0018 7766 38 (Nov. 14, 2016) – Because the employer did not accept the terms of claimant's proposed consulting agreement in lieu of continued employment, the proposal did not amount to a notice of resignation. The claimant was discharged after the employer hired his replacement and asked him to leave. There is no evidence of misconduct.

**Board of Review**
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**Issue ID: 0018 7766 38**

# 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 his position with the employer on May 12, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 3, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on July 9, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. 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 gave notice of his voluntary resignation when he submitted a proposed consulting agreement is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as the vice president of finance for the employer, an urgent care center, from April 16, 2013 until May 12, 2016.

2. At the time the claimant was hired, the claimant was the direct supervisor of the employer's information technology department manager (the IT Department Manager) and the employer's office manager (the Office Manager).

3. On June 1, 2015, the employer hired a chief financial officer (the CFO). The CFO became the claimant's immediate supervisor at the time he was hired.

4. Prior to the CFO being hired, the claimant held the most senior financial position.

5. The CFO was 18 years younger than the claimant.

6. In January 2016, the CFO requested the IT Department Manager and the Office Manager begin reporting to him directly because the IT Department Manager and the Office Manager did not work with the employer's finances.

7. The claimant disagreed with the IT Department Manager and the Office Manager reporting to the CFO because he believed the CFO was taking away his job duties and trying to eliminate his position.

8. The claimant did not tell the CFO he disagreed with the IT Department Manager and the Office Manager reporting to him directly because the claimant believed the CFO was trying to eliminate his positon.

9. The claimant believed the CFO was trying to eliminate his position because he believed the employer did not need a CFO and a vice president of finance and because the CFO was discriminating against him because of his age.

10. The claimant drafted a consulting proposal (the Proposal) and a consulting agreement (the Agreement) to work for the employer as an independent contractor and not as [an] employee. The claimant proposed that he work 80 hours a month for $135,000 a year and that the length of the contract be for one year or two years.

11. The claimant drafted the Proposal and the Agreement because he did not want to be terminated for what he believed to be was [sic] age discrimination and believed it would be a "voluntary separation".

12. On February 25, 2016, the claimant called the CFO and informed him he was sending him an email with the Proposal and the Agreement attached because he would like to spend more time on a multi-unit psychiatry practice project that his wife was working on.

13. The claimant told the CFO he wanted to spend more time on his wife's project because he did not want to address what he believed was age discrimination.

14. The claimant sent the CFO an email with the Proposal and the Agreement attached and gave the CFO a 48 hour deadline to respond.

15. On February 26, 2016, the employer's director of human resources (the Director) contacted a recruiter to find a controller to replace the claimant because the CFO told the Director the claimant resigned when he sent the Proposal and the Agreement and told the CFO he wanted to spend time working with his wife on her project.

16. On and unknown date during the week ending March 19, 2016, the CFO responded to the Proposal and the Agreement with a counter offer with a three month term and a 120 hour work month for the same wage.

17. On April 1, 2016, the employer hired a controller (the Controller) to replace the claimant because the CFO and the Director believed the claimant resigned when he sent the Proposal and the Agreement and told the CFO he wanted to spend time working with his wife on her project.

18. On April 1, 2016, the claimant met with the CFO and the Director and the claimant told the CFO and the Director he did not accept the employer's counter offer and he rescinded the Proposal and the Agreement. The CFO and the Director told the claimant he could not rescind the Proposal and the Agreement because the employer had accepted his resignation and hired the Controller to replace him.

19. The employer did not accept the claimant's rescission because they had hired the claimant's replacement.

20. The CFO and the Director asked the claimant to train the Controller and the claimant agreed.

21. Between April 1, 2016 and May 12, 2016, the claimant trained the Controller to replace him.

22. On May 12, 2016, the CFO and the Director believed the Controller had been fully trained and brought the claimant into a conference room and told him they accepted his resignation effective that day.

23. On May 12, 2016, the claimant quit his employment.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible

evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. We reject Finding of Fact # 23 to the extent it concludes that the claimant quit his employment. Whether the claimant quit or was fired is a central legal question in this case and a question for the Board to decide. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude, contrary to the review examiner, that the claimant is entitled to benefits.

First, we consider whether there is substantial evidence to support the examiner's conclusion that the claimant resigned from his employment. There is no dispute that, on February 25, 2016, the claimant sent his supervisor a proposed agreement to transform his working relationship from employment to consulting, including a 48-hour window to respond. *See* Findings of Fact ## 12 and 14. This proposed agreement is Exhibit # 4. The document is undated, unsigned, and the cover email describes it as a "proposal."[1] Its content does not show an unequivocal statement of resignation, but rather communicates proposed terms for creating the new relationship. *See* Exhibit # 4. There is also no documentary evidence indicating that the employer accepted the claimant's offered consulting terms, or that there was any meeting of the minds. The supervisor's counter-proposal was not returned within 48 hours. It was transmitted three weeks later with a higher proposed hourly commitment and much shorter proposed contract duration. *Compare* Findings of Fact ## 10 and 16. A proposed conditional quit is not a quit unless it is accepted by the other party on the same conditions. Here, neither party accepted the other party's proposals.

What remains in the record is the parties' testimony. The employer's supervisor, who spoke directly with the claimant in February, did not appear as a witness. Instead, the employer offered its Human Resources Director's hearsay testimony about what the supervisor told him. Hearsay is certainly permissible in these administrative proceedings and may even constitute substantial evidence, if it contains indicia of reliability. Covell v. Department of Social Services, 439 Mass. 766, 786 (2003). In this case, however, the hearsay testimony is not reliable but rather grounded in speculation. The Human Resource Director testified that the supervisor told him that the claimant resigned. *See* Finding of Fact # 15. More precisely, both the Human Resource Director and the supervisor believed the claimant had resigned, based only on the fact that the claimant had sent the proposed consulting agreement and had said he wanted to spend more time on his wife's project. *See* Finding of Fact # 17.

The claimant testified that he did not intend to resign. *See* Hearing Decision, page 3. Even if the claimant made a statement that he would like to spend time working on his wife's project, the review examiner was unreasonable to place much significance upon it. The statement simply expressed a reason for the claimant to present his consulting proposal.[2]

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[1] The contents of Exhibit # 4 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

[2] Whether this was the real reason or whether it was the claimant's perception of age discrimination makes no difference for purposes of deciding whether the claimant quit or was discharged. *See* Finding of Fact # 13.

In sum, because the document the claimant transmitted to his supervisor on February 25, 2016, was a conditional offer to quit, the employer rejected those conditions, and the claimant never accepted the employer's counter offer, there was no meeting of the minds as to the claimant having quit. Therefore, there is insufficient evidence to show that the claimant gave the employer a resignation. In hiring a replacement for the claimant without having received a legally effective resignation, the employer involuntarily terminated the claimant's employment.

Because we conclude that the claimant was involuntarily discharged, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant part, as follows:

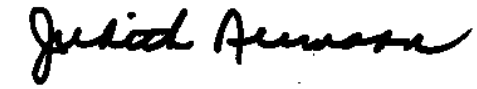
> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable 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 . . . .

"[T]he 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).

At a minimum, the employer must show that the claimant engaged in some form of misconduct. Since there is no evidence of misconduct in the record, there is no basis to disqualify the claimant from receiving benefits.

We, therefore, conclude as a matter of law that the claimant was involuntarily terminated from his employment. We further conclude that the employer has not sustained its burden to prove that the claimant either engaged in deliberate misconduct or knowingly violated a rule or policy, as required under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 8, 2016, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION – November 14, 2016**

Judith M. Neumann, Esq.
Member

Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, 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.

AB/rh