

Where the claimant quit her employment in order to open her own nail salon business with her spouse, she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0067 1719 06

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 resigned from her position with the employer on March 12, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 6, 2021. 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 December 2, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant quit her job for non-disqualifying reasons under G.L. c. 151A, § 25(e)(1), and thus, she was eligible for benefits.¹ After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to testify. 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 resigned because her employer repeatedly urged her to report to work, even though she had to take time off to care for her seriously ill infant son, is supported by substantial and credible evidence and is free from error of law, where, after remand, the evidence shows that the claimant left her position with the employer to open her own business.

Findings of Fact

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

¹ In her initial hearing decision, the review examiner did not state whether the circumstances surrounding the separation, as presented by the claimant, constituted good cause attributable to the employer or urgent, compelling, or necessitous reasons.

1. In February 2020, the claimant began working as a part-time manicurist for the employer, a nail salon. She worked 15–20 hours a week, based on when her mother was willing and able to watch her newborn. If the baby was sick[,] the claimant would leave work early and/or stay home to care for it.
2. The employer is legally owned by one person. That person’s wife operates the business as the manager. She was the one representing the employer at the hearing.
3. In March 2020, the salon was closed temporarily due to the COVID-19 mandate. The claimant was therefore laid off.
4. The claimant filed her 2020-01 unemployment claim, effective April 4, 2021.
5. Before the COVID-19 pandemic, the employer had [four] employees at the claimant’s location. All four employees, including the claimant, returned to work on June 22, 2020. No new employees were hired.
6. As part of its COVID-19 safety protocols, the employer required both staff and customers to wear masks at all times. The customers were spaced 6 feet apart and plexiglass was sent [sic] up between the customers and the employees and at the reception’s desk. The customers were required to have their temperature taken and to sanitize their hands before they could have a service performed.
7. On March 10, 2021, the claimant sent the owner a text in the morning that this would [sic] her last week of work, as she and her husband were opening their own salon. The claimant worked at the salon on March 10, 2021.
8. The claimant’s last day performing services for the present employer was Friday, March 12, 2021.
9. The claimant’s infant son may have been ill on or about March 10, 2021, but she did not mention this to the employer or request time off to care for her son March 10, 2021, through March 12, 2021.
10. On August 6, 2020, DUA issued Notice of Disqualification 0067 1719 06-01, stating that under M.G.L. c. 151A, Section 25(e)(1), the claimant is disqualified from receiving benefits for the period starting February 28, 2021, and until she has worked for 8 weeks and earned an amount equal to or in excess of 8 times her weekly benefit amount.

Credibility Assessment:

The claimant’s testimony that she resigned because the employer was harassing her to return to work even though her child was sick has been found to be less credible than the manager’s testimony that the claimant resigned to start her own business. The employer provided a text message, dated March 10, 2021, from the claimant

stating that she was resigning to start a salon. The claimant testified at the initial hearing that she sent this text because the employer was harassing her to return to work even though her child was still sick. The credibility of this testimony was found to be questionable, particularly given additional evidence that the claimant posted an offer on face book to sell nail polish she had acquired through the purchase of a salon and of a Venmo payment on the claimant's account that appeared to be for a nail service. The claimant testified that she posted the face book offer for her sister and that her husband was working at someone else's salon and used her Venmo account to be paid. The credibility of this testimony was also found to be questionable but was again accepted given the lack of any direct testimony to rebut it. It is noted that the claimant's testimony was further weakened by the lack of any documentary evidence to support it, such as a text message or phone record from the employer on or after March 10, 2021 asking her to come into work or a record from the Secretary of State that her sister was the owner of a salon, or a paycheck for her husband from a salon with evidence that that salon is/was not owned by the claimant or her husband. At the remand hearing, the employer's manager testified credibly that the claimant sent her the text, on March 10, 2021, stating that this would be her last week as she and her husband were opening a salon. She further testified, credibly, that the claimant worked on March 10th and March 12th and did not mention her child being sick on either day. In addition, the manager testified credibly that she never asked the claimant to return to work after she gave notice on March 10, 2021, that she was resigning effective March 12, 2021. Given the lack of any evidence from the claimant documenting that the owner called or texted her regarding returning to work or that her sister was the one who purchased a salon, or that her husband is or was employed by a salon that he and she did not themselves own, the record as a whole supports the employer's testimony that the claimant resigned to start her own business, not the claimant's testimony that she resigned because the employer was harassing her to return to work even though her child was sick.

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. 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to receive benefits.

Because it is undisputed that the claimant quit her job, we analyze the claimant's separation under G.L. c. 151A, §§ 25(e) and (e)(1), which provide, 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 the above provisions, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

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). At the initial hearing, the claimant testified that she quit after the employer repeatedly called her about returning to work because the business was short-staffed, even though the claimant had informed the employer that she could not report to work because her infant son was seriously ill. After remand, however, the review examiner rejected this testimony and, instead, found that the claimant left her position with the employer because she and her husband were opening their own nail salon. Consolidated Finding # 7. Since the consolidated findings show that the claimant's reason for leaving had nothing to do with the employer's conduct, the claimant failed to establish that she left her employment for good cause attributable to the employer.

The claimant also failed to establish that she left her employment for urgent, compelling, and necessitous reasons. After receiving the employer's testimony on remand, the review examiner declined to credit the claimant's testimony that the employer urged her to return to work, even though her infant son was ill. 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). As stated previously, we consider the review examiner's credibility assessment to be reasonable in relation to the record.

We also consider whether another provision under G.L. c. 151A, § 25(e) applies to the claimant, which states, in pertinent part, as follows:

No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit.

By its express terms, this provision places the burden of proof upon the claimant.

In this case, there is insufficient information contained in the record to ascertain whether the claimant performed services in the new nail salon, which she opened with her husband, as an employee as that term is defined under G.L. c. 151A. Even if the claimant's business endeavor did constitute employment, there is no evidence that she separated from that employment at any time. As a result, she does not meet her burden to show that she became separated from such new employment for good cause attributable to the new employing unit.

We, therefore, conclude as a matter of law that the claimant has failed to satisfy her burden under G.L. c. 151A, § 25(e)(1), to show that she left her employment for good cause attributable to the employer. We further conclude that she has not shown that she separated for urgent, compelling, and necessitous reasons or that she left her job with the employer in good faith to accept new employment on a permanent full-time basis and became separated from such new employment for good cause attributable to the new employing unit.

The review examiner's decision is reversed. The claimant is denied benefits from the week beginning February 28, 2021, 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 - October 18, 2022



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
(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.

JMO/th