

The claimant reasonably believed that she had been fired when the employer took her off its scheduling app and ceased communicating with her. Contending that the claimant quit her employment, the employer did not establish that the claimant's discharge was due to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy under 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: 0080 3579 31

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 was separated from her position with the employer on April 16, 2022. She filed a claim for unemployment benefits with the DUA, effective April 3, 2022, which was approved in a determination issued on June 13, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on June 30, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without establishing good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, 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 remanded the case to the review examiner to allow the claimant to present testimony and other evidence. Only the claimant 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 was ineligible for benefits because she initiated her separation without establishing good cause attributable to the employer or urgent, compelling, and necessitous reasons, 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 are set forth below in their entirety:

1. The employer is a homecare agency. The claimant worked as a home health aide for the employer. The claimant performed work for the employer from 1/25/2022 to 4/16/2022.
2. The employer hired the claimant to work full-time. Upon hire, the employer told the claimant that she would provide services for one client (Client 1). Upon hire, the employer told the claimant that she would work 10:00 a.m. to 9:00 p.m. shifts Tuesday through Thursday.
3. The claimant performed work for the employer in the period 1/25/2022 to on or around 4/8/2022. The claimant worked 10:00 a.m. to 9:00 p.m. shifts Tuesday through Thursday. The claimant provided services for Client 1 in Client 1's home.
4. The claimant wanted to eat her meals in Client 1's kitchen away from Client 1 because she had COVID-19 transmission concerns. Client 1's daughter insisted that the claimant eat her meals with Client 1 while Client 1 ate. The claimant was not comfortable with this because she could not wear a mask while she ate. The employer removed the claimant from this assignment.
5. The employer communicated with the claimant via a cellular telephone application (Application 1). The employer posted available work on Application 1. The employer's owner (Owner 1) removed the claimant from Application 1 on 4/8/[2022]. After 4/8/[2022], the claimant could not communicate with the employer via Application 1 because the employer removed her from it.
6. The claimant contacted the employer after it removed her from her assignment with Client 1. The employer assigned the claimant to perform work for another client (Client 2). The claimant performed work on this assignment on 4/16/2022. The claimant did not perform work for Client 2 on any other days.
7. The claimant performed work for Client 2 in Client 2's home. The home was under renovation. Male workers worked on the renovations. The claimant had to use the bathroom. Client 2 told the claimant that she could use one particular bathroom. This bathroom did not have a door on it. The claimant was not comfortable with this because male workers were in the house. The claimant then reported this situation to the employer and told the employer that she would not perform work for Client 2 due to this lack of privacy.
8. The claimant communicated with Owner 1 via text message after she ceased her assignment with Client 2. Owner 1 offered work in [City], MA. The claimant asked for the address. The employer did not provide the address. The employer then did not communicate with the claimant until mid-June [2022]. In that period of no communication, the claimant concluded that the employer no longer employed her.

9. The claimant never performed any work for the employer after 4/16/[2022].
10. The employer's supervisor (Supervisor 1) sent text messages to the claimant in mid-June [2022]. In these messages, Supervisor 1 offered work to the claimant. The claimant responded that the employer was unprofessional due to its lack of communication for two months. The claimant told Supervisor 1 that she would not continue her work for the employer because she believed the employer had bad communication and because it left her without an assignment for two months. The claimant told Supervisor 1 that she planned to file for unemployment insurance benefits. Supervisor 1 told the claimant that she would reach out to Owner 1.
11. On 6/15/[2022], Owner 1 sent text messages to the claimant after the claimant had her text message exchange with Supervisor 1. In these text messages, Owner 1 informed the claimant that he had a client available for her with ten-hour shifts. The claimant responded via text message. In her response, the claimant asked for the days when the shifts were and for a summary of the assignment. Owner 1 never replied. The employer ceased communication with the claimant.

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. 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, except where the review examiner incorrectly stated applicable dates occurred in 2023, rather than in 2022. *See Consolidated Findings ## 5 and 8–11.* 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 original legal conclusion that the claimant is ineligible for benefits.

The review examiner initially denied benefits after analyzing the claimant's separation under the following provisions under G.L. c. 151A, §§ 25(e), which state, 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.

The review examiner originally concluded that the claimant, who failed to participate in the initial hearing, had voluntarily left her employment without good cause attributable to the employer and without an urgent, compelling, and necessitous reason, when she quit because of general job dissatisfaction. However, after hearing the claimant's testimony, the review examiner issued

consolidated findings that do not support a conclusion that the claimant voluntarily left her employment.

Specifically, the review examiner found that after the claimant complained she had concerns about COVID-19 transmission and her initial client's insistence that she eat meals while the client also ate with her (thus having to remove her own mask), the employer removed her from this assignment on or about April 8, 2022. *See Consolidated Finding # 4.* Both the claimant's request and the employer's response were reasonable.

But after the employer removed the claimant from her initial client due to her reasonable concerns about possible exposure to COVID-19, the employer also removed the claimant's access to the scheduling app which permitted the claimant to communicate with the employer about potential jobs. *See Consolidated Finding # 5.* It is unknown why the employer removed the claimant from the scheduling app.

Despite the lack of access to the employer's scheduling app, the claimant contacted the employer for another assignment. The claimant worked for the second client on April 16, 2022. *See Consolidated Finding # 6.* But the second client's home was under renovation and the claimant was told to use a bathroom without a door. Where there were male construction workers in the home, the claimant was not comfortable with this situation. The claimant reasonably cited this lack of privacy when she told the employer she did not want to return to the second client. *See Consolidated Finding # 7.*

The claimant once again texted the employer seeking an assignment. The employer replied there was an assignment available in [City], Massachusetts but did not respond when the claimant requested the client's address. The claimant did not perform any further work for the employer after April 16, 2022, and the review examiner found that the claimant concluded that she was no longer employed by the employer. *See Consolidated Findings ## 8–9.* The employer subsequently reached out to the claimant again about an alleged assignment in mid-June of 2022 (after the claimant had filed her claim for unemployment benefits), but the employer again failed to respond to the claimant's inquiries regarding this alleged assignment. *See Consolidated Findings ## 10–11.*

The employer did not attend the remand hearing to respond to the claimant's detailed testimony regarding her work experiences for her first and second clients, to her allegations that the employer had removed her from its scheduling app, and to her claim that the employer failed to respond when she asked for the address of a potential third client in [City]. It is unknown why the employer stopped communicating with the claimant after April 16, 2022.

The claimant countered during the remand hearing that she did not quit her employment. Rather, in an attempt to preserve her position, she texted the employer about the potential job in [City] with no response. The review examiner found that the claimant concluded that the employer no longer employed her. *See Consolidated Finding # 8.* Although the claimant did not explicitly testify during the remand hearing that she believed that she had been discharged by the employer, we can reasonably infer that this was her belief based on her testimony that she did not quit, the fact that the employer removed her from its scheduling app schedule, and stopped communicating

with her without explanation. Based on the totality of the evidence before us, we conclude that the claimant's belief that she had been discharged was reasonable.

Because the review examiner's consolidated findings do not support a conclusion that the claimant initiated her separation but, rather, that the employer initiated the claimant's separation by taking her off its scheduling app and subsequently ceasing all communication, her qualification 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. . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced rule or policy of the employer or for deliberate misconduct in wilful disregard of the employer's interest. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). We conclude that the employer has not met its burden.

As an initial matter, the employer must show that the claimant was discharged for some sort of misconduct. Because nothing in this record indicates that the claimant violated any employer rule, policy, or expectation, the employer has not met its burden.

We, therefore, conclude as a matter of law that the claimant was discharged without engaging in deliberate misconduct in wilful disregard of the employer's interest and without committing a knowing violation of a reasonable and uniformly enforced rule or policy of the employer. She is eligible for benefits under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 23, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 26, 2024



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.

JPCA/rh