

The review examiner reasonably rejected as not credible the claimant's allegations that the employer created a hostile work environment, improperly denied overtime pay, and disregarded COVID-19 safety measures. Held the claimant was ineligible for benefits as he failed to show that he resigned for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0064 7991 61

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 resigned from his employment without showing good cause attributable to the employer or urgent, compelling, and necessitous reasons. Thus, he was disqualified pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on March 23, 2021. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, attended only by the employer, the review examiner reversed the agency's initial determination in a decision rendered on September 14, 2022. The claimant sought review by the Board, which dismissed his appeal because it was filed after the statutory deadline under G.L. c. 151A, § 40. The claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On March 8, 2023, the District Court ordered the Board to remand the matter to obtain further evidence. Although the Board continues to maintain that it does not have jurisdiction due to the claimant's failure to timely file his Board of Review appeal, we complied with this order and remanded the case to the review examiner to take additional evidence. Both parties attended the remand hearing, at which the claimant was represented by counsel. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the employer had not bullied nor disrespected the claimant, nor had it failed to take COVID-19 seriously, as alleged, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full-time as a client service associate for the employer's wealth management business from 5/13/20 until 1/21/21. The claimant worked a regular schedule of Monday through Friday from approximately 9:00 a.m. until 5:30 p.m. and was paid \$19 per hour.
2. Due to the COVID-19 pandemic, the employer took measures to protect employees' health. The employer installed special filters on its HVAC system. The employer separated employees' work areas. At the time of the claimant's separation, eight employees worked at the business, which is housed in a 5000 square foot building. The building underwent a construction project that was completed in February 2020, prior to the claimant beginning work with the employer. The claimant was aware of the construction because he was a friend of the business owner's son and frequented the owner's home. The employer provided employees hand sanitizer to keep at their desks, and industrial grade face shields for their use in the workplace. Employees were required to wear masks if they got up from their desk or engaged in conversation with any other employees within a six foot distance. The employer provided the face shields for employees to use if they chose, they were not required. The employer assigned only two employees to each available restroom to limit the sharing of these spaces. The employer complied with COVID-19 mandates issued by the government. The business owner wiped down doorknobs and surfaces in the kitchen and restrooms each morning and night. The business owner's husband picked up trash from the workplace during evening hours. The husband does not go into the workplace during business hours unless there is a problem with computers. The employer did not allow clients to enter the workplace; documents were dropped off and/or picked up from the foyer area of the business office. The claimant was not required to perform any cleaning duties in the workplace. The claimant volunteered to collect trash from employees' work areas and place it in a larger bag that was left for the owner's husband to pick up. The employer contracts with a cleaning vendor that provides monthly cleanings of the workplace.
3. During the pandemic, the business owner's husband continued working for his employer in a system engineering position. The husband's employer required him to submit to COVID-19 screening tests every Tuesday. On the Tuesday after the Thanksgiving holiday, the husband tested positive. The husband was notified of the positive test result at approximately 11:30 p.m.; he had been at the workplace to retrieve trash at approximately 10:00 p.m.-11:00 p.m. that evening. The husband did not exhibit any symptoms of the virus and did not feel ill. Due to his positive test result, the business owner and other family members who gathered at her home for the Thanksgiving holiday submitted to COVID-19 tests; none of the tests were positive. Despite testing negative for COVID-19, the business owner remained out of work for one week after

learning that her husband tested positive. The owner consulted with her physician who opined that the husband likely had a false-positive test result. None of the family members or guests who had been at the owner's home for Thanksgiving ever tested positive for COVID-19.

4. At the time of hire, the business owner considered the claimant in an internship-like position as a financial administrator. The claimant's annual pay rate at the time of hire was \$37,440. The owner found that the claimant did not perform well in the position and decided to reassign him to a lower level customer service position. The owner gave the claimant a pay increase of approximately 6% as a measure of good faith. The claimant's annual pay rate in the customer service position was \$39,520. All of the employees of the business are salaried and receive vacation and paid holidays. The employer does not provide vacation and holiday pay for hourly employees.
5. During the term of the claimant's employment, his immediate supervisor, the Client Services Account Manager (CSAM), held morning "stand-up" meetings where the employees gathered as a group between 9:00-10:00 a.m. The business owner did not attend or participate in these meetings since she arrived at the office later in the morning. During these meetings, the CSAM discussed errors committed by employees for the purpose of ensuring others did not make the same mistakes. The CSAM did not conduct the meetings for the purpose or with the intention of humiliating employees. The claimant was aware that when errors he made were discussed, they were worthy of correction and were discussed to make sure no one else made the same mistakes.
6. Employees of the employer's business were responsible for reporting their hours worked on a timesheet that they submitted to the employer at the end of each week. The claimant did not work more than 40 hours in any week of his employment.
7. During the week of January 1, 2023, through January 7, 2023, the claimant worked 8 hours on 1/4/23; 8 hours on 1/5/23; 6 hours on 1/6/23; and 9 hours on 1/7/23.
8. During the week of January 8, 2023, through January 14, 2023, the claimant worked 9 hours on 1/8/23; 8 hours on 1/11/23; 9 hours on 1/12/23; 8 hours on 1/13/23. The claimant charged vacation time on 1/14/23.
9. During the week of January 15, 2023, through January 21, 2023, the claimant charged vacation time on 1/15/23 and on 1/18/23; the claimant worked 9.5 hours on 1/19/23; 8 hours on 1/20/23; and 8 hours on 1/21/23.
10. During the evening of 1/21/21, the claimant sent a text message to the CSAM stating that he was done and would not be at work the next day. Earlier that day, the claimant told the CSAM that he wanted more money. The CSAM responded to the claimant's text message, stating that he should return his key

- to the office. The claimant acknowledged the message, stating that this sounded good. The claimant did not have any additional communication with the CSAM. The claimant did not speak with the business owner about his reason for resigning, prior to resigning or after leaving. Prior to resigning, the claimant did not speak with the business owner about any problems or issues.
11. The claimant filed an initial claim for unemployment insurance benefits, effective 2/21/21.
 12. On 2/26/21, the claimant completed a DUA factfinding questionnaire, informing the DUA that he quit his work due to feeling disrespected and bullied by the business owner. The claimant wrote, "I told my manager that I felt as if I was being discriminated against and bullied by the owner of the firm. I also brought up how I felt like the health of me and my family was in danger due to blatant disregard of COVID-19. One major example of this was when the owners [sic] husband came in to 'disinfect' the office while he himself was positive for COVID-19, this was very scary for me and my coworkers because he came to the office every single day to clean while he was positive for Covid and we were all still working in-office. It seemed as if there was no care for our health or well being due to his close presence to us while he was sick. The owners response to me bringing up these issues was to scream in my face yelling that I was 'the most selfish and disrespectful person she had ever met and that I was stabbing her and her business in the back.' After being verbally abused for voicing what I believed to be some serious concerns about my mental and physical health I knew that this hostile work environment was something I could no longer be a part of."
 13. On 3/23/21, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits.
 14. On 3/23/21, the employer appealed the Notice of Approval.
 15. On 9/13/21, a hearing was held on the employer's appeal. The claimant did not attend the hearing. After a hearing decision was issued on 9/14/22, which found the claimant ineligible for benefits, the claimant submitted an appeal to the Board of Review. In his appeal, the claimant wrote, "...First, the defendant states the building is 5000 square feet. This is misleading as only about 30% of the building was being utilized due to construction on the other portion. Within this 30% employees worked in small offices no bigger than 200 square feet with at least one other coworker in that office. There was also no enforcement at all of the masks, as the owner herself never wore one. The 'industrial grade face shields' were purchased as a satirical gag joke as the owner did not believe Covid-19 was any real danger, the face shields were by means (sic) a serious attempt at safety as the protective shield did not even cover your entire face (sic) and were open faced on all sides. In addition, clients were allowed into the office to drop off paperwork during peak lockdown with no regard or testing for whether they were infected or not."

Credibility Assessment:

The claimant informed the DUA in his initial response that he felt disrespected and bullied by the business owner. The claimant wrote that the owner screamed in his face when he brought forward concerns. Yet, during the hearing, the claimant testified to having never brought any issues to the business owner. This was subsequently contradicted by his testimony that the business owner yelled at him that he was backstabbing her during a phone call where he was speaking with the CSAM. The claimant's inconsistent statements and testimony diminished his overall credibility. Likewise, the claimant testified that the business owner showed no concern for COVID-19 and that she sent her husband to clean the workplace after learning that he tested positive for COVID-19. The claimant's testimony was not credible, given the steps that the employer took to protect the employees working at her business, including providing protective personal equipment, assigning only two employees to each restroom, and cleaning the office twice each day. It is unlikely the business owner would have purchased face shields for the employees to use, if she did not take the virus seriously, since employers were not mandated to provide face shields. The claimant testified to having worked in excess of forty hours and that he was not paid for overtime. The employer produced the claimant's timesheets that the claimant generated, which showed he had not worked more than forty hours. Further, the claimant conceded during the hearing that his "timeline" regarding the construction project in the building was off when he contended that the area within the workplace was restricted due to construction. The claimant's statements regarding this in his appeal to the Board of Review were false and misrepresented the conditions within the workplace. In light of the above, the claimant's testimony was not credible and was therefore given no weight.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 and credibility assessment except as follows. Consolidated Findings ## 7–10 refer to hours worked during the two weeks shown in Remand Exhibit 9, an attendance record. Inasmuch as this exhibit and the balance of the record show that these hours were worked in 2021, we believe the year 2023 in these findings to be a scrivener's error. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Moreover, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

As the claimant resigned from his employment, this case is properly analyzed pursuant to the following provisions under G.L. c. 151A, § 25(e), which state, 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.

This statutory language expressly assigns the burden of proof to the claimant.

As an initial matter, we agree that the claimant has not presented any reason of an urgent, compelling, and necessitous nature that caused him to resign. Thus, his eligibility for benefits is based upon whether he has met his burden to show that he left for good cause attributable to the employer.

The claimant resigned on January 21, 2021. Consolidated Finding # 10. When 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). In his appeal to the Board, the claimant asserted that he quit due to a hostile work environment and the owner's disregard for practicing COVID-19 safety measures.

In a detailed credibility assessment, the review examiner rejected the claimant's assertions that the owner screamed in his face when he raised concerns, that she showed no concern for COVID-19, and that he had to work more than 40 hours a week without being paid overtime. 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). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Given the claimant's conflicting and inconsistent testimony and written statements to the DUA and to the Board, as noted by the review examiner, we believe her assessment to be reasonable in relation to the evidence presented.

Inasmuch as the consolidated findings do not show that the employer acted unreasonably, either in regard to how the owner treated the claimant, its pay practices, or its COVID-19 safety measures, the claimant has failed to sustain his burden of proof.

We, therefore, conclude as a matter of law that the claimant did not resign for good cause attributable to the employer or for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 21, 2021, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 2024



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE DISTRICT 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