Even if the claimant's credibility was in doubt, the review examiner may not ignore competent medical evidence that claimant's medical condition rendered him unable to either perform, or make efforts to preserve, his job. Majority held this to be an involuntary separation, rendering claimant eligible for benefits.

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCEDEVELOPMENT
BOARD OF REVIEW

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Board Of Review Decision

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Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Benefits were denied after the review examiner determined that the claimant was disqualified under G.L. c. 151A, § 25(e)(1), because he left employment voluntarily. After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision and the employer's appeal, we remanded the case back to the DUA review examiner to take additional evidence. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based on our review of the entire record, including the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal.

The claimant separated from employment on March 26, 2009. He filed a claim for unemployment benefits with the DUA, but was disqualified in a determination issued by the agency on May 8, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, a review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on July 17, 2009.

The issue on appeal is whether the claimant was mentally capable of performing his duties as a direct care provider to disabled persons, and, if not, whether he was obligated to request an accommodation from his employer prior to leaving his job.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked part time as a direct care counselor for the employer's human services agency from August 28, 2001 until he resigned his position on March 26, 2009. The employer services clients with developmental delays and other mental health issues.

2. The claimant also worked full time at [subsidiary employer] in their accounting department.

3. The claimant has been in the care of a psychiatrist for the approximately 4 years and has been diagnosed with schizophrenia.

4. The claimant worked part time for the present employer for the 4 years he had the diagnosis of schizophrenia.

5. The claimant's employment at [subsidiary employer] was not affected by the claimant's diagnosis of schizophrenia.

6. On March 26, 2009, the claimant sent an e-mail to the present employer's clinical director resigning his position immediately. The claimant's e-mail stated that the claimant was resigning due to an unspecified medical condition which required the claimant to take some time off of work.

7. The claimant, at no point during his employment, informed the employer of his condition or that he was having difficulty performing the duties associated with his position because of an unspecified medical condition.

8. The employer was not aware of the claimant's medical condition prior to his resignation or during his 7 ½ years working for the employer.

9. The claimant provided no medical documentation to the employer prior to submitting his resignation that he was advised by his doctor to resign. The claimant did not provide documentation because the employer did not ask for it and because it was a part-time job.

10. The claimant did not request a leave of absence prior to submitting his resignation.

11. The reason the claimant did not request a leave of absence is not known.

12. The claimant did not request a transfer prior to his resignation.

13. The employer has over 1,000 employees and has "dozens" of different positions.

14. The employer could have placed the claimant in a position that would not involve contact with the clients or could have assigned the claimant to an administrative position where he would have been required to answer phones and perform paperwork.

15. If the claimant had submitted a letter from his doctor detailing what accommodations were necessary, the employer would have placed the claimant in a position that conformed to any limitations set forth by the claimant's doctor.

16. The claimant could have continued working for the employer had he not resigned.

17. The claimant's job was not in jeopardy.

The claimant's overall credibility is weakened by inconsistencies in his testimony. The claimant at the first hearing testified that the reason he did not request a leave of absence prior to his resignation was because he had a full time job. He, later, testified at the remand hearing that he did not request a leave of absence because he did not feel his condition would allow him to return to work and because his state of mind made him unable to make "competent" decisions. This inconsistency in the claimant's testimony concerning the reason why he did not request a leave of absence undermines his credibility on this point.

With regard to other inconsistencies in the claimant's testimony, the claimant testified that he left his position with the present employer because his condition was such that he was hearing voices in his head that could have prompted him to "dangerous" behavior, he was having hallucinations, and was not able "to write" shift notes as part of his job requirements. Yet the claimant testified that these conditions did not impact his full time position as a financial analyst at [subsidiary employer]. In light of the inconsistencies in the claimant's testimony, this review examiner does not find the claimant's contention that he did not request a leave of absence because he did not feel his condition would allow him to return to work and because state of mind made him unable to make "competent" decisions to be credible.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e)(1), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual ... after the individual has left work ... 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.
>
> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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 claimant testified that he left his job because his illness made it impossible to safely perform the functions of the job. The employer did not dispute the claimant's position, but testified that he could have been accommodated if he had explained his condition to the employer and sought either a transfer to a different position or a leave of absence. The claimant responded that, at the time he left the job, his mental status was impaired, and he neither understood the need to involve the employer in his decision nor had the mental capacity to negotiate an accommodation.

The review examiner did not make explicit findings on either of the following essential issues: (a) whether the claimant was medically unable to do the job; and (b) if so, whether he failed to make reasonable efforts to preserve his employment before leaving. The factual basis for the examiner's conclusion appears only in the section on credibility, which suggests that the examiner rejected the claimant's own testimony about his mental condition and its impact on his ability to function at the relevant time.

Our analysis of the case begins and ends with two letters from [claimant's physician], an assistant professor at Harvard Medical School and the associate director of the First Episode and Early Psychosis program in the Department of Psychiatry of the Massachusetts General Hospital. The review examiner admitted the letters into evidence[1] but declined to discuss or otherwise incorporate them in his decision. At the first hearing, the claimant presented a letter from [his physician], dated May 13, 2009, which identified the author as the claimant's treating psychiatrist for the past four years and stated that the claimant's illness had worsened to an extent that it became necessary for him to leave his job.

At the remand hearing, the claimant submitted another letter from [his physician], dated October 22, 2009. This letter stated that after losing his job with the [subsidary employer] in March of 2009, the claimant became very depressed and symptomatic and was not able to function.[2]

The purpose of the unemployment compensation statute is to assist those who are involuntarily "thrown out of work through no fault of their own." Leone v. Director of the Div. of Employment Security, 397 Mass. 728, 733 (1986). An employee who brings unemployment on himself without good cause is ineligible for unemployment benefits. Id. We will not disturb a review examiner's decision unless, *inter alia*, the examiner applied incorrect legal principles, or made findings on essential factual issues that were not supported by substantial evidence. Director, DES v. Fingerman, 378 Mass. 461 (1979).

The legal principle applicable to this dispute was the employee's obligation to make efforts to preserve employment. An employee who anticipates a medical reason requiring temporary absence from work must take reasonable steps to preserve his employment. Scannevin v. Director of the Div. of Employment Security, 396 Mass. 1010, 1010-1011 (1986).

However, the body of law addressing the employee's obligation to negotiate the terms of an accommodation to preserve employment presumes adequate mental resources to understand the need for communication and the ability to carry it out. These efforts have been described in terms that indicate the need to do more than perform a ministerial function:

> Not unlike a person who had scheduled elective surgery, the [pregnant] claimant anticipated her departure from work well in advance. She had ample time and opportunity to explore with the bank the possibility of returning to work once she was physically able to do so. In such circumstances, it was proper for the examiner to have concluded that if the claimant had wanted to preserve her job, she would have requested a leave of absence.

Dohoney v. Director of Division of Employment Sec., 377 Mass. 333, 337-338, (1979).

None of the reported cases to date have had the occasion to define the preservation efforts required of a mentally disabled person. In the instant matter, however, the medical evidence demonstrated that the claimant lacked the ability to function.

The claimant's credibility in the eyes of the DUA review examiner was irrelevant to the question of his medical condition at the time of separation. The only probative evidence is [claimant's physician's] assessment of somatic and auditory hallucinations, paranoid ideation, depression, and anxiety that rendered the claimant unable to function well enough to engage in efforts to preserve his job.

In our view, a review examiner's obligation to resolve factual conflicts and assess credibility of witnesses, Dowd v. Director of Div. of Employment Sec., 390 Mass. 767, 770 (1984), does not extend to rejecting uncontroverted medical evidence. The review examiner was free to accept or reject the claimant's testimony as to his own mental condition, but he was not entitled to ignore medical evidence from the claimant's treating physician. It does not escape our notice that the review examiner did not mention the medical evidence in his findings of fact, since the letters cannot be reconciled with the examiner's conclusion.

The evidence does not support the examiner's conclusion that the claimant's separation was voluntary as a matter of law. The claimant left work because he was medically unable to perform the job. The claimant's reasons for leaving were for such an urgent, compelling, and necessitous nature as to make his separation involuntary.

We conclude that as a matter of law, claimant is entitled to benefits because his separation from employment was not voluntarily, within the meaning of G.L. c. 151A § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending April 4, 2009, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 27, 2010

/s/
John A. King, Esq.
Chairman

/s/
Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – February 26, 2010

LH/rh

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1 Exhibit 8 and Remand Exhibit 5.

2 We take notice of the DUA's own records showing that claimant separated from his full time job in March of 2009.