

The claimant quit in lieu of imminent discharge for remaining away from work for two months without leave time available to cover his absences. Because the claimant was unable to report to work due to a medical condition and was unable to extend a prior medical leave to cover his absences, he has established mitigating circumstances for his absences, and his discharge would not have been disqualifying under G.L. c. 151A, § 25(e)(2). Held he is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0083 3719 47

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 his position with the employer on August 2, 2024. He filed a claim for unemployment benefits with the DUA, effective July 28, 2024, which was approved in a determination issued on August 27, 2024. 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 October 8, 2024. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without 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 give the claimant 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 quit his employment without good cause attributable to the employer or urgent, compelling and necessitous reasons, when he failed to return to work after his medical leave ended, 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 full-time bus operator for the employer, a public transit system, between 11/26/2023 and 8/2/2024, when he separated.
2. The claimant had a supervisor. The claimant's upper-level manager was the superintendent of bus operations (superintendent).
3. The employer has an attendance policy prohibiting employees from calling out more than three (3) times in a three (3) month span without protected leave.
4. The claimant was a probationary employee. For probationary employees, a first offense for attendance causes a final written warning and a second offense for attendance causes a seventy (70) day referral for discharge.
5. The employer expects employees not to call out more than three (3) times in a three (3) month span without protected leave.
6. On 2/26/2024, the employer issued the claimant a final written warning for attendance for absences between 12/29/2023 and 2/26/2024. The claimant had seven (7) absences in a ninety (90) day period for which he did not have protected leave.
7. The claimant's last day worked was 3/15/2024.
8. The claimant was on an approved leave of absence pursuant to paid family medical leave between 3/16/2024 and June, 2024.
9. The claimant was not eligible for the family medical leave act because he was a new employee and had not worked the one thousand, two hundred fifty (1,250) minimum required hours.
10. Employees who are absent more than thirty-two (32) days must be cleared by the employer's clinic (the clinic) to return to work following a physical examination, drug test and alcohol test. The claimant was required to obtain clearance from the clinic to return to work for the employer.
11. On an unknown date, the claimant applied for additional paid family medical leave from 6/3/2024 to 9/15/2024. As of 6/3/2024, the claimant was not medically able to work due to nerve problems requiring treatment. As of 6/3/2024, no further time off was available for the claimant.
12. On 7/1/2024, the claimant's application for additional paid family medical leave was denied. As of 7/1/2024, the claimant was not medically able to work due to his nerve problems and no further time off was available for the claimant.
13. The claimant did not apply for further time off after 7/1/2024 and had not returned to work by 7/1/2024.

14. On 7/10/2024, the superintendent issued the claimant an “order in” letter requiring the claimant to meet with the superintendent on 7/29/2024 at 11:00 a.m. The purpose of this meeting was to discuss the claimant’s attendance since 6/3/2024.
15. On 7/29/2024, the claimant had an appointment at the clinic scheduled for 10:30 a.m. The claimant did not meet with the superintendent on 7/29/2024 at 11:00 a.m., as scheduled, because he was waiting to be seen at the clinic. The claimant’s appointment occurred at approximately 4:00 p.m., when he was medically cleared to return to work.
16. On 7/29/2024, the superintendent issued the claimant a second “order in” letter requiring the claimant to meet with the superintendent on 8/16/2024 to discuss the claimant’s attendance since 6/3/2024.
17. On approximately 7/29/2024, the claimant and the superintendent spoke via telephone. The claimant informed the superintendent that he had an appointment scheduled at the clinic to return to work. The claimant and the superintendent scheduled to meet on 8/2/2024, to discuss the claimant’s attendance.
18. The claimant’s medical documentation that he is “qualified to return to work” was dated 8/1/2024.
19. When employees are medically cleared to return to work by the clinic, the clinic emails the superintendent. On 8/1/2024, the superintendent received an email from the clinic that the claimant was cleared to return to work.
20. On 8/2/2024, the claimant and the superintendent met. During the meeting, the superintendent gave the claimant the choice to resign or receive a seventy (70) day referral for discharge for being absent from work without protected leave between 6/3/2024 and 8/2/2024.
21. For employees reapplying for future employment with the employer, human resources is less likely to rehire a former employee who has a seventy (70) day referral for discharge in their employment history.
22. If the claimant did not resign on 8/2/2024, he would have received a termination letter after a seventy (70) day unpaid suspension for being absent from work without protected leave between 6/3/2024 and 8/2/2024.
23. The claimant chose to resign in lieu of discharge.
24. The claimant signed an employee resignation form and an operator statement, resigning from his employment.

Credibility Assessment:

At the original hearing, the superintendent asserted that the claimant did not inform her that he was at the clinic getting his physical. The superintendent also maintained that she had not received any emails from the clinic regarding the claimant, that by 8/2/2024, the clinic did not have a physical scheduled for the claimant, and that the clinic had not medically cleared the claimant to return to work. These assertions are not credible considering that after the claimant testified in the remand hearing and presented the 8/1/2024 medical documentation, the superintendent's testimony at the remand hearing differed from her original assertions and was largely consistent with the claimant's testimony. The claimant's testimony is credible as to the events causing his separation from employment. During the remand hearing, the superintendent offered detailed and specific testimony (that she did not provide in the original hearing) about the options presented to the claimant on 8/2/2024: to resign or receive a seventy (70) day referral for discharge for being absent from work without protected leave between 6/3/2024 and 8/2/2024. In light of this, and paired with the 8/1/2024 medical documentation clearing the claimant to resume work, it is credible and believable that the claimant resigned in lieu of discharge, and did not resign because he was "still dealing with medical issues," as written in the claimant's operator statement.

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. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant is not eligible for benefits.

Because the claimant resigned from employment, his eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1), 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 (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 . . .

This statutory provision expressly places the burden of proof upon the claimant.

It is undisputed that the claimant submitted a resignation letter solely because he would be discharged after an unpaid suspension, and he was given the option to resign to avoid having a termination on his record. Consolidated Findings ## 20–24. It is well-settled that an employee who resigns under a reasonable belief that he is facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and

not a termination. *See Malone-Campagna v. Dir. of Division of Employment Security*, 391 Mass. 399 (1984). In this situation, the claimant will not be eligible for benefits if the discharge, had it occurred, would have been for disqualifying reasons within the meaning of G.L. c. 151A, § 25(e)(2).

Consolidated Finding # 22 provides that, if the claimant had not resigned on August 2, 2024, he would have been terminated. Technically, the employer would not have discharged him for another 70 days while he served an unpaid suspension. Inasmuch as the consolidated findings indicate that this suspension would have been imposed immediately, and the employer had already made its decision to terminate him at the conclusion of the suspension, we are satisfied that his discharge was imminent. *See Consolidated Findings ## 20 and 22.*

We consider whether this discharge for attendance would have been disqualifying under G.L. c. 151A, § 25(e)(2), which provides, in pertinent part:

[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 review examiner found that the employer has an attendance policy that prohibits more than three call-outs in a three-month span without leave time available to cover the absences. Consolidated Finding # 3. Because Consolidated Findings ## 4 and 6 reflect that the employer waited to discipline the claimant until he had seven call-outs without leave time available, we cannot conclude that the claimant violated a reasonable and *uniformly enforced* rule or policy of the employer. Alternatively, we consider whether the record shows that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

As a threshold matter, the claimant must have engaged in the misconduct or policy violation for which he was going to be discharged. In this case, the employer was going to discharge the claimant because he was absent from work between June 3, 2024, and August 2, 2024, without being on an approved leave of absence. Consolidated Findings ## 20 and 22. Inasmuch as the employer expected employees not to call out of work more than three times in a three-month period without leave time available for their use, and the claimant remained out of work for two months without an approved leave of absence, we agree that he engaged in misconduct. Consolidated Findings ## 5, 11–12, and 20. Because the claimant remained away from work during this time due to a nerve condition that had not completely improved during his prior medical leave, we can reasonably infer that he was absent from work deliberately. *See Consolidated Findings ## 11–12.*

However, the Supreme Judicial Court (SJC) has stated, “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer’s interest. In order to determine whether an employee’s actions were in wilful disregard of the employer’s interest, the proper factual inquiry is to ascertain the employee’s state of mind at the time of the behavior.”

Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The claimant here was aware of the employer's expectation that he refrain from calling out more than three days in a three-month period without leave time available to cover the absences, as he had received a final written warning on February 26, 2024, for failing to comply with the expectation. Consolidated Findings ## 5–6. We believe that the employer's expectation was reasonable, as the claimant worked as a bus operator, and it is evident that commuters depend on bus operators' attendance for transportation services. *See* Consolidated Finding # 1.

We next consider whether the claimant presented evidence of mitigating circumstances. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). Consolidated Findings ## 11–12 reflect that the claimant's medical condition prevented him from complying with the employer's expectation once his leave of absence ended. Further, these consolidated findings show that the claimant attempted to comply with the expectation when he requested an extension of his leave of absence, but this request was denied. Based on these findings, the claimant has established circumstances which were beyond his control that prevented him from complying with the employer's attendance policy.

We, therefore, conclude as a matter of law that the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), because he left his employment under the reasonable belief that he was about to be discharged for reasons that would not be disqualifying under G.L. c. 151A, § 25(e)(2).¹

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 28, 2024, and for subsequent weeks if otherwise eligible.

¹ We note that, during a disciplinary suspension, a claimant's eligibility for benefits is decided pursuant to a separate statutory provision, G.L. c. 151A, § 25(f), and the DUA regulation at 430 CMR 4.04(4). In short, a claimant is disqualified during a disciplinary suspension of up to 10 weeks only when, *inter alia*, he has the right to return to his employment at the end of the suspension period. 430 CMR 4.04(4). Inasmuch as the relevant facts to decide this issue are undisputed and contained within the consolidated findings, we see no reason to ask the DUA to open a separate issue. Here, there is no question that the employer intended to discharge the claimant rather than return him to his job at the end of the 70-day suspension period. *See* Consolidated Finding # 22. Therefore, had the claimant not resigned, he would have been eligible for benefits during his suspension period pursuant to G.L. c. 151A, § 25(f).

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 16, 2025



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.

SVL/rh