

**Board held that the claimant did not resign; she was discharged. Merely telling the employer she would go home to think about whether to submit her resignation did not rise to actually quitting. Rather, the employer’s directive for the claimant to turn in her badge, then escorting her out of the building amounted to a discharge. Since there was no evidence the claimant engaged in any misconduct, the employer failed to meet its burden under § 25 (e)(2), and the claimant is eligible for benefits.**

**Board of Review  
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**Issue ID: 0076 2147 54**

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 February 18, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 15, 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 August 11, 2022. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant was disqualified under G.L. c. 151A, § 25(e)(1), because she voluntarily resigned. 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 resigned without showing good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law where the claimant informed her employer that she was contemplating resigning if she was required to obtain a COVID-19 booster shot.

Findings of Fact

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

1. The claimant worked part-time in a sales position for the employer’s cannabis business from approximately 7/1/20 until 2/18/22. The claimant worked a varied schedule of approximately 20 hours per week and was paid an hourly rate of \$17.50.

2. On 2/18/22, the employer conducted a meeting where its mask policy was discussed. During the meeting, the employer cited that the local public school system was dropping its mask mandate. Prior to the date of the meeting, employees of the business were required to wear masks. During the meeting, a manager referenced information from the CDC website regarding individuals who were considered fully vaccinated and those who were considered up-to-date. The claimant questioned the information presented by the manager. The manager accessed the CDC website and it appeared to the claimant that the manager was surprised by the information she found. The manager told the claimant that she needed to find out more information. The claimant questioned the fully vaccinated versus up-to-date status because she was hoping to no longer be required to wear a mask at work. The claimant received one dose of the Johnson & Johnson vaccine and subsequently had concerns about possibly having a blood clot. The claimant has a deviated septum and enlarged tonsils and finds it difficult to breathe with a mask on.
3. At the end of her shift on 2/18/22, the owner asked to speak with the claimant. The owner stated that she understood the claimant was questioning the employer's mask policy. The claimant responded, telling the owner that she finds it hard to wear a mask and was afraid to get a booster vaccine shot because of a blood clot scare. The owner stated that she was getting sick of all the whining. The claimant responded by asking the owner if she (the claimant) was whining. The owner told the claimant that no one was making her stay there. The claimant told the owner that she was going to go home and think about this, and she may write a letter, giving a 2-week notice of her resignation. The owner told the claimant not to bother, she could turn over her identification badge. The claimant questioned the owner why she would not be allowed to work out her 2-week notice period. The owner told the claimant that this was company policy. The owner escorted the claimant out of the building.
4. After the claimant left the workplace, the manager notified the claimant by text message or email that she would be paid in lieu of her 2-week notice.
5. The claimant filed an initial claim for unemployment insurance benefits, effective 2/27/22.
6. On or about 3/3/22, the claimant completed a DUA factfinding questionnaire in which she confirmed that she quit her work. In her responses, the claimant wrote that she left because she had concerns with a policy change, after being informed that she had to get a COVID-19 booster shot. The claimant wrote that she gave notice on 2/18/22 and planned to work until 2/25/22.
7. On 3/24/22, the claimant completed a DUA factfinding questionnaire in which she wrote that she never got to give notice, she tried to explain that she was going to go home and think about the employer's new booster policy and that she may write a letter of resignation and give a 2-week notice, but the employer

told her not to bother and to leave. The claimant wrote that the employer said that to work there without wearing a mask, employees would have to be fully vaccinated, but the employer misrepresented what that actually meant as she was quoting from the CDC, but the CDC did not consider adding a booster [sic] fully vaccinated, but rather it would be considered up to date. The claimant wrote that when she questioned the employer's error, the employer got mad.

8. On 4/7/22, the employer completed a DUA factfinding questionnaire indicating that on 2/18/22, the claimant told the General Manager and the business owner that she was quitting because she did not agree with an announcement made in a staff meeting that the employer was going to continue to follow CDC guidelines regardless of vaccine status.
9. On 4/15/22, 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 3/6/22 and indefinitely thereafter.
10. On 4/25/22, 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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject a portion of Finding of Fact # 6 which asserts the claimant confirmed that she quit, as it is inconsistent with Findings of Fact ## 3 and 7. In adopting the remaining findings, we deem 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 benefits.

The first question we must decide is whether the claimant voluntarily resigned or was discharged. The entirety of events unfolded on February 18, 2022, when the employer scheduled a meeting to discuss removing the mask mandate in accordance with CDC guidelines. After the meeting, the claimant informed her manager that she had questions as to what constituted "fully vaccinated" and those considered "up to date". The manager informed the claimant that she would investigate the matter further and would get back to her. *See* Finding of Fact # 2.

Upon completion of her shift, the owner approached the claimant requesting to speak with her as she had heard the claimant had some questions regarding the employer's mask policy. The claimant reiterated her earlier discussion with her manager and further explained to the owner that she found it hard to breathe with the mask on and was afraid to obtain a booster shot due to a blood clot scare. Further words were exchanged, at which point the claimant informed the owner that she was going home to think about the matter and *may* write a letter of resignation. The owner informed the claimant not to bother, requested that she turn in her badge, and escorted her out of the building. *See* Finding of Fact # 3.

Nothing in the record indicates that the claimant resigned. The review examiner found the claimant was going to go home and think about the employer's policy changes and she *may* write a letter of resignation. Mere contemplation of a resignation, without acting on it, is not a resignation. Even if characterized as a threat to quit, as the review examiner does in her decision, the claimant's actions fall short of actually resigning.

Rather, it was the employer's actions which caused the claimant to separate from her employment. In response to hearing that the claimant may resign, the owner directed her to turn in her badge and walked her out of the building. *See* Fact Finding # 3. These facts show that the employer discharged the claimant.

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 evidence that the claimant did anything wrong. The employer had a policy that required all employees wear a mask due to the COVID-19 pandemic. The review examiner noted in her decision that the claimant had been in compliance with the employer's existing mask policy. There is no indication in the record that she refused to comply with the current policy or would not comply with the new policy. *See* Finding Fact # 2. The claimant merely expressed her medical concerns with the new booster requirement. *See* Finding Fact # 3. Expressing a concern does not amount to a refusal to comply.

We, therefore, conclude as a matter of law that the claimant did not voluntarily leave her employment. We further conclude that the employer has not met its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or engaged in 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 February 27, 2022, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 21, 2023**



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](http://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.

DY/rh