

Although the claimant submitted a two-week notice to resign, her manager asked her to stay and she agreed. Because a week later the employer notified her that she had been replaced and had to stop working, the Board held her separation was a discharge. Since there was no evidence of any misconduct, the Board further held that the claimant was eligible for benefits pursuant to 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: 0075 9015 19

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 separated from her position with the employer on March 4, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 30, 2022. 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 May 26, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, she 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 left her job without giving the employer an opportunity to address her concerns, 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 as a Dietary Aide for the employer, a nursing home, from 3/4/03 until she separated from the employer on 3/4/22.

2. The claimant was hired to work full-time, 32 hours a week, earning \$18.00 an hour.
3. The claimant had left work after an incident she had with the Dietary Manager.
4. The claimant got a new manager approximately a month after she began working.
5. The claimant and other employees would always serve trays at 8 a.m. The new manager suggested that they be ready to serve at 7:30 a.m. It took a couple of weeks for them to be ready to serve at 7:30 a.m.
6. On 2/22/22, the manager was cooking while the claimant was doing other duties. The claimant decided to help the manager by placing oatmeal in bowls. The claimant had asked another Aide to get her more bowls. When the manager heard the claimant's request, she stopped cooking and went over to tell the other Aide she was to do as she asked her and not what others were asking of her, such as the claimant.
7. The claimant asked the manager "What happened? I thought we were working together?" The manager told the claimant she could walk around the counter and get the bowls herself.
8. After breakfast was served, the claimant submitted her two weeks' notice in writing to her manager.
9. On Friday 2/25/22, while the claimant was in the office doing paperwork, the manager asked the claimant to stay on and to give her a couple of months for things to be different because she planned to get more help.
10. The claimant agreed to continue working. The claimant had been offered another job with another employer during this time. She called the other employer and informed him she would not be accepting the offer of work.
11. On the following Friday 3/4/22, the manager informed the claimant she was no longer an employee. They had accepted her resignation and hired her replacement.
12. The claimant finished her work and then left.

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 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 disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question we must decide is whether the claimant resigned or was discharged. The review examiner treated the claimant's separation as a resignation. Presumably, this is based upon her findings that the claimant submitted her two weeks' notice after an incident with her manager on February 22, 2022. *See* Findings of Fact ## 6–8. However, the review examiner further found that, three days later, the manager asked the claimant to stay, and the claimant agreed. *See* Findings of Fact ## 9 and 10. These findings show that the resignation was rescinded at the employer's request.

A week later, the employer told the claimant she had to leave, that they had accepted her resignation and hired a replacement. *See* Finding of Fact # 11. It seems that the employer had changed its mind. Since the claimant had already agreed to stay, it was the employer's decision to end the claimant's employment, not the claimant's. When an employer tells an employee that she no longer has a job, we treat this as an involuntary separation. It is considered a discharge.

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).

As a threshold matter, the employer must show that the claimant's termination was attributable to some sort of misconduct or rule violation. Here, there is no indication that the claimant did anything wrong. During the hearing, the claimant testified that her manager stated that she had not immediately notified the supervisor that the claimant had agreed to continue working and that, by the time she did, the supervisor had hired a replacement.¹ Thus, it appears to have been a miscommunication among managers that caused the separation.

¹ While not explicitly incorporated into the review examiner's findings, this part of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* *Bleich v. Maimonides School*, 447 Mass. 38, 40 (2006); *Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training*, 64 Mass. App. Ct. 370, 371 (2005).

Since there is no evidence that the claimant engaged in misconduct or violated any rule or policy, we conclude as a matter of law that there is no basis to disqualify her from receiving benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 13, 2022, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 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.

AB/rh