

**The claimant was discharged when the employer stopped offering him work based on an employer assumption that he did not want to return to work. There was no evidence the claimant communicated any intention to resign. Held the employer did not show the claimant engaged in misconduct. Therefore, the claimant was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0080 9698 70**

### 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 we affirm in part and reverse in part.

The claimant separated from his position with the employer on August 8, 2023. He filed a claim for unemployment benefits with the DUA, effective July 30, 2023, which was denied in a determination issued on September 29, 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 November 7, 2023. We accepted the claimant's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional information about the circumstances surrounding the claimant's separation. 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 resigned for good cause attributable to the employer because the employer did not fulfill its promise to transfer the claimant after his foreman threatened to break the claimant's jaw, 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 hood cleaner for the employer, a ventilation contractor. The claimant began work for the employer on June 18, 2023. He

worked from 9:00 p.m. to 9:00 a.m. Sunday through Thursday and earned \$25 per hour.

2. The employer assigns work to two-person teams, including a hood cleaner and a foreman.
3. The foreman the claimant worked with made comments about the claimant's mother. He also swore in the presence of customers. On Sunday, July 30, 2023, the foreman was upset with the claimant's performance. He told the claimant he was going to break his jaw.
4. On Monday, July 31, 2023, the claimant complained to his supervisor, the employer president. He told him the foreman made remarks about his mother.
5. The president asked the claimant to elaborate on the remarks. The claimant did not provide additional details and did not do so. The president told the claimant he understood he was uncomfortable. He asked the claimant if he could hold on for two weeks because a new truck was arriving, and he would assign him to it. The claimant said he would return to work when the truck arrived.
6. The claimant and the president understood that the claimant would return to work when the new truck arrived.
7. Hood cleaners can apply for two licenses. One license permits them to work in [City], MA. The other license permits them to work in all other municipalities in Massachusetts. The claimant was licensed to work in all other municipalities and was studying to take the test for the [City] license.
8. The president assists his hood cleaners in studying for their licensing tests by holding study sessions at the workplace. The claimant agreed to attend a study session on Wednesday, August 2, 2023.
9. The claimant was concerned with his mental health and decided to seek hospitalization. At 9:35 p.m. on Tuesday, August 1, 2023, he texted the president: "not gonna make it tomorrow to study."
10. The claimant was hospitalized from August 2, 2023, to August 7, 2023.
11. On August 7, 2023, the claimant called the president and asked if work was available. The president told the claimant there would not be work for two weeks.
12. On August 8, 2023, the claimant applied for unemployment benefits. He was determined to have a benefit year beginning July 30, 2023.
13. Later, on August 8, 2023, the claimant texted the president that he had applied for unemployment. The president responded that he considered him to have quit

because he refused work. The claimant responded that he did not quit and was ready and willing to work.

14. There was no further communication between the claimant and the employer.

#### Credibility Assessment:

There was some discrepancy between the parties regarding what was said when the claimant and the president met on July 31, 2023. The claimant alleged that the president did not ask him to elaborate on the comments made about his mother. The claimant stated the president did not ask him to stick it out for two weeks. However, when he described the meeting, the claimant was hesitant and required prompting. The president testified that he asked the claimant to elaborate and asked him to stick it out. His testimony was candid and not at all hesitant. The president's testimony was more credible than the claimant's.

#### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. While we agree with the review examiner's legal conclusion that the claimant is entitled to benefits, we reach this conclusion on different grounds.

The review examiner initially concluded that the claimant quit his employment because the employer did not offer him any work after he reported that his foreman had made disparaging comments about his mother and threatened to break his jaw. *See Consolidated Findings ## 3, 4, 11, and 13.* While the claimant's separation was a result of the employer's decision not to offer him any additional work, the consolidated findings do not support the review examiner's conclusion that the claimant quit his employment.

After the claimant reported his concerns about his foreman, both he and the employer's president left with the understanding that the claimant intended to return to work when he could be assigned to a different team on one of the employer's new trucks. *Consolidated Findings ## 5 and 6.* As the employer's president conceded that he accepted this arrangement, his testimony confirms that the claimant did not resign when he refused to continue working with the foreman. Instead, the record and consolidated findings show the employer initiated the claimant's separation.

On the evening of April 1, 2023, the claimant informed the employer's president via text that he would not be able to attend their study session scheduled for the following day. *Consolidated Findings ## 8 and 9.* The employer's president testified that, upon receiving this text, he assumed that the claimant no longer wanted to work for the employer and concluded that the claimant had resigned. However, as the claimant stated only that he was "not gonna [sic] make it tomorrow to study," nothing in the substance of this communication suggests that the claimant had changed his

mind about returning to work once the employer took delivery of its new work trucks. Consolidated Finding # 9.

After speaking with the employer's president and learning that the employer would not have work available to him for another two weeks, the claimant decided to file a claim for unemployment insurance benefits. Consolidated Findings # 11 and 12. The claimant then sent the employer's president a text message, which was admitted into evidence as part of Remand Exhibit 4, explaining that he "had to claim unemployment *for the time being*." (emphasis added).<sup>1</sup> As with the claimant's previous communications, nothing that the claimant said in this text message suggests that he had decided to renege on the parties' agreement that he would return to work when the employer obtained its new work truck. However, acting on his previous assumption, the employer's president told the claimant that the employer considered the claimant to have quit and ceased communications with the claimant. As the employer's president decided not to offer the claimant additional work after August 8, 2023, his actions ultimately severed the parties' employment relationship. *See* Consolidated Findings ## 13 and 14. Therefore, the record confirms the claimant was discharged from his employment on or around August 8, 2023.

Because the claimant was discharged, his 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 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 show that the claimant engaged in some misconduct which either violated a policy or an employer expectation. In this case, the employer severed the employment relationship because the employer's president assumed from the claimant's text message on the night of August 1, 2023, that the claimant no longer wanted to return to work. *See* Consolidated Findings ## 8, 9, 13, and 14. The employer's president may have felt that the claimant's need to cancel the study session showed a lack of dedication to his job, but he did not provide any testimonial or documentary evidence showing that the claimant engaged in any action that violated an employer policy or expectation. Therefore, the employer has not shown that misconduct caused the claimant's separation.

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<sup>1</sup> 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).

We, therefore, conclude as a matter of law that the claimant was discharged from employment. We further conclude that the employer has failed to demonstrate that the discharge was due 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. The claimant may not be disqualified under G.L. c. 151A, § 25(e)(1) or (2).

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week of August 6, 2023, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 10, 2024**



Paul T. Fitzgerald, Esq.  
Chairman



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.

LSW/rh