

Where a claimant did not carry his burden to show exactly why he quit his position, and he gave conflicting evidence to the DUA and to the review examiner regarding the circumstances of his separation, he has not carried his burden to show that he is eligible for benefits under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0023 7083 52

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 separated from his position with the employer on October 30, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 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 overturned the agency's initial determination and awarded benefits in a decision rendered on February 17, 2018.

Benefits were awarded after the review examiner determined that the claimant involuntarily separated from his position for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence, as well as to clarify the reasons for the claimant's decision to separate from his position. Only the employer 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 resigned his position for urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact and credibility assessment do not indicate a specific or credible reason for the claimant's quitting.

Findings of Fact

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

1. The claimant was employed as a full time implementation specialist for the employer, a staffing firm, from March 27, 2017, until October 30, 2017 and then again from December 11, 2017, to December 12, 2017.
2. The employer assigned the claimant to work for its client, a hotel chain (the Client).
3. The claimant's immediate supervisor at the Client was the manager (the Manager). The claimant also reported to the employer's senior recruiter (the Senior Recruiter).
4. As an implementation specialist, the claimant was required to travel internationally and nationally.
5. On October 27, 2017, the claimant sent the Manager an email stating, "After a lot of thinking, I am going to resign my position with implementations as of this Sunday, October 29th. This job has been wonderful although unfortunately I have decided the travel just isn't for me... I am supposed to fly to Arizona on Monday with [coworker] for a few days however I will not be able to make this trip, my new position also wants me to start as soon as possible. As you know I have this urgent medical issue as well that I need to take care of and I need to get home to ensure I have things taken care of before I start my new position. I hate to do this to you and cut my notice so short and just know that this wasn't my intention at all."
6. The claimant attached a letter to the email that stated in part, "Please accept this letter as a formal notice of my resignation from my position as the Implementation Specialist. My last day of employment will be on Sunday October 29, 2017. After much consideration I have decided to accept another job offer."
7. The claimant did not ask the Senior Recruiter for a leave of absence.
8. The claimant did not ask the Senior Recruiter if there were additional positions available.
9. The claimant worked until October 30, 2017.
10. On October 30, 2017, the claimant quit for an unknown reason.
11. Prior to quitting, the claimant did not notify the Senior Recruiter he had chronic medical issues.

12. On November 17, 2017, the claimant sent the Senior Recruiter a text message stating in part, "...I just wanted to see what you thought about this but I asked [the Manager] for my position back...I felt I made a very bad decision to leave implementations and I hope that he will consider it. Very personal to discuss but I deal with a chronic depression problem and a few months after starting this position I thought I could come off my medication and it put me in a really bad spot in life. I am now back on new medication and doing so much better." And, "How do you feel about all of this? Let me know when your free. I really appreciate if [the Senior Recruiter]".
13. On November 20, 2017, the claimant sent the Senior Manager multiple text messages stating, "Good morning [the Senior Recruiter] could we chat on the phone this morning sometime?"; "Hey [the Senior Recruiter] sorry to bug you again, I was thinking do you think it's better to chat with [the Manager] myself first on the phone. We did have a good working relationship". The Senior Recruiter responded stating, "Yes". The claimant responded stating, "Okay let me see if I can reach him by phone in a little".
14. On November 20, 2017, the claimant sent the Senior Manager a text message stating, "Hello [the Senior Manager] just wanted to let you know I texted him but didn't hear anything back. Maybe you'll talk to [the Manager] before me". The Senior Manager responded stating, "Ok".
15. On November 20, 2017, the claimant sent the Senior Manager a text message stating, "[The Manager got back to me in email...he said they can look at things in the new year but all positions have been filled at this point..."]
16. On an unknown date, the employer offered the claimant a position with the Client in Mexico. The claimant accepted the position and agreed to return to work on December 10, 2017.
17. On December 10, 2017, the claimant flew to Mexico to return to work for the Client through the employer.
18. On December 11, 2017, the claimant worked his last physical day for the employer.
19. On December 12, 2017, the claimant flew home from Mexico without notifying the employer.
20. On December 12, 2017, the Senior Manager sent the claimant a text message stating, "Really??" The claimant responded by text message stating, "I know I'm so sorry I felt so uncomfortable in Mexico...if it wasn't for that I would have been fine. Got treated like shit by the other two implementations employees as well. And no one told me u couldn't use Amex out there and I don't have cent to my name what was I supposed to do...I wanted to just tell them no on Mexico but it's not my choice I didn't know what else to do..."

The Senior Manager responded by text message stating, “Well you shouldn’t have quit like that”. The claimant responded by text message stating, “I didn’t say anything to them about quitting”. The Senior Manager responded by text message stating, “You left the site so that’s just the same”.

21. On January 12, 2018, the claimant completed a “Telephone Fact Finding” questionnaire (Questionnaire) with a Department of Unemployment Assistance (DUA) adjudicator. The claimant responded to the employer’s statement of “You state that you are on a leave due to health reasons and you expect to return in February. You employer states that you quit due to personal reasons” and “Question 1: Who approved your leave of absence? Did you get in writing?” stating “It was a verbal conversation between [the Senior Recruiter] and me about a leave just for a few weeks.” He responded to the question, “In that conversation what was the expectation of the leave?” by stating, “What was agreed upon it was to be an unpaid leave because I did not have any sick time or PTO time.” The claimant responded to the question, “What was the duration of the leave?” The leave would have been about 5 weeks. I returned and I only worked a day. That is when my medical condition kicked up again. That is when I decided to quit, when I ask for time they became upset and I then quit.”
22. In the Questionnaire, the claimant responded to “Question 4: What date did the leave/quit begin and your last physical day at the job” by stating, “My last physical day at the job was December 18.” He responded to the question, “Did you request an extension on your leave?” stating, “Yes and that when I was told absolutely not by [the Senior Recruiter] and that when I said I am going to have to separate my employment with you, because I felt I had no other choice with what was going on.”
23. On February 7, 2018, the Department of Unemployment Assistance (DUA) received a “Health Care Provider’s Statement of Capability” (Statement) completed by the claimant’s doctor. In the Statement, the claimant’s doctor responded to the question, “Has the patient been able (or capable) to work since 11/19/2017?” by checking the box next to “Y”. The claimant’s doctor responded to the question, “If yes, when did the patient become able to return to work full time?” by stating, “Never unable per our office”.

Credibility Assessment:

The Senior Manager testified that the claimant quit for new employment. The Senior Manager directly testified he did not deny the claimant a leave of absence because the claimant did not ask him for a leave of absence. Further, the Senior Manager gave the claimant the opportunity to return to work on December 10, 2017, but the claimant ultimately quit without notice. The Senior Manager’s testimony that the claimant quit for new employment is corroborated by the email and the attached resignation in which the claimant stated he was leaving for new employment.

As a result of his failure to attend the remand hearing session, the claimant failed to offer any additional testimony or evidence regarding the reason he quit his employment on October 30, 2017. During the initial hearing, the claimant testified he asked for a leave of absence and was denied that request. However, that testimony directly contradicts the claimant's statement to the DUA in the Questionnaire wherein he stated he was granted a five week leave of absence.

As the employer provided detailed, consistent testimony and documentary evidence consistent with the witnesses' testimony, the totality of the employer's testimony outweighs the claimant's testimony given in the initial hearing. Therefore, the employer is deemed 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 ultimate 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we reject the review examiner's initial legal conclusion that the claimant is eligible for benefits, because he has not carried his burden to show that he quit his job for good cause attributable to the employer or for urgent, compelling, and necessitous reasons.

There is no dispute that the claimant informed the employer of his resignation in an e-mail on October 27, 2017, in which he stated, "I am going to resign my position . . . as of this Sunday, October 29th." He actually worked until October 30, 2017. Consolidated Findings of Fact ## 5 and 9. Because the claimant resigned from his position, his separation is governed by G.L. c. 151A, § 25(e), 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 . . . [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 these provisions of the law, the claimant has the burden to show that he is eligible to receive unemployment benefits. Following the initial hearing, the review examiner concluded that the claimant had carried his burden. After reviewing the testimony from both the initial and remand hearings, the documentary evidence, and the review examiner's consolidated findings of fact, we now conclude that the claimant is not eligible to receive unemployment benefits.

In the February 17, 2018, decision, the review examiner found that the claimant ultimately quit, "because he was unable to see his doctor to regulate his medication while traveling for work."

Remand Exhibit # 1, p. 3. In his resignation e-mail from October 27, 2017, the claimant indicated several things which led him to quit, including: “I have decided the travel just isn’t for me,” “my new position also wants me to start as soon as possible,” and “I have this urgent medical issue as well that I need to take care of.” Consolidated Finding of Fact # 5. After hearing evidence from both the employer and the claimant, the review examiner ultimately found that the real reason for the claimant’s resignation was not clear. *See* Consolidated Finding of Fact # 10.

There is substantial and credible evidence in the record to support the finding that the claimant did not carry his burden to show why he resigned his position with the employer. As to the medical issues, the claimant failed to provide any documentation to support his contention that a medical issue forced him to quit his position with the employer. Indeed, the only medical information in the record is a Healthcare Provider’s Statement of Capability, which indicates that the claimant was never unable to work. *See* Consolidated Finding of Fact # 23 and Remand Exhibit # 10. Contrary to his testimony that he separated from his job in October and then again in December of 2017 due to health issues, text messages between the claimant and his senior manager do not indicate anything regarding the claimant’s health issues. *See* Consolidated Finding of Fact # 20. Although the claimant testified before the review examiner, and the review examiner initially found, that the claimant requested and was denied a leave of absence, *see* Findings of Fact ## 10 and 11 in Remand Exhibit # 1, he initially told the DUA that he was approved for a leave of absence. *See* Consolidated Finding of Fact ## 21 and 22. No documentation was presented to substantiate a request for a leave of absence to address a medical issue, and the employer’s witness at the remand hearing denied that such a request was made. The review examiner has now found that the claimant did not ask for a leave prior to his October 2017 separation. Consolidated Finding of Fact # 7. In short, there is insufficient evidence in the record to show that the claimant had a medical need so great that his separation could be characterized as urgent, compelling, and necessitous. He has not carried his burden under that standard.

Further, he has not shown that the employer somehow caused his separation. The claimant offered no evidence to suggest that the employer changed his job duties, altered his schedule, reduced his pay, or created a poor working atmosphere. He made no complaints to the employer prior to resigning in October. He has not shown that he quit his job for good cause attributable to the employer.¹

Finally, we are aware of a provision in the law which states that a claimant is not subject to disqualification if he quits a position to accept a full-time, permanent job and the claimant loses the new job through no fault of his own. The claimant suggested in his October 27, 2017, e-mail that he had another position. However, the claimant specifically testified that he quit due to health issues. He did not provide testimony as to whether the new job was full-time and permanent. He did not explain why he no longer worked for that employer, such that he could

¹ Even if the claimant had shown some type of urgent, compelling, and necessitous or good cause reason for resigning his position, the review examiner’s supported consolidated findings of fact do not indicate sincere and reasonable efforts by the claimant to address whatever issues he may have been facing. Such preservation efforts are normally required in order for a claimant to carry his burden under G.L. c. 151A, § 25(e)(1). *See Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development*, 66 Mass. App. Ct. 759, 766 (2006) (citation omitted); *Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93–94 (1984).

have returned to work for this employer in December of 2017. Again, he has not carried his burden to show that he is eligible for benefits under this provision of the law.

We, therefore, conclude as a matter of law that the review examiner's initial decision to award benefits is not supported by substantial and credible evidence or free from error of law, because the claimant did not carry his burden to show that the circumstances of his separation, for whatever reason, were qualifying pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 29, 2017, 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.²

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

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² We note that the review examiner's decision references a second separation from this employer in December of 2017. We need not address that separation here, because the separation in October of 2017 was disqualifying. Nothing in the record suggests that the claimant has re-qualified for benefits since his October, 2017, separation. Therefore, the disqualification in effect beginning in October was still in effect in December of 2017. In any event, the circumstances of the December, 2017, separation also appear to be disqualifying. See Consolidated Findings of Fact ## 16-20.