

Although the employer's owner is the claimant's spouse, the employer elected to be treated as a corporation for federal tax purposes. Therefore, claimant's employment is not exempt under G.L. c. 151A, § 6(d), and his earnings from the employer constituted qualifying wages under G.L. c. 151A, §§ 1(s)(A) and 24(a).

**Board of Review
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Issue ID: 0025 4988 87

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 filed a claim for unemployment benefits with the DUA on May 10, 2018, which was denied in a determination issued on May 30, 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 August 29, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's services for the employer are not considered employment, and since those were his only wages during the base period, he had insufficient base period wages upon which to establish a claim for benefits pursuant to G.L. c. 151A, §§ 6(d), 24(a), 1(a), and 1(s). 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 additional testimony and other evidence pertaining to the employer's tax status during the base period. 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 decision, which concluded that the claimant's services for the employer were not considered employment, because the employer's owner was the claimant's spouse, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the employer elected to file as an S-corporation with the Internal Revenue Service beginning in 2011.

Findings of Fact

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

1. The claimant filed his claim for unemployment benefits on May 10, 2018. The effective date of the claim is May 6, 2018.
2. Prior to filing his claim for unemployment benefits, the claimant was working at the [Employer A], LLC. The claimant began work for that employer on July 1, 2007. The claimant was no longer working for the employer as of April 27, 2018, when he was discharged from employment.
3. The claimant had gross wages paid with this employer during the 2nd Quarter 2017 in the amount of \$21,538.51, 3rd Quarter 2017 in the amount of \$18,461.58, 4th Quarter 2017 in the amount of \$21,538.51 and the 1st Quarter 2018 in the amount of \$18,461.58.
4. The claimant had no other work and no other wages paid during the base period of his claim for unemployment benefits.
5. The employer's business is a primary care medical practice. The claimant worked in the position of Practice Manager with the employer. The claimant was paid an annual salary of approximately \$80,000.
6. The claimant did not perform any services for the employer after April 27, 2018.
7. The claimant's wife owned the business where the claimant had been performing the services. The business was established in March of 2007. At no time did the claimant hold any interest in that business.
8. The employer elected to file as an S-corporation with the Internal Revenue Service. The employer first made the election to do so in 2011.
9. The claimant's wife signed the Form 2553 Election by a Small Business Corporation with a date of August 15, 2011.
10. The employer filed a Form 1120S, U.S. Income Tax Return for an S Corporation for 2015, 2016 and 2017.
11. The employer was being taxed by the Internal Revenue Service as an S-corporation during the claimant's base period (April 1, 2017 through March 31, 2018).
12. The claimant filed for divorce from his wife on April 10, 2018. The divorce is still pending. The claimant believes his discharge from employment was retaliatory for filing for divorce.

13. The claimant's base period wages with this employer were reported as \$21,538.51 for the 2nd Quarter 2017, \$18,461.58 for 3rd Quarter 2017, \$21,538.51 for the 4th Quarter 2017 and \$18,461.58 for the 1st Quarter 2018.

14. On May 30, 2018, a Notice of Disqualification was issued to the claimant under Section 6(d) of the Law, indicating that the claimant's base period wages were exempt. The claimant filed an appeal to that determination.

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 that the review examiner's consolidated findings of fact support the conclusion that the claimant's services for the employer during the base period are not exempt under G.L. c. 151A, §§ 6(d), and, thus, he is monetarily eligible for unemployment benefits.

In order to be eligible for unemployment benefits, the claimant must have earned wages of at least \$3,500.00 in his base period. G.L. c. 151A, § 24(a).¹ Wages are defined under G.L. c. 151A, § 2(s), which provides, in relevant part, as follows:

(A) "Wages", every form of remuneration of an employee subject to this chapter for employment by an employer

Since the claimant's spouse owned the company where the claimant worked, we must also consider whether the wages he earned were for services that are exempt under G.L. c. 151A, § 6(d). In relevant part, G.L. c. 151A, § 6, provides as follows:

The term "employment" shall not include: . . . (d) Service performed by an individual in the employ of his son, daughter or spouse

The findings provide that the claimant worked for an employing unit which is a Limited Liability Company (LLC). *See* Finding of Fact # 2. The default tax treatment of LLCs is as a sole proprietorship (single-member LLC) or a partnership (2 or more member LLC), unless the LLC files a tax form with the IRS electing to be treated as a corporation for tax purposes.² We remanded to find out whether or not the employer LLC had made this election. If it had not, then we would have to treat the entity as an individual.³ Since the individual owner of the business is

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount changes periodically, as required under the statute, based on changes to the minimum wage. The minimum amount of wages needed for a valid unemployment claim at the time the claimant filed his 2018 claim was \$3,500.00.

² 26 C.F.R. § 301.7701-3 (the check-the-box regulation); *see also* 26 C.F.R. § 301.7701-1 and U.S. Department of Labor Unemployment Insurance Program Letter 26-08 (Sept. 8, 2008).

³ Exhibit 10, a 2015 tax return, shows that the LLC was wholly owned by the claimant's spouse. While not explicitly incorporated into the review examiner's findings, Exhibit 10 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*

the claimant's spouse, G.L. c. 151A, § 6(d), would have rendered all services that he performed for the LLC exempt and the claimant would not be eligible for unemployment benefits. However, if the LLC had elected to be treated as a corporation by the IRS, then it is recognized as an entity separate from its owner.⁴ If the latter, then the claimant was technically employed by the corporation and not his wife, and G.L. c. 151A, § 6(d), would not exempt his earnings.

After remand, the review examiner found that the employer elected to file as an S-corporation with the Internal Revenue Service beginning in 2011, and it was taxed as an S-corporation throughout the claimant's base period. The review examiner also found that the claimant earned a total of \$80,000.00 while working for the employer during the base period of his claim, thus satisfying the minimum earnings requirement to be monetarily eligible for a claim.

We, therefore, conclude as a matter of law that the claimant's base period employment was not exempt under G.L. c. 151A, § 6(d), and, consequently, his earnings from the employer constituted qualifying wages under G.L. c. 151A, §§ 1(s)(A) and 24(a).

The review examiner's decision is reversed. The claimant is monetarily eligible for benefits in connection with his 2018 unemployment claim. We note that our decision does not render the claimant automatically eligible for unemployment benefits, as the DUA must determine whether the claimant's separation from the employer was qualifying under a different section of law, G.L. c. 151A, § 25(e).

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2019



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:

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).

⁴ See 26 C.F.R §§ 301.7701-1 and 301.7701-3.

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.

SVL/rh