was preferred. In support of her testimony, she provided a screenshot of a job description listing a driver's license as preferred. However, the screenshot is undated, difficult to read, and appears to be from a third-party job site. Although neither the claimant nor the employer witness could state definitively whether the screenshot was from the employer's website, it is concluded it is not. The employer provided a job description for the position of LPN dated January 17, 2019, and a copy of the claimant's new employee authorization form, signed by the claimant. The job description requires a valid driver's license. The claimant also reports her

skills in her new employment authorization form, including a valid driver's license. Given these facts, it is concluded that the employer maintains a policy requiring LPNs to have valid driver's licenses, and the claimant was aware of the policy.

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 entitled to benefits because she did not engage in a knowing violation or deliberate misconduct.

There was no dispute that the claimant was discharged after the employer learned her driver's license had been suspended. Consolidated Finding # 7. While the claimant did dispute that having a valid license was a requirement of her position, the review examiner accepted as credible the employer's contentions that it required all LPNs to have a vehicle and active driver's license. *See* Consolidated Findings ## 2 and 3. Such an assessment is within the scope of the fact finder's role, and, unless the assessment is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Upon review of the testimonial and documentary evidence submitted by both parties at all three hearing sessions, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the record.

The review examiner initially applied G.L. c. 151A, § 25(e)(2), the portion of the law governing a claimant's eligibility for benefits where they are discharged, because the parties' testimony indicated the employer initiated the claimant's separation. However, in cases such as this, where an employee is discharged because she has created a legal impediment preventing her from meeting the requirements of her position, the Supreme Judicial Court has stated that the employee will be considered to have "voluntarily" left her employment pursuant to G.L. c. 151A, § 25(e)(1). *Rivard v. Dir. of Division of Employment Security*, 387 Mass. 528, 528-529 (1982). *See also Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (1985).

As the claimant's actions effectively caused her separation from employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(1), which provides, in pertinent part:

[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 of such an urgent, compelling and necessitous nature as to make his separation involuntary.

The explicit language of the foregoing provision places the burden upon the claimant to establish that she left her job either for good cause attributable to the employer or for urgent, compelling, and necessitous reasons. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

There is no indication from the record that the employer did or failed to do something that gave the claimant a valid reason to quit her job. Accordingly, we conclude that the claimant did not separate from her employment for good cause attributable to the employer. Instead, we consider only whether the claimant can be said to have left her job for urgent, compelling, and necessitous reasons.

The claimant's driver's license was suspended sometime in November, 2019 because she was found to have been operating a vehicle under the influence of alcohol. Consolidated Finding # 7. As the claimant understood her job required her to have a valid driver's license, she created a statutory impediment to retaining her LPN position with the instant employer when she made the volitional choice to drive while intoxicated. *See* Consolidated Findings ## 2, 5, 7 and 10. In effect, she "voluntarily" left her job and "brought h[er] unemployment on h[er]self." *See Olmeda*, 394 Mass. 1002.

We have held that if the inability to control alcoholism played a role in the incident which caused the claimant to lose her job, her separation may be attributable to urgent, compelling, and necessitous circumstances and she may not be disqualified pursuant to G.L. c. 151A, § 25(e)(1). *See* Board of Review Decision 0026 2284 78 (Mar. 28, 2019). However, in this case, the review examiner found that the claimant was never diagnosed with Alcohol Use Disorder nor sought treatment for alcohol dependency. Consolidated Finding # 11.

We, therefore, conclude as a matter of law that claimant voluntarily left her employment without urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week of July 9, 2021, 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 2022



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