

Whether or not the claimant separated from the employer due to an urgent, compelling, and necessitous family situation in Florida, his reason for separating from this employer has no bearing on the claimant's eligibility for benefits. Since the separation preceded his last 8 weeks of work before filing his claim, this was not an interested party employer under G.L. c. 151A, § 38(b).

**Board of Review
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Issue ID: 0023 6905 09

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 September 19, 2017. On November 21, 2017, he filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 13, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on April 7, 2018. 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, he 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 obtain more accurate information about the claimant's dates of employment and the circumstances of his departure from the employer. Only the claimant 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 decision, which concluded that the claimant is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1), based upon his separation from the employer, is supported by substantial and credible evidence and is free from error of law, where the record shows that he did not perform work for this employer during the last eight weeks of employment prior to filing his claim.

Findings of Fact

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

1. Prior to the claimant's first day of employment for [Employer A], he last performed services for [Employer B] during the week beginning August 12, 2017.
2. The claimant's initial separation from [Employer B] was due to the claimant's interest in working at a bigger company with union benefits.
3. At [Employer B] the claimant was paid \$35.00 hourly for the regular rate and \$52.00 to \$55.00 hourly for the state rate.
4. At [Employer A], the claimant was paid between \$32.40 to \$36.85 hourly for the regular rate and \$45.00 to \$55.00 hourly for the state rate. The pay rate depended upon the job type and location.
5. The claimant first performed services for [Employer A] on August 13, 2017.
6. The claimant last performed services for [Employer A] on September 18, 2017.
7. On September 18, 2017, the claimant's sister called him to seek help dealing with their mother. The claimant's sister asked him to come to Florida and talk to their mother because she always listened to him more.
8. The claimant's mother resides in [Town A], Florida. The claimant's mother's medical condition was dementia.
9. On September 19, 2017, the claimant text messaged his supervisor informing him he had to tend to his ill mother in Florida and that he may or may not be returning. The supervisor responded saying he will let his boss know. Approximately an hour later, the claimant text messaged the supervisor informing him he could work up until Friday September 22. The supervisor did not respond.
10. On September 19, 2017, the claimant quit [Employer A] when he informed the supervisor via text message that he was going to Florida and he may or may not return. The claimant intended to work through September 22.
11. The claimant did not receive a text message with the schedule following that conversation, as he would normally receive the schedule through a group text. The claimant did not call the supervisor's boss because he did not have his phone number and he wanted to go through the chain of command.

12. On September 20, 2017, the claimant spoke to the owner of [Employer B]'s son-in-law. The claimant told the son-in-law that [Employer A] did not respond to his text message and asked if they needed any help at [Employer B]. The son-in-law told the claimant that he could come back anytime. The claimant told him he needed to go to care for his mother in Florida, but he wanted to make money before he left. The son-in-law told him he could work the following day.
13. The claimant began working at [Employer B] on September 21, 2017.
14. The claimant worked for [Employer B] on September 22, 2017.
15. The claimant was paid for 16 hours of work from [Employer B] during the week beginning September 17, 2017.
16. It is unknown if the claimant traveled to Florida during the week beginning September 17, 2017.
17. On September 25, 2017, the claimant worked for [Employer B] at a job site in Brockton.
18. On November 18, 2017, the claimant last worked for [Employer B] due to an end of season lay off.

[Credibility Assessment:]

In [b]oth hearings, the claimant testified he stopped working for [Employer A] when he informed the employer he was going to Florida and he may or may not return. In the first hearing, the claimant testified he text messaged the supervisor on November 14, in the second hearing the claimant testified the text was sent on September 19. The claimant submitted pay stubs to substantiate the dates in question. The paystubs reflect that the claimant's last week working for [Employer A] was the week beginning September 17, 2017. Therefore, it is concluded the claimant separated from [Employer A] during the week beginning September 17, 2017.

In the original hearing, the claimant testified he began working for [Employer B] the week following his separation from [Employer A]. In the second hearing, the claimant testified he began working for [Employer B] during the same week he separated from [Employer A]. The claimant's pay stubs reflect the claimant worked at both employers during the week beginning September 17, 2017. Thus, the claimant began working for [Employer B] during the week beginning September 17, 2017.

The claimant continuously testified that he separated from [Employer A] because he had to go to Florida to assist in caring for his ill mother. The claimant was asked to provide copies of text message correspondence among the claimant, his

employers, and his sister regarding the claimant's need to travel to Florida. Additionally, the claimant was asked to provide phone records showing he allegedly tried to call and text his sister and employers regarding his need to travel or his sister's cell phone records. The claimant did not submit any evidence of his need to travel to Florida. The claimant testified he could not get the phone records from his September 2017 cell phone because he lost that phone. The claimant testified his sister called the phone company to retrieve a copy of her phone records but she was sent a copy of a bill instead. The claimant was also asked to submit any evidence such as receipts from gas stations in Florida, toll passes, restaurants or credit card statements to substantiate he actually traveled to Florida during the week in question. The claimant did not provide any evidence that he traveled to Florida during the week beginning September 17, 2017. Therefore, it is unknown if the claimant traveled to or had the need to travel to Florida during the week beginning September 17, 2017.

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 except as follows. We note that, in Consolidated Finding # 8, the reference to dementia to describe the medical condition of the claimant's mother reflects the review examiner's suggestion and not a medical diagnosis. The review examiner more accurately could have explained the mother's condition as described by the claimant, (*i.e.*, "she forgets things, she sees things, believes some guy is controlling the phone, controlling the car.").¹ We reject that portion of Consolidated Finding # 10, which states that the claimant quit [Employer A], because whether or not the claimant quit is a mixed question of fact and law, a determination reserved for the Board of Review. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979). Finally, although Consolidated Finding # 15 states that [Employer B] paid the claimant for 16 hours of work for the week beginning September 17, 2017, Remand Exhibit # 8b shows that he was paid for 18 hours.² In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's separation from the employer disqualifies him from receiving benefits under this claim.

Under G.L. c. 151A, § 38(b), the DUA must give notice of a claim to the claimant's most recent employing unit and to such other employers as the DUA shall prescribe. The DUA prescribes that such employing units include only interested-party employers, which are those employers from whom the claimant became separated during the last eight weeks of employment prior to opening or reopening his or her claim. *See DUA Service Representative Handbook*, § 1710. In

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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 Remand Exhibit # 8b, the [Employer B] pay stub for the week of September 17–23, 2017, is also part of the unchallenged evidence in the record.

the present case, the claimant did not work for this employer, [Employer A], during the last eight weeks of work prior to filing his claim on November 21, 2017.³

Although the employer reported to the DUA that the claimant separated from employment in October, 2017,⁴ the review examiner found that his last day of work for this employer was actually September 18, 2017. Consolidated Finding # 6. As explained in her credibility assessment, she relied upon the claimant's testimony at the remand hearing, which was supported by pay stubs from both employing units. Pay stubs from [Employer A] and [Employer B] show that the claimant worked part-time for both entities during the week of September 17, 2017, but that he worked full-time for [Employer B] thereafter until he stopped working due to a seasonal layoff just before filing his claim. *See* Consolidated Findings ## 13–15 and 18; *see also* Remand Exhibits ## 8 and 9. 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.) We believe this portion of the review examiner's credibility assessment is reasonable in relation to the evidence presented.

The last eight weeks of work prior to filing his claim for benefits on November 21, 2017, include the period September 24 through November 18, 2017. Because the claimant separated from [Employer A] prior to this period, the reason for his separation from his job from [Employer A] has no bearing on his eligibility for benefits.⁵

We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, § 25(e), based upon his separation from the employer, [Employer A], because it was not an interested party employer within the meaning of G.L. c. 151A, § 38(b).

³ We take administrative notice of the claim filing date, November 21, 2017, appearing in the Exhibit # 9, a screen printout from DUA's electronic record-keeping system, UI On-line.

⁴ *See* Exhibit # 4 and Remand Exhibit # 6g.

⁵ Had [Employer A] been an interested party employer, we further believe that the claimant has presented sufficient evidence to show that he stopped working due to urgent, compelling, and necessitous circumstances pursuant to G.L. c. 151A, § 25(e). *See* Consolidated Findings ## 7–9. Although the review examiner's original decision concluded that the claimant's need to help his mother could not have been urgent, because he waited three days to travel to Florida, we believe this to be incorrect as a matter of law. The record includes repeated, undisputed claimant testimony that he had to wait until he got paid on Friday to be able to afford the trip. We believe the claimant acted reasonably under the circumstances.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 19, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
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.

AB/rh