Where the claimant left her work key and ID badge in an envelope on a desk of the employer's office, and did not return to work for her next shift or contact the employer any time thereafter, she is deemed to have voluntarily left her employment. Held the claimant was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

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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 reverse.

The claimant separated from her position with the employer on September 12, 2023. She filed a claim for unemployment benefits with the DUA, effective September 3, 2023, which was denied in a determination issued on November 3, 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 December 13, 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. Only the employer 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 was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), because the employer failed to show that the claimant was discharged for intentionally failing to adhere to reasonable employer expectations, 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 as a non-exempt retail associate for the employer, a cannabis retailer, from 10/25/22 to 9/12/23. She was paid bi-weekly.

2. The employer has a written clock-in procedure which says all non-exempt employees must clock in and out by using the employer's timekeeping system. Employees may not clock in or out for anyone but themselves. Should an employee miss an entry, they must follow the timecard discrepancy reporting procedure.

3. The timecard discrepancy reporting procedure gives the employer consent to change an employee's timecard. For missed clock-ins, employees must clock in when they realize they missed clocking in, even if the initial clock-in is incorrect for the time being. Employee timecards are not altered without the approval of the employee.

4. The written timecard discrepancy reporting procedure is as follows: log into the employer's timekeeping system, find the day and time you need to request a change for, and select "request punch corrections", follow prompts for correcting the punch, and then wait for the manager to approve or reject the correction request.

5. Managers do not need an employee ID badges [sic] to approve or reject time punch correction requests.

6. The above policy is in place to ensure that employees are paid correctly and to prevent time theft.

7. Employees may clock in and out of the employer's timekeeping system using a mobile app or a computer at the workplace. An internet connection is required to complete time punches properly.

8. Employees who use the mobile app to clock in and out of work without an internet connection are unable to complete their time punches.

9. The computer in the workplace is always connected to the internet.

10. The claimant worked in-person and was not required to use a mobile app to clock in and out of the employer's timekeeping system.

11. There were no technical issues that prevented any employees from punching in and out of the employer's timekeeping system using the workplace computer during the claimant's employment.

12. If business was slow and not all staff were needed, the manager on duty would ask for volunteers to leave work early. Those that volunteered were made aware that if they left, they would only be paid for actual time worked that day.

13. On 7/11/23, the claimant received a first written warning for counting money on the sales floor that was not part of her till. The warning said that cash tips are to be immediately placed in the tip jar, and any other cash should be handled in the intake room, with the window closed, and seen on camera, at all times. No personal money should be counted or handled while on the sales floor.

14. The claimant signed the warning and did not write a response in the "Employee Response" section of the warning.

15. On 8/28/23, the claimant received a final written warning for not punching out of the employer's timekeeping system for her 30-minute breaks on multiple occasions. The warning says that omitting records and/or refusing to clock out is time theft, and if time entries are incorrect, the claimant will ensure that a timecard correction request is submitted.

16. The claimant signed the warning and wrote, "Unable to punch in or out on any device" in the "Employee Response" section of the warning.

17. On the days the claimant did not punch out for her 30-minute break, she successfully punched into the employer's timekeeping system at the beginning of her shift and punched out at the end of her shift.

18. The Assistant Manager found out the claimant was not punching out for her 30-minute break when she was reviewing the claimant's bi-weekly timekeeping that required management approval.

19. The Assistant Manager spoke with the claimant about her failure to punch out for her 30-minute breaks and asked the claimant to submit time punch edit requests to correct these punches. The claimant did so.

20. The claimant continued to punch into the employer's timekeeping system at the beginning of her shift, not punch out for lunch as she was required to do, and then punch out at the end of her shift, after receiving the 8/28/23 final written warning.

21. On 8/31/23, the claimant received another final written warning for giving discounts to customers on multiple dates when the customers did not have discount cards, using her own discount card to give a discount to a customer, and processing a transaction using the incorrect discount.

22. The claimant signed the above warning and did not write comments in the "Employee Response" section of the warning.

23. The claimant appeared at work on 9/12/23. Prior to leaving, she left her work key and ID badge which were attached to a lanyard, in an envelope, on a desk in the back room.

24. The claimant did not return to work for her next shift, nor did she contact the employer after 9/12/23. and left her work key, lanyard, and ID badge with a co-worker, then left. She did not return to work the next day, nor did she contact the employer after 9/12/23.

Credibility Assessment:

Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence provided by the employer at the remand hearing and the DUA fact-finding questionnaires and documents provided to DUA prior to the original hearing was more credible than the evidence provided by the claimant via DUA fact-finding and at the original hearing. The claimant stated that she was unable to clock in or out of the employer's timekeeping system, she was given a written warning for this, and, as she did not want to further put her job in jeopardy for not properly utilizing the employer's timekeeping system, she left her work keys and ID badge at work with a note, hoping the employer would resolve this issue and she could return to work. The current Store Manager, who was an Assistant Manager at the time of the claimant's employment, and the Human Resources Manager, testified on behalf of the employer. They were sequestered and provided corroborating testimony about how employees utilize the timekeeping system, how time punches are edited, and whether other employees had any issues with their time punches. Their testimony was detailed and supplemented by a screen shot of a co-worker's time punches for the last week the claimant worked, showing that the co-worker had no issues with her time punches; the employer's timekeeping policy; and the warning the claimant received for not punching out for her 30-minute breaks. The claimant failed to punch out for her 30-minute breaks on occasion after receiving the 8/28/23 written warning. She was paid bi-weekly, and the Assistant Manager found out the claimant was not punching out for breaks when she viewed the claimant's bi-weekly timekeeping. The employer witnesses had no knowledge of whether the claimant experienced a schedule change initiated by the then-Store Manager, whether the claimant's availability changed, or whether the claimant spoke with the then-Store Manager about her schedule. The employer witnesses had no knowledge of whether the claimant was sent home early because work was slow. The employer witnesses had no knowledge of whether the claimant left a note for a manager when she left her lanyard, keys, and ID badge at work on her last day. The claimant had access to employer email on her last day of work. No evidence was presented to show that the claimant emailed any managers to explain why she was leaving her lanyard, keys, and ID badge at work on her last day. No telephone records or records of text messages were presented to show that the claimant tried contacting the employer after her last day of work. The claimant stated at the original hearing that she thought she was discharged from employment. When the claimant filed her unemployment insurance claim on 9/15/23, she reported to DUA that she separated from employment due to lack of work.

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 where Consolidated Finding # 24 states that the claimant left her work key, lanyard, and ID badge with a co-worker before leaving. This portion of Consolidated Finding # 24 is unsupported by the record and inconsistent with Consolidated Finding # 23. In adopting the remaining findings, we deem 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for benefits.

The first question we must decide is whether the claimant resigned or was discharged. Based only upon hearing the claimant's testimony at the original hearing, the review examiner concluded that the employer discharged the claimant as of September 12, 2023. However, after considering the employer's testimony and documentary evidence during the remand hearing, the consolidated findings now provide that the claimant was not discharged on September 12, 2023. *See* Consolidated Findings ## 23–24.

The employer characterized this separation as a voluntary resignation. We agree. In Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950), the Supreme Judicial Court upheld the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1).

In the instant case, the claimant last performed work on September 12, 2023, and, prior to leaving, she left her work key and ID badge, which were attached to a lanyard, in an envelope on a desk in the back room. Consolidated Finding # 23. Subsequently, the claimant did not return to work for her next shift or contact the employer any time after September 12, 2023. Consolidated Finding #24.

In our view, these facts demonstrate that the employer had work available, but the claimant chose not to work. Thus, the substantial and credible evidence before us is that the claimant resigned her position, effective September 12, 2023.

Since we conclude the claimant quit her employment, we analyze her eligibility for benefits under G.L. c. 151A, § 25(e), 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 (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.

Under the above provisions, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

Based on the record before us, the claimant did not allege or present any evidence that she left due to an urgent, compelling, and necessitous reason. Therefore, we consider whether the employer provided the claimant with good cause attributable to the employer to leave her employment.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). During the hearing, and in her fact-finding questionnaires, the claimant asserted various reasons why her failure to continue working was the employer's fault. She asserted that she had received warnings for timecard issues regarding her failure to punch out for her 30-minute breaks even though the employer's system had not been working properly, and that, once she lost access to her work email and schedule after September 12, 2023, she tried calling the employer multiple times but never received any response.[1]

Despite the claimant's assertions, however, we note that, in rendering her consolidated findings, the review examiner provided a detailed credibility assessment, which found the employer's testimony more credible. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Based upon the record before us, we see no reason to disturb this credibility assessment.

In rendering this assessment, the review examiner found that the two witnesses for the employer provided corroborating testimony about how employees utilize the timekeeping system. Their testimony, after being sequestered, was detailed and supplemented by a screenshot of a co-worker's time punches for the last week that the claimant worked, showing that the co-worker had no issues with her time punches. They testified to the employer's timekeeping policy as well as the warning the claimant received for not punching out for her 30-minute breaks. Further testimony showed that the claimant continued her failure to punch out for her 30-minute breaks on occasion even after receiving the August 28, 2023, written warning. The review examiner also noted that no telephone records or records of text messages were presented to show that the claimant tried contacting the employer after her last day of work.

The employer has a reasonable interest in making sure that its employees follow its timekeeping policy, and it showed that the claimant was not following this policy. The claimant has not established that it was unreasonable for the employer to issue a warning to her in an attempt to improve compliance with its timekeeping policy. Thus, we agree that the claimant has not shown good cause attributable to the employer to resign.

[1] *See* Remand Exhibits 3 and 4. Although not explicitly incorporated into the review examiner's consolidated findings, the contents of these exhibits and the claimant's testimony are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

Even if we were to assume, *arguendo*, that the claimant had good cause attributable to the employer to resign from her employment, the Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984).

In this case, on September 12, 2023, the claimant did not speak with her manager to address any concerns or provide any explanation for her leaving her work key and ID badge in an envelope on a desk in the back room. She has therefore failed to show that she had taken reasonable steps to preserve her employment or that her efforts would have been futile.

We, therefore, conclude as a matter of law that the claimant voluntarily left her employment. We further conclude that, because the claimant has failed to demonstrate that her resignation was for good cause attributable to the employer or urgent compelling and necessitous circumstances, she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits as of the week beginning September 10, 2023, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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

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.

JMO/rh