

**Claimant is deemed to have voluntarily abandonment his job pursuant to § 25(e)(1), where the review examiner was reasonable in crediting the employer's consistent hearsay testimony over the claimant's illogical and inconsistent testimony as to the events in question.**

**Board of Review  
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**Issue ID: 0018 6783 98**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Allison Williams, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. Benefits were denied on the ground that the claimant voluntarily left his employment without good cause attributable to the employer, pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on June 15, 2016. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on August 6, 2016. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On December 6, 2016, the District Court ordered the Board to remand the case to the review examiner to address several areas of concerns. Consistent with this order, we remanded the case to the review examiner to take additional evidence from both parties. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether, after remand, the review examiner's conclusion that the claimant voluntarily left his employment by abandoning his job is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a Selector for the employer, a warehouse, from 11/30/05 until he separated from the employer as of 4/5/16. The claimant had last performed work on 3/4/16.
2. The claimant was hired to work full time, Sunday, Monday, Tuesday and Friday from 4 PM to 2 AM, earning \$18.45 an hour.
3. The claimant had unexcused absences on 3/6/16, 3/7/16 and 3/8/16 when he called out sick.
4. The claimant subsequently requested from his Supervisor a three week vacation and all of his floating days which were approved based on his seniority.
5. The claimant was put out on vacation from 3/11/16 through 3/29/16.
6. The claimant took additional floating days to extend his vacation and was approved for the next 5 shifts which would have been 4/1/16, 4/3/16, 4/4/16, 4/5/16 and 4/8/16.
7. Prior to going on vacation the claimant had told his supervisor that he was quitting because he had another job but he never formally submitted a resignation letter.
8. The claimant was scheduled to work on 4/10/16, 4/11/16, 4/12/16 and 4/15/16. He never showed up for work or notified the employer of his absences on these days.
9. The claimant never notified the employer of any issues with his employment prior to his leaving. If an issue had been brought to Human Resources, the Associate Relations Manager would have been informed. The Associate Relations Manager was never informed of any issues or concerns raised by the claimant.
10. The claimant belonged to the Union. There were no grievances ever filed prior to the claimant's separation.
11. At no time was the claimant discharged. To discharge an employee the employer follows a progressive system of discipline. The claimant had no active warnings prior to his separation. The claimant's Supervisor does not have the authority to send the claimant home or discharge him; only the Associate Relations Manager has that authority.
12. The employer considered the claimant to have quit when he did not return to work from vacation.
13. The employer heard nothing further from the claimant.

### Credibility Assessment:

Although the claimant contended that he was discharged, his contention is not deemed credible because he provided conflicting testimony regarding his separation. In particular, when asked at the initial hearing how he became separated, the claimant indicated he returned from vacation and asked the Supervisor for his headset and the Supervisor did not want to give it to him. He continued to state that the Supervisor told him to leave and that he did not want him there anymore so Security walked him out. When asked again at the continued hearing, the claimant stated that the Supervisor would not look at him or talk to him but had his back to him when he went to get his headset so he left. He testified further that when he returned the next day, Security walked him out. Since the claimant's testimony is not credible, the employer's version of events is accepted in its entirety.

The case was remanded back to allow the employer the opportunity to present testimony from the claimant's Immediate Supervisor, Mr. Smith. Mr. Smith was not available to testify during the remand hearing. Although Mr. Smith was not made available to testify, the employer's testimony is still deemed more credible since the claimant again provided inconsistent testimony at the remand hearing. When asked by the employer's agent if he requested vacation time from the employer, the claimant testified he had not. In review of the original hearing (recorded at 26.42 minutes) the claimant testified that he had requested vacation time through his Supervisor but had originally been denied. Since the claimant's testimony is not deemed credible, the facts remain the same.

### 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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Finding of Fact # 1's placement of the date of the claimant's separation, April 5, 2016, is unsupported by the record before us. The employer actually testified that, after the claimant was absent on April 15, 2016 — his fourth consecutive absence without contacting the employer — the employer determined the claimant to have quit. The word "subsequently" in Finding of Fact # 4 is also unsupported by the record. At the initial hearing, the employer did not specify when the claimant requested his vacation time or his floating days from the supervisor. At the remand hearing, the employer testified that the claimant requested his vacation time and his floating days from the supervisor on or before March 4, 2016, his last day actually worked<sup>1</sup>. In adopting the remaining findings, we deem them

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<sup>1</sup> We reference the employer's testimony here because the review examiner did not credit the claimant's testimony regarding any of these events. In any case, the claimant testified that he never requested time off in March or April, and never specified the date that his alleged discharge occurred.

to be supported by substantial and credible evidence. As discussed more fully below, we believe these findings sustain the review examiner's initial decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(1).

The parties disputed the nature of the claimant's separation. The employer maintained that the claimant requested to use all of his available vacation time and floating time, and then abandoned his job without ever contacting the employer again. The claimant maintained that vacation time and floating days were scheduled for him despite the fact that he did not request them, and that, when he attempted to return on his scheduled day back, he was not allowed to work and was discharged. Before determining which section of law to apply and allocating the burden of proof, this factual dispute must first be resolved.

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31-32 (1980). Here, the review examiner made a credibility assessment in favor of the employer. 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). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

We note that the employer's version of events consists almost entirely of hearsay testimony. The employer's witness, a human resources representative, testified that the claimant's immediate supervisor informed him that the claimant requested to use three consecutive vacation weeks followed by five consecutive floating days off, and further that the claimant had stated to the supervisor that he would be quitting because he had obtained another job. The human resources representative also testified that this supervisor also informed him that, contrary to the claimant's testimony, the claimant never again contacted him or attempted to return to work. While hearsay evidence is admissible in informal administrative proceedings, it can only constitute substantial evidence on its own unless it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether it was corroborated by other evidence in the record. In this case, the supervisor's account of events to the human resources representative are corroborated by an email from the supervisor,<sup>2</sup> as well as a vacation request form showing the claimant's scheduled vacation days.<sup>3</sup>

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<sup>2</sup> Exhibit # 15 from the original hearing.

<sup>3</sup> Exhibit # 16 from the original hearing.

Hearsay evidence may also be relied on if the countervailing direct testimony is itself not credible, for example, if it is inconsistent, illogical, or presented with a nervous demeanor. *See Covell*, 439 Mass. at 786–787. This is particularly relevant here, where the review examiner explicitly found the claimant’s testimony not credible due to numerous inconsistencies.<sup>4</sup> Having determined that the claimant’s testimony is not credible, there is no evidence in the record to support the notion that the claimant was discharged from his employment. Therefore, based upon the record before us, we conclude that the review examiner’s credibility assessment was reasonable, that her findings are based on substantial evidence, and that those findings indicate that the claimant was not discharged, but rather quit.

Because the claimant quit his job, we analyze the claimant’s separation under G.L. c. 151A, §§ 25(e) and (e)(1), which provide, 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 he left his job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons. As the claimant’s testimony was deemed not credible, and as he denied quitting his job, there is no basis from which to conclude that the claimant had a non-disqualifying reason for quitting his job.

We, therefore, conclude as a matter of law that the review examiner’s conclusion that the claimant’s separation from employment was disqualifying, under G.L. c. 151A, § 25(e)(1), is supported by substantial evidence and free from error of law.

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<sup>4</sup> We note that the claimant was inconsistent as to whether his last day of work occurred in March or April, whether he ever requested to use vacation time, the number of weeks off he was given, whether his absence from work was considered vacation time or floating days, and whether he ever filed a union grievance.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending April 16, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 30, 2017**



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](http://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.

JRK/th