After the employer had an opportunity to present evidence at a remand hearing, the consolidated findings showed that the claimant did not have good cause attributable to the employer to resign after the employer challenged the claimant's request for a day off. The claimant's text messages and admission that she lied to the employer supported the examiner's adoption of the employer's version of events.

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Issue ID: 0018 9631 69

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Danielle Etienne, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her position with the employer on June 4, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 18, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 29, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to participate in the hearing. 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 initial conclusion that the claimant is eligible for benefits is supported by substantial and credible evidence and is free from error of law, where, after obtaining evidence from the employer on remand, the review examiner's consolidated findings of fact now show that the employer did not deny the claimant time off to care for an ill daughter, nor did it threaten to suspend or cut the claimant's hours.

Findings of Fact

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

1. The claimant worked as a home health aide for the employer from December 19, 2014 until the claimant quit on June 4, 2016.

2. The claimant cared for the employer's patient at the patient's home.

3. On or about June 4, 2016, the claimant sent a text message to the employer's Owner stating "I just got a call from my dad my grandpa was just taken by ambulance to the hospital I'm on my way to pick up my Dad I will not be in tomorrow". The Owner replied "Hi (claimant's name) you can't be doing that it is happening more and more" because the claimant had been taking a lot of time off from work. The claimant replied "(owner's name) you treat me so bad I quit".

4. The Owner did not state to the claimant that she would suspend the claimant or reduced the claimant's work schedule if the claimant did not report to work.

5. On or about June 6, 2016, the claimant sent a text message to the Owner indicating that she still had the patient's house key. The Owner replied "please drop the keys at the office. Thanks". The claimant then replied "I will when I can I'm with my dad to make funeral arrangements."

6. The claimant's [g]randfather did not die.

7. The claimant believes she lied about her grandfather dying because the Owner brought her to the point of lying.

8. The claimant quit for unknown reasons.

Credibility Assessment:

The claimant contends that when she requested time off from the Owner to care for her daughter, the Owner denied her request. The claimant further alleges that the employer also threatened to suspend her or take time off from her schedule if she did not report to work.

The employer's Owner denies threatening to suspend the claimant or take time off from the claimant's schedule if the claimant did not report to work. The employer' Owner offered that the claimant did not request time off to care for her daughter instead on [June] 4, 2016 the claimant sent a text message to the Owner explaining that she received a call from her father that her [g]randfather was taken to the hospital by ambulance and the claimant had to pick up her father. The Owner provided a copy of the text message that corroborates her testimony regarding the claimant's request for time off. The Owner offered that her reply to the claimant that "you can't be doing that it is

> happening more and more" is because the claimant was taking a lot of time off from work. The claimant then replied "you treat me so bad I quit". Furthermore, the claimant later sent a message to the Owner stating that her [g]randfather died. The claimant's father provided testimony at the hearing indicating that the claimant's [g]randfather is still alive. The claimant contends that she lied about her grandfather's death because the Owner brought her to that point. Such contention is not reasonable especially since the claimant was already separated from the employer when she lied about her grandfather dying.
>
> Given the above and the documentary evidence corroborating the Owner's testimony, it is concluded that the employer's testimony is more credible.

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. However, as discussed more fully below, we believe the consolidated findings no longer support the examiner's original decision to award benefits, under G.L. c. 151A, § 25(e)(1).

Where, as here, the claimant resigned from her job, eligibility for unemployment benefits must be analyzed pursuant to 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] . . . (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 . . . .

As stated in the above provision, the claimant has the burden of proof. Where a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

On June 4, 2016, the claimant quit her job. Consolidated Findings ## 1 and 3. In the original decision, after hearing testimony only from the claimant, the examiner found that the claimant resigned because the employer would not give her June 5, 2016 off to care for her daughter, who was ill, and also threatened to suspend or reduce the claimant's hours if she did not show up for work.[1] During the remand hearing, the employer presented evidence about the claimant's communications with the employer and request for time off on June 5, 2016 that conflicted with

[1] *See* Findings of Fact ## 4 and 6 contained in Remand Exhibit # 1, the original hearing decision, dated September 29, 2016.

the claimant's evidence. The consolidated findings show that the review examiner adopted the employer's version of events.

"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). The examiner determined that the employer's testimony was more credible. 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).

Specifically, the findings now provide that, on June 4, 2016, the claimant notified the employer via text message that she would not be in on June 5, 2016, because her grandfather was going to the hospital. Consolidated Finding # 3. They further provide that the employer did not threaten to suspend or reduce the claimant's hours if she did not report for work on June 5, 2016. Implicit in the removal of the original finding about needing time off to care for the claimant's ill daughter is that the review examiner did not believe the claimant's testimony in this regard. In a detailed credibility assessment, the examiner explains why she found the employer's version of events more truthful. The employer's testimony was backed up with copies of text messages from the claimant,[2] and, during the remand hearing, the claimant admitted that she had lied to the employer about her grandfather's death. *See* Consolidated Findings ## 5–7. In light of the evidence before her, we believe the examiner's credibility assessment is reasonable.

We do not question the claimant's decision to quit her job, as she may have had valid personal reasons for doing so. However, regardless of whether the employer's response to the claimant's request to have June 5, 2016, off is characterized as a denial of the request or simply an admonishment for what the employer viewed as too many requests for time off, we do not believe the employer's conduct was unreasonable under the circumstances. It did not rise to the level of constituting good cause attributable to the employer to resign, within the meaning of G.L. c. 151A, § 25(e)(1).

We, therefore, conclude as a matter of law that the claimant did not voluntarily leave her employment for good cause attributable to the employer, pursuant to G.L. c. 151A, § 25(e)(1).

[2] Remand Exhibit # 6 is a photocopy of these text messages. While not explicitly incorporated into the review examiner's findings, it 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).

The review examiner's decision is reversed. The claimant is denied benefits for the period beginning May 29, 2016, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 23, 2017

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