

The claimant did not engage in misconduct when he left work early, as the review examiner found that he only left because the manager told him to leave. Held the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
100 Cambridge Street, Suite 400
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: 0079 0393 88

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 affirm.

The claimant was discharged from his position with the employer on January 6, 2023. He filed a claim for unemployment benefits with the DUA, effective January 1, 2023, which was denied in a determination issued on February 24, 2023. 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 April 22, 2023. 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 or knowingly violate a reasonable and uniformly enforced rule or policy of the employer 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 afford the employer an opportunity to testify and present other evidence. 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer when he left work early, 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 full-time for the employer, an automobile dealership, from April 28, 2022, until January 6, 2023.

2. The employer has two locations, one in [Location A] and one in [Location B].
3. The claimant lives in [Location C].
4. The distance between [Location C] and [Location A] is approximately twenty (20) miles each way. The distance between [Location C] and [Location B] is approximately thirty-eight (38) miles each way.
5. The claimant was hired to work as a sales manager at [Location B] with a weekly salary of \$1,725.00.
6. In August 2022, the employer transferred the claimant to [Location A] as sales personnel because [Location A] was understaffed. The claimant's pay rate was decreased to \$15.00 per hour (\$600 per week) plus commission.
7. The claimant agreed to transfer to [Location A] at the lower pay rate because it had more sales, greater potential for commission, and a shorter commute.
8. On the morning of January 5, 2023, the general manager at [Location A] ([Manager A]) told the claimant that he was being transferred back to [Location B] at a pay rate of \$15.00 per hour plus commission.
9. The claimant's own personal vehicle was leased, and his lease terms include a certain number of miles annually. The claimant was concerned that he would lose money on his lease by commuting to [Location B].
10. The claimant asked [Manager A] if he could receive a pay increase or a "demo car" due to the longer commute and lower sales potential at [Location B]. A demo car is a vehicle provided by the employer that the claimant could drive to and from work.
11. [Manager A] told the claimant that he would discuss the possibility of a pay increase or demo car with the owner.
12. After speaking with the owner, [Manager A] told the claimant, "There is nothing to discuss and no negotiations. You can't stay in [Location A]." The claimant and [Manager A] had no further discussions about the transfer to [Location B]. The claimant did not think that the employer had continuing work for him at [Location A] and left [Location A] before noon to go home. As the claimant left [Location A], he did not make any comments or statements.
13. The claimant did not quit his employment and did not intend to quit his employment when he left [Location A] on January 5, 2023. The claimant would not have quit this employment without first securing new employment, which he did not have.

14. At the time [the] claimant left [Location A], on January 5, 2023, he planned to try and continue negotiating a pay increase or a demo car with [Location B]. If negotiations with [Manager B] were not successful, the claimant planned to work at [Location B] for \$15.00 per hour plus commission.
15. At 12:47 p.m. on January 5, 2023, Manager B] called the claimant to reiterate the offer for the claimant to transfer to [Location B] and that [Location B] was short-staffed. The claimant did not decline or refuse the transfer during this call.
16. The only remaining work for the claimant was at [Location B].
17. At 7:33 p.m. on January 5, 2023, the claimant called [Manager B] and explained that he would be reporting to [Location B] for work the following day, on January 6, 2023. During that call, [Manager B] did not rescind the transfer.
18. At 8:24 a.m. on January 6, 2023, [Manager B] called the claimant and told the claimant that his position with the employer was “no longer available” because the claimant was “not compliant the day before.”
19. On January 6, 2023, the employer terminated the claimant’s employment when they withdrew their offer for the claimant to transfer to [Location B] because the claimant left [Location A] on January 5, 2023.
20. The claimant filed an unemployment claim on January 13, 2023, with an effective date of January 1, 2023.

Credibility Assessment:

After the conclusion of the hearings, the claimant’s testimony is deemed more credible than that of the employer witnesses. The claimant’s testimony was consistent and corroborated. In both the original hearing and remand hearing, the claimant provided specific details about his conversations with the employer.

The employer argued the claimant quit and declined the transfer to [Location B] when [he] walked out of [Location A] around noon on January 5, 2023. However, this argument is not credible. The claimant provided detailed and specific testimony about his conversation with [Manager A] on January 5, 2023, during which the claimant was explicitly told “...You can’t stay in [Location A].” [Manager A] did not testify in the hearing and neither the controller nor the [Manager B] was a witness to this conversation. The controller admittedly was not present on any calls between the claimant and either manager, nor did she have any conversations herself with the claimant. As such, the claimant’s testimony about what [Manager A] told him is deemed credible. The claimant admittedly did not talk with [Manager A] further about the transfer or make any statements or comments as he was leaving. The claimant’s testimony that he left [Location A] before noon because he did not think work remained for him at [Location A] was logical, believable, and credible given [Manager A]’s statement that he could not stay in [Location A].

A further reason it is not credible that the employment relationship ended when the employer alleged is due to [Manager B]’s call to the claimant at 12:47 p.m. on January 5, 2023, reiterating the transfer and the understaffing at [Location B]. The record does not contain any comments or statements from the claimant that he quit or that he refused the offer to work at [Location B] at any time. The claimant was consistent in his testimony that he did not quit, nor did he intend to quit. It was logical and reasonable for the claimant to inquire about his pay rate, or a demo car given the increased commuting distance to [Location B] (compared to his commuting distance to [Location A]), and the claimant was adamant and compelling in his testimony during the original hearing that he would not have quit without new employment (which he did not have).

During the remand hearing, there was a dispute between the claimant and [Manager B] about whether they talked to each other during the call at 7:33 p.m. on January 5, 2023. The claimant testified with detail and specificity about the call with [Manager B]. The claimant provided phone records showing the incoming and outgoing calls that corroborated his testimony. As such, the claimant’s testimony is deemed credible that they spoke during said call, and the claimant explained to [Manager B] that he would report to work at [Location B] on January 6, 2023.

The claimant’s testimony is deemed credible and supported by the record, that his employment ended on January 6, 2023, when the claimant was ready and willing to come in for work and was told by [Manager B] at 8:24 a.m. that he could not do so.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact except as follows.

We reject the portion of Consolidated Findings ## 8 and 10–11 and the credibility assessment that indicate that the claimant phone conversation was only with [Manager A], as the parties testified that the claimant spoke to both [Manager A] and the Controller on the morning of January 5, 2023, when the claimant was told that he was being transferred to the employer’s [Location B].¹ We also set aside the portion of Consolidated Finding # 12 and the credibility assessment that states that the claimant testified that he left [Location A] before noon on January 5, 2023.²

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

² The claimant testified during both the initial and remand hearings that he left [Location A] after lunch, and, during the remand hearing, he specifically said that it was after 3:00 p.m. Further, the employer’s Controller testified during the remand hearing that she believed that the claimant left around 1:00 p.m., but she could be off by a couple of hours.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that, except as noted above, the review examiner's credibility assessment is reasonable in relation to the evidence presented.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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. . . .

“[The] 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 demonstrate that the claimant engaged in the misconduct or policy violation for which he was discharged. In this case, on January 5, 2023, the employer notified the claimant that he would be transferred from the employer's [Location A] to its [Location B]. Consolidated Finding # 8. The employer subsequently discharged the claimant on January 6, 2023, when it did not allow the claimant to start working at [Location B]. Consolidated Finding # 19.

The employer alleged that it did not allow the claimant to begin working in [Location B] on January 6th, because it believed that the claimant had quit his job on January 5th when he left his shift early at [Location A]. Consolidated Findings ## 12 and 18–19. However, the review examiner found that the claimant never told the employer that he was quitting, that he left early on January 5th because the manager in [Location A] told him that he could not stay there, and, further, that, later that day, the claimant confirmed with the manager in [Location B] that he would report to work at that location the next day. Consolidated Findings ## 12–15 and 17. In light of the above findings and the totality of the record before us, the employer has failed to show that the claimant's discharge on January 6, 2023, was attributable to misconduct or a policy violation.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that he knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending January 7, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 26, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

SVL/rh