

0015 9635 27 (Dec. 24, 2015) – A claimant, the owner of a corporation which is also her employer, who shows that the corporation was losing money, had large outstanding debts, and could not secure a loan or further financing to keep the business going, has carried her burden to show that it was financially necessary to close the business down and that she separated involuntarily under G.L. c. 151A, § 25(e).

Board of Review
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Issue ID: 0015 9635 27
Claimant ID: 10367884

BOARD OF REVIEW DECISION

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 her position with the employer in September of 2014. She later filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 23, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 28, 2015. 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 take additional evidence from the claimant regarding her efforts to keep her business operating and whether it was financially feasible to keep her business in operation. The claimant attended the remand hearing with her attorney. 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 conclusion that the claimant is disqualified from receiving unemployment benefits is supported by substantial and credible evidence and is free from error of law, where the claimant shut down her business (the employer in this case) after she was unable to secure business loans to keep the employer in operation, the business had significantly reduced sales in 2014, and the claimant was unable to pay the debts of the company.

Findings of Fact

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

1. The claimant worked as the president of the corporation, a mini super market, from December 25, 2012 until September 2014. The claimant was the employer corporation's only officer.
2. In 2013, the corporation experienced a profit of \$288.00.
3. In 2013, the claimant did not receive any wages or remuneration from the corporation employer.
4. In 2013, the claimant did not make any efforts to keep the business profitable or open because she did not believe any effort was needed.
5. In May 2014, the employer's lottery machine was taken by the state lottery commission because the employer failed to pay the required fees.
6. In June 2014, the employer's EBT machine was taken because the provider of the EBT machine determined the employer's EBT receipts that [sic] were too high for the employer's small size.
7. The employer's loss of the lottery machine and EBT machine led to a reduction in sales.
8. In 2014, the corporation experienced a loss of \$26,590.00.
9. In 2014, the corporation employer paid officers of the corporation employer \$4,452.00.
10. In 2014, the claimant was the only employee of the corporation.
11. In 2014, the claimant's accountant ("the Accountant") advised the claimant to receive a salary so that when applying for loans the employer's business would appear to be healthy.
12. In 2014, the claimant unsuccessfully requested personal loans from family members to keep the business open and profitable.
13. In 2014, the claimant applied for more than one loan from financial institutions to keep the business open and profitable. Each of the claimant's loan applications requested between \$18,000.00 and \$25,000.00.
14. In 2014, the claimant's husband ("the Husband") loaned the claimant and the corporation approximately \$30,000.00 to keep the business open and profitable.

15. Before September 2014, the claimant attempted to sell the remaining inventory and corporate fixtures such as registers, coolers, counters, and shelving.
16. Before September 2014, the claimant failed to sell the corporation's fixtures or inventory.
17. Before September 2014, the corporation's landlord ("the Landlord") advised the claimant and the Husband they would be responsible for repairing any damage caused by the removal of fixtures from the corporation's store.
18. Before September 2014, the Husband and the Landlord agreed the Landlord would keep all the corporation's fixtures in the store in exchange for the claimant and the corporation not being held liable for the remaining lease payments through 2018.
19. Around September 2014, the claimant disposed of the employer corporation's inventory in the trash.
20. Before September 2014, the Accountant advised the claimant to close the corporation.
21. In September 2014, the claimant closed the corporation.
22. In September 2014, the corporation had approximately \$10,000.00 in outstanding debts.
23. At the time the claimant closed the corporation, the claimant's personal savings account contained no money.
24. At the time the claimant closed the corporation, the claimant's personal checking account contained no money.
25. At the time the claimant closed the corporation, the corporation's checking account contained a negative balance.
26. Since September 2014, the claimant has not performed any services for the corporation.
27. Since September 2014, the claimant has not received any wages or money from the corporation.
28. As of the date of the remand hearing, the claimant and the corporation have not paid the corporation's debts, the claimant owes the corporation's creditors, and collection agencies are contacting the claimant to pay the debts.

Ruling of the Board

In accordance with our statutory obligation, we review 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 original 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.¹ As discussed more fully below, we reject the review examiner's legal conclusion that the claimant separated from her position voluntarily. We think that there is sufficient evidence in the record to show that the claimant closed her business due to financial necessity, and, thus, that she separated involuntarily.

The review examiner found that the claimant, the owner of the employer, closed the corporation in September of 2014, and stopped operating her convenience store/mini-mart. Since she stopped the company operations, the claimant caused her own unemployment. Consequently, the claimant's eligibility for benefits is governed by G.L. c. 151A, § 25(e)(1), 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 (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

In addition, another provision under G.L. c. 151A, § 25(e), provides, in pertinent part, as follows:

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.

Under either of these sections of law, the burden is upon the claimant to show that she is entitled to benefits. After the initial hearing, the review examiner concluded that the claimant did not carry her burden. Following our review of the record from the remand hearing, we disagree.

“[W]here a controlling shareholder of a closely held corporation voluntarily sells the very business in which he is employed, he has created his own unemployment and resulting disqualification.” Jahn v. Dir. of Division of Employment Security, 397 Mass. 61, 63 (1986). However, if a claimant can show that she was compelled by financial circumstances to sell, or

¹ The Board has reviewed the recording for the remand hearing, which took place on October 28, 2015. It appears that the final 15 to 20 minutes of the hearing was not recorded. However, approximately one hour of testimony was taken from the claimant, and the review examiner covered all of the Board's remand questions during his direct examination. The attorney's questions, while adding some detail to the record, restated some of the claimant's earlier testimony. Thus, we decline to remand the case for another hearing to retake the lost 15 to 20 minutes of testimony. We are satisfied that the findings of fact are supported by testimony given and the documents submitted into the record.

cease operations of, the business, the claimant may qualify for benefits, under G.L. c. 151A, § 25(e). Id. at 63–64.

In Jahn, the Supreme Judicial Court ultimately concluded that a claimant, who owned 55% of a corporation, voluntarily caused his own unemployment and, hence, was disqualified from benefits, because he was not compelled by the unprofitability of his business to sell it. In that case, the claimant sold the business in 1984 after operating for nine years. Tax returns for the business showed a net income of \$8,445 in 1981, a loss of \$4,634 in 1982, and a net income of \$3,660 in 1983. The corporation also continued to pay the claimant a salary; and, after all debts were paid, had net proceeds of \$40,000 from the sale of the company's assets. Id.

In this case, as the consolidated findings of fact indicate, the claimant's situation was worse than that of the claimant in Jahn. The business began operating in 2012. In its first year, it experienced a very small profit of \$288.00. In 2014, the company lost over \$26,000.00. The reasons for the significant loss, as noted in the findings of fact, were the loss of the employer's lottery and EBT machines. Both of these contributed a large portion of income to the employer's bottom line. Given the documentary evidence which indicates that the claimant was unable to pay for the lottery privileges, it appears that these significant sources of income for the business had very little, if any, chance of returning. Thus, unlike in Jahn, the business experienced a loss in its most recent year of record, and the prospects of getting back to a profit were slim. We note also that the claimant's husband loaned the corporation approximately \$30,000.00 in 2014, to keep the business afloat. Given the losses experienced by the business in 2014, it appears that the business was losing money at a very fast rate.

In addition, based upon what occurred following the cessation of business operations, it appears that the company's overall debts exceeded its assets. The business was unable to continue paying its rent. Ultimately, the claimant left the business' assets to the landlord. At the time of the closing of the business, the business still had \$10,000.00 in outstanding debts. It had no money in its bank account. *See* Finding of Fact # 25. During the hearing, the claimant even indicated that collection agencies are still contacting her to pay off the corporation's debts. *See* Finding of Fact # 28. The claimant could not raise any money to pay off her debts, because she was unable to sell the company assets. *See* Finding of Fact # 16. Thus, the situation appears to have been dire for the claimant's business, and the financial circumstances were such that it was reasonable for her to consider shutting down the company and leaving it altogether. Indeed, her own accountant advised her to do so.

However, in order to show that a separation is truly involuntary, the law requires that a claimant attempt to make efforts at preserving the employment relationship. *See Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development*, 66 Mass. App. Ct. 759, 766 (2006) (noting that efforts at preserving a job is a "prominent" factor in determining if personal reasons are urgent, compelling, and necessitous). In a case where a claimant shuts down a business, the preservation requirement is still relevant. Here, the review examiner noted several different things that the claimant did to try to save her business. Her husband gave the business a loan. The claimant asked family members for loans. She applied to financial institutions for loans, but she was unable to secure any further financing. The claimant could not personally give the business any more money, because she had little or no money in her bank accounts. *See* Findings of Fact ## 23 and 24. We can think of little more that the claimant could

have done to keep her business afloat. Therefore, we conclude that she made reasonable attempts to keep her business running.

We, therefore, conclude as a matter of law that the review examiner's decision denying unemployment benefits is not based on substantial and credible evidence or free from error of law, because the claimant did carry her burden to show that the financial circumstances of her business were such that it was reasonable for her to shut it down, thus involuntarily separating from her ongoing employment, within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 29, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

SF/rh