0024 8563 03 (Mar. 28, 2019) – Although the claimant was surprised to find the employer present and represented by an attorney at the hearing, she did not request a continuance to obtain her own counsel. In light of the review examiner's assistance with questioning and framing objections, the claimant had a fair hearing. A post-hearing employer withdrawal of its opposition to the unemployment claim is irrelevant to whether the claimant is eligible for benefits under the law. The withdrawal also has no bearing on the credibility of the employer's witnesses, as their testimony was provided under oath at the hearing. *[Note: the District Court affirmed the Board of Review's decision.]*

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**Issue ID: 0024 8563 03**

# 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. Benefits were denied on the ground that the claimant voluntarily separated from 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 March 28, 2018. The claimant appealed to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on July 28, 2018. 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 January 25, 2019, the District Court ordered the Board to consider and address the issues which the claimant raised in court. Consistent with this order, we have reviewed again the entire record, including the recorded testimony and evidence from the hearing before the review examiner, the claimant's original appeal to the Board, the complaint and recorded testimony presented in the District Court, the email correspondence from the employer's attorney on June 12 and 13, 2018, and the letter from the employer's attorney to the DUA hearings department on July 26, 2018.

The issues before the Board are: (1) whether the claimant was afforded a fair hearing before the review examiner as required by G.L. c. 151A, § 39(b); (2) whether a post-hearing letter from the employer's attorney withdrawing its opposition to the claimant's entitlement to benefits has any bearing on the employer's witnesses' credibility; and (3) whether the review examiner's decision

to deny benefits under G.L. c. 151A, § 25(e)(1) is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time Web Developer for the employer, a manufacturer of alarms, sensors and transmitters, from July, 2012, until becoming separated from employment on February 21, 2018. (The claimant had previously worked for the employer. It was the employer who reached out to the claimant to return to work for them in July, 2012.)

2. The claimant was provided with a written job description for the position of Marketing Web Developer. The claimant's positon did not entail attending the employer's Trade Shows.

3. The claimant was presented with an Employee Handbook, containing a policy entitled "Anti-Discrimination and Sexual Harassment Workplace Policy". The claimant signed for receipt of the policy with a date of July 10, 2012.

4. The claimant reported directly to the Marketing Information Systems Manager (hereinafter "the Manager"). The claimant worked with the Manager and the Vice President of Business Development (hereinafter "the Vice President") throughout the course of her employment.

5. The claimant received an annual performance review with the employer. That performance review was issued by the Manager.

6. The employer would provide all employees with a bonus if the company did well. The claimant received a bonus, equivalent to 5% of her salary each year. The claimant was receiving a bonus amount of approximately $2,400 per year.

7. For the period of January 1, 2013, to December 31, 2013, the claimant received a "Meets" expectation on her Performance Evaluation. The claimant did not comment.

8. For the period of January 1, 2014, to December 31, 2014, the claimant received an "Exceeds" expectations on her Performance Evaluation. The claimant commented on the Evaluation, "There is much to accomplish this year and I may need outside 3rd party resources to ensure all the goals are achieved."

9. In or around 2015, the employer hired a Consultant to review the employer's website in order to improve the website to make it more marketable for the

benefit of the business. In one of her interactions with the consultant, the consultant informed the claimant that the employer could hire someone to perform their web development for $40,000 annually.

10. For the period of January 1, 2015, to December 31, 2015, the claimant received an "Exceeds" expectations on her Performance Evaluation.

11. In 2016, the claimant met with the Chief Executive Officer (hereinafter "the CEO"). The claimant informed the Chief Executive Officer that she had only attended one trade show and the Vice President was sending his nephew to the shows. The claimant was inquiring as to why others were being chosen to go and she had only been chosen once. The claimant inquired if it was because she was old and female. The CEO informed the claimant that the employer does [sic] engage in discrimination.

12. At no time after that meeting did the claimant report to the employer her perception that the Manager was upset with her speaking to the CEO and was not speaking with her.

13. For the period of January 1, 2016, to December 31, 2016, the claimant received a "Meets" expectation on her Performance Evaluation. The claimant disagreed with the information in the Performance Evaluation and refused to sign the document. (That Performance Evaluation was issued to the claimant on February 23, 2017.) The claimant received a pay increase from the employer effective January 1, 2017, from $49.45 per hour to $50.44 per hour, based upon her performance review.

14. After receiving the 2016 Performance Review, the claimant was unhappy working with the Manager and the Vice President.

15. In August, 2017, the claimant met with the Manager to make sure that her performance was satisfactory and that she was meeting goals. The claimant was informed that her performance was fine and she was meeting expectations.

16. The claimant was issued the 2017 Performance Evaluation on February 15, 2018. The claimant was informed that the Vice President did not want to give her an increase, but that she had argued for her. The claimant was informed that she received 1% and the Manager gave her 1% of hers. During that Performance Evaluation, the claimant asked what she had to do to obtain any type of advancement (pay increase or promotion). The claimant felt that she was unappreciated for her efforts. The claimant obtained a "meets" on her 2017 Performance Evaluation.

17. The claimant worked four days per week, 32 hours, for the employer. Her annual salary had increased from approximately $78,000 to $84,000.

18. At or around that time, the employer had provided an increase in pay to a newer employee, after evaluating the work that he was performing and determining that his work exceeded his salary of [$]50,000 annually. (That employee was working five days a week, forty hours.)

19. On or about February 15, 2018, the claimant spoke to the Human Resources Manager addressing her concerns. On February 15th and over the course of approximately 4 meetings, the claimant addressed her concerns about her working conditions. The claimant informed the Human Resource Manger that she was unhappy with the conversation with her Manager at her last Performance Evaluation, there was no room for advancement with the employer, she had received a low pay increase and she felt her job was being outsourced. The claimant indicated that she felt the goals outlined in her Performance Evaluation were unattainable, she did not want to work with the consultant as he was rude to her and the she felt that the Vice President did not like her. The claimant asked the Human Resources Manager to find her another position with a different Manager with the employer at that time or she would be leaving employment. During each meeting, the Human Resources Manager indicated that she would look into the issues raised by the claimant and did so thereafter.

20. At no time prior to the February 15th meeting, did the claimant notify the Human Resource Manager of any issues related to the Manager, the Vice President or the Consultant.

21. The Human Resources Manager investigated the issues raised by the claimant. In speaking with the Manager about the claimant's goals, she went back and revised some of the goals for the claimant. The Human Resources Manager spoke with the Vice President, who indicated that he did not dislike the claimant and he had no issues related to the claimant. The Human Resource Manager spoke to other employees, who indicated that they had not experienced any issues in working with the Consultant.

22. On February 21, 2018, the claimant was called into a meeting with the Human Resources Manager and the Human Resource Generalist. The Human Resources Manager indicated that they did not have another position available to the claimant, so they would accept her resignation. The claimant inquired about her package, whereupon the Human Resource Manager indicated that it would be sent to her home, shortly. The claimant indicated that she expected that the package would be presented to her at that time and she would seek counsel. The claimant was then escorted out of the building.

23. At no time did the claimant inform the employer that she was willing to remain in her position and was not resigning.

24. On February 21, 2018 at 1:38 p.m., the Human Resource Manager sent the claimant an email indicating in part "please be advised that (employer name) accepts your resignation of employment, effective immediately."

25. The claimant filed her claim for unemployment benefits on March 4, 2018. The effective date of the claim is March 4, 2018.

[Credibility Assessment][1]

The claimant contends that she did not offer her resignation, but that she was discharged from employment after bringing issues related to her employment to the attention of the Human Resource Manager. The claimant further alleged that at no time did she provide the employer with an "ultimatum" in relation to her employment, as was alleged by the employer. However, the employer's witness, the Human Resource Manager's, testimony that the claimant stated that she would be leaving if she could not obtain a transfer, was supported. The Human Resource Generalist who was present on the claimant's last day of work, February 21st, testified that when the claimant was notified that there was no transfer available and the employer would accept her resignation, the claimant made no indication that she intended to remain working for the employer. As such, the credible evidence and testimony established that the claimant intended to resign her position with the employer.

Ruling of the Board

*Fair hearing*

Based upon the claimant's assertions in District Court, the Judge has asked the Board to consider whether the claimant was granted a full and fair hearing. In the District Court, the claimant essentially argued that she was taken off guard when the employer appeared at the June 13, 2018, hearing with its attorney. Because she is not an attorney herself, she maintained that she had difficulty conducting cross-examination and generally conforming to the hearing procedures. In support, she attached to her complaint copies of emails from the employer's counsel to her attorney. At 5:05 p.m. on June 12, 2018, the employer's attorney sent an email to the claimant's attorney communicating its intent not to actively participate in the June 13, 2018, unemployment hearing or to appeal an award of benefits. Early the next morning, at 5:57 a.m., before the 9:00 a.m. hearing, the employer's counsel sent another email, communicating that, since the parties had not reached a final agreement,[2] the employer intended to attend the hearing. However, because claimant's counsel did not read this second email in time to alert the claimant before she

[1] We include here the review examiner's credibility assessment, which appears in the Conclusions and Reasoning section of her decision.

[2] In her District Court complaint, the claimant states that on April 24, 2018, she filed a discrimination charge against the employer with the Massachusetts Commission Against Discrimination and that both her attorney and the employer's counsel were attempting to negotiate a settlement which included an employer agreement not to contest her unemployment claim. *See* paragraphs 42 and 43 of the Complaint for Judicial Review, Boston Municipal Court Civil Action No. 1801 CV 2103 (District Court complaint). We presume that the 5:57 a.m. email was referring to a final settlement agreement in connection with the claimant's discrimination complaint.

attended the 9:00 a.m. unemployment hearing, she appeared *pro se*.[3] We must decide whether the email communications or conduct of the June 13, 2018, hearing resulted in a denial of the claimant's right to representation by counsel or otherwise deprived her of the right to produce evidence, offer testimony, or effectively cross-examine witnesses. *See* G.L. c. 151A, § 39(b)(3) and (4).

First, it is important to recognize that G.L. c. 151A, § 39(b), gives the employer the right to participate in the unemployment hearing with or without legal representation and nothing in the statute requires that it notify the claimant of its decision in advance. Here, it is evident that the employer had a change of heart about participating in the hearing and that it endeavored to communicate that change three hours ahead of the June 13, 2018, hearing. We do not question the claimant's assertion that had she known this before appearing for the hearing, she would have brought her own attorney. Nonetheless, once the claimant became aware, she chose to proceed on her own.

The Supreme Judicial Court has stated that, in a hearing, "an unrepresented unemployment compensation claimant is entitled to reasonable assistance from the review examiner in presenting relevant evidence." Hunt v. Dir. of Division of Employment Security, 397 Mass. 46, 48 (1986), *quoting* McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, n. 4 (1986). In the present case, the review examiner carefully explained the hearing procedures, helped the claimant articulate a legal basis for her objections, and provided extensive assistance to the claimant with breaking down and framing questions for cross-examination. At no point did the claimant ask that the proceedings be continued or suspended so that she could bring in her own attorney. Thus, we are satisfied that the claimant was provided with a reasonable opportunity for a fair hearing within the meaning of G.L. c. 151A, § 39(b).

*Credibility of employer witnesses*

The District Court has also asked that the Board consider a July 26, 2018, letter to the DUA Hearings Department in which a new attorney stated that the employer was withdrawing its opposition to the claimant's request for unemployment benefits. The District Court Judge questioned whether this post-hearing statement should have been factored into the review examiner's assessment of the employer witnesses' credibility.

We begin by examining the review examiner's credibility assessment. A key point of dispute in this case was whether the claimant quit or was discharged. The review examiner concluded that the claimant quit. She accepted the employer's hearing testimony that at a meeting with the Human Resource Manager, the claimant presented an ultimatum for the employer to reassign her to a different manager or she would resign. *See* Finding of Fact # 19. The review examiner also accepted the employer's testimony that, during the final February 21, 2018, meeting with Human Resources, the claimant never said that she was not resigning. *See* Findings of Fact ## 22 and 23. In doing so, the review examiner rejected the claimant's testimony that she was fired, that she never presented this ultimatum and that, during the last meeting, she affirmatively stated that she was not resigning. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of

[3]*See* District Court complaint, paragraphs 46 and 47.

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). 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). In rendering these findings, the review examiner explained that she relied upon consistent testimony from the Human Resource Manager and the Human Resource Generalist, which showed that the claimant had no interest in continuing her employment. In light of this explanation, we believe this assessment is reasonable in relation to the evidence presented.

In considering the import of the attorney's July 26, 2018, letter, we also note the statutory language that a hearing decision "shall be based solely on the testimony, evidence, materials and issues introduced at the hearing."[4] As for the testimony, each of the witnesses took an oath to provide truthful testimony during the hearing and nothing in the transcript or exhibits indicates that anyone endeavored to do otherwise. To the extent the District Court Judge was concerned that the employer's witnesses were motivated to lie under oath in order to help the employer fight the unemployment claim, we find no evidence of that. To be sure, the parties presented different versions of events. But, this is commonplace, particularly when events are recollected over time.

Had the July 26, 2018, letter raised newly discovered material evidence or recanted testimony, we may have remanded this matter back for an additional hearing to afford the review examiner an opportunity to consider such evidence and, perhaps, revise her findings and credibility assessment. Since it did not, there is no reason to remand for further proceedings. The post-hearing letter from the new attorney advising that the company was withdrawing its opposition to the claim simply has no bearing on the witnesses' factual allegations, the truthfulness of their sworn testimony, the determination of credibility, or the legal issues to be decided.

For purposes of deciding unemployment benefit eligibility, it also makes no difference whether or not an employer wants a claimant to receive the benefits. It is the Legislature and not the employer which dictates the circumstances under which an individual is entitled to benefits. Those circumstances are set forth under G.L. c. 151A. In the present appeal, the only question before the review examiner was whether the claimant's separation was qualifying or disqualifying under G.L. c. 151A, § 25(e). Whether the parties are engaged in a discrimination suit before a different administrative agency, whether settlement negotiations are underway, or whether they privately agree that the claimant should or should not receive unemployment benefits as part of that settlement agreement is irrelevant to whether a claimant is entitled to benefits under the unemployment law.

*Eligibility under G.L. c. 151A, §* 25(e)

Having concluded that the claimant received a fair hearing and that the employer's withdrawal of its opposition is not relevant to this appeal, we turn to the review examiner's decision. In accordance with our statutory obligation, we review the decision to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review

[4] *See* paragraph 3 of G.L. c. 151A, § 39(b).

examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. In light of Findings of Fact ## 19 and 21, we believe the review examiner meant to state in Finding of Fact # 20 that the claimant did not notify the Human Resource Manager of any *other* issues related to the Manager, the Vice President, or the Consultant. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We also believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. We further conclude that the review examiner's decision that the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), is based on substantial evidence and is free from any error of law affecting substantive rights.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 18, 2018, 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 - March 28, 2019**

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

**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