

The claimant quit his job to accept a position as an independent contractor. Because independent contractor work is not considered employment under G.L. c. 151A, he did not resign his position to accept new, full-time employment within the meaning of G.L. c. 151A, § 25(e). As the employer did not take any action that negatively impacted the claimant's earnings and there was insufficient evidence to indicate the claimant's earnings were financially unsustainable, the claimant also did not meet his burden to show that he separated for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons, and he is ineligible pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0071 5767 49

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 affirm.

The claimant separated from his position with the employer on March 20, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 11, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on November 16, 2022. 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 March 27, 2023, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence pertaining to the claimant's employment during the 2020 calendar year. 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 voluntarily resigned his employment under disqualifying circumstances in order to accept another job with a new employer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a lead representative for the employer, a solar electric utility supplier, from April 2019 until March 20, 2021.
2. The claimant earned a base rate of \$600.00 per week, plus commission.
3. The claimant's weekly gross earnings from December 22, 2019, through April 11, 2020, were:
 - a. December 22, 2019, through December 28, 2019 - \$1,200.00;
 - b. December 29, 2019, through January 4, 2020 - \$3,475.00;
 - c. January 5, 2020, through January 11, 2020 - \$800.00;
 - d. January 12, 2020, through January 18, 2020 - \$1,800.00;
 - e. January 19, 2020, through January 25, 2020 - \$1,600.00;
 - f. January 26, 2020, through February 1, 2020 - \$1,000.00;
 - g. February 2, 2020, through February 8, 2020 - \$2,600.00;
 - h. February 9, 2020, through February 15, 2020 - \$1,000.00;
 - i. February 16, 2020, through February 22, 2020 - \$1,200.00;
 - j. February 23, 2020, through February 29, 2020 - \$2,600.00;
 - k. March 1, 2020, through March 7, 2020 - \$2,475.00;
 - l. March 8, 2020, through March 14, 2020 - \$600.00;
 - m. March 15, 2020, through March 21, 2020 - \$1,600.00;
 - n. March 22, 2020, through March 28, 2020 - \$800.00;
 - o. March 29, 2020, through April 4, 2020 - \$1,679.75; and
 - p. April 5, 2020, through April 11, 2020 - \$16.00.
4. At a point between April 5, 2020, and April 11, 2020, the employer laid the claimant off due to the COVID-19 pandemic.
5. On June 22, 2020, the employer contacted the claimant to return to work. When the claimant returned to work, his base pay increased from \$600.00 per week to \$615.39 per week. The claimant's set commission rate remained the same as before the layoff.
6. The claimant's weekly gross earnings from June 21, 2020, through August 29, 2020, were:
 - a. June 21, 2020, through June 27, 2020 - \$1,065.30;
 - b. June 28, 2020, through July 4, 2020 - \$1,015.39;
 - c. July 5, 2020, through July 11, 2020 - \$1,365.39;
 - d. July 12, 2020, through July 18, 2020 - \$1,415.39;
 - e. July 19, 2020, through July 25, 2020 - \$2,115.39;
 - f. July 26, 2020, through August 1, 2020 - \$1,365.39;
 - g. August 2, 2020, through August 8, 2020 - \$1,665.39;
 - h. August 9, 2020, through August 15, 2020 - \$1,815.39;
 - i. August 16, 2020, through August 22, 2020 - \$2,165.39; and
 - j. August 23, 2020, through August 29, 2020 - \$1,415.39.

7. The claimant's weekly gross earnings from December 26, 2020, through January 2, 2021, were:
 - a. December 26, 2020, through January 2, 2021 - \$715.39;
 - b. January 3, 2021, through January 9, 2021 - \$615.39;
 - c. January 10, 2021, through January 16, 2021 - \$965.39;
 - d. January 17, 2021, through January 23, 2021 - \$715.39;
 - e. January 24, 2021, through January 30, 2021 - \$1,115.39;
 - f. February 1, 2021, through February 6, 2021 - \$1,465.39;
 - g. February 7, 2021, through February 13, 2021 - \$1,565.39;
 - h. February 14, 2021, through February 20, 2021 - \$715.39;
 - i. February 21, 2021, through February 27, 2021 - \$1,365.39; and
 - j. February 28, 2021, through March 6, 2021 - \$2,465.39.
8. The claimant was actively seeking new work in the beginning of 2021.
9. The claimant verbally resigned to his immediate supervisor on or about March 6, 2021, because he had been offered and accepted a position with Company A, which is also a utility supplier. The claimant told his supervisor that his last day with the employer would be March 20, 2021.
10. The claimant had not made complaints about his employment to a supervisor or manager prior to submitting his resignation.
11. The claimant would not have left his job with the employer if he had not accepted the new work with Company A.
12. The claimant did not request a leave of absence, a reduction in hours, a transfer, or other accommodations prior to resigning.
13. The claimant's weekly gross earnings from March 7, 2021, through March 20, 2021, were:
 - a. March 7, 2021, through March 13, 2021 - \$1,065.39; and
 - b. March 14, 2021, through March 20, 2021 - \$1,511.09.
14. During the week of April 11, 2021, through April 17, 2022, the claimant received a demo payout in the gross amount of \$100.00.
15. On March 21, 2021, the claimant began working full time, 40 hours per week, as an independent contractor for Company A.
16. The claimant entered into a contract with Company A dated March 24, 2021. The contract indicates that the claimant was to be a self-employed contractor of Company A. The contract reads, "RELATIONSHIP OF PARTIES. It is understood by the parties that Sales Agent is an independent contractor with respect to [Company A], and not an employee of [Company A]. [Company A]"

will not provide fringe benefits, including health insurance benefits, paid vacation, or any other employee benefit, for the benefit of Sales Agent.”

17. The contract with Company A provided compensation of “payments equal to \$500 per week. Sales Agent will receive commission payments equal to \$100/kw (up to \$1,000) for the creation of each new sales agreement (contract signed).”
18. At some point in May of 2021, Company A changed its compensation rate and the claimant’s pay became 100% commission based.
19. The claimant voluntarily left Company A on July 9, 2021, because he was not making any money after Company A’s switch to 100% commission-based compensation.
20. The claimant returned to work for the employer in June of 2022 with a base salary of \$50,000.00 per year, plus commission.

Credibility Assessment:

The claimant’s testimony during the remand hearing about his pay from the employer is not credible. During the remand hearing, the claimant alleged that his gross pay between June of 2020 and March of 2021 decreased by more than half and he earned between \$400.00 and \$700.00 per week, with an average gross pay of \$650.00 per week. These allegations are not plausible when compared to the employer’s detailed and specific evidence. The employer recited the claimant’s actual gross earnings both before and during the COVID-19 pandemic directly from its payroll records, which are contemporaneous business records. The employer’s evidence shows that the least the claimant earned during any of the 12 weeks of 2021 prior to his resignation was \$615.00 (during week ending January 9, 2021) and the most he earned was \$2,465.00 (during week ending March 6, 2021). The claimant also maintained that when he returned to work in June of 2020, the employer had changed the pay scale and began paying demos as commissions of \$250.00 each. The employer’s witness testified the claimant’s base pay was increased when he returned to work in June of 2020 from \$600.00 to \$613.39, and the claimant’s commission rates remained the same. The claimant testified that the decrease in pay began when he returned to work in June of 2020, however, the evidence shows that the claimant’s pay always fluctuated, sometimes greatly, from week to week both before and during the pandemic. As such, the employer’s evidence of the claimant’s pay is deemed more credible than that of the claimant.

The claimant did offer specific testimony about the terms of his work with Company A, consistent with and corroborated by the contract itself. The claimant was also clear in his testimony that he would not have left his job with the employer if he did not accepted [sic] the new work with Company A.

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 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 believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not entitled to benefits.

The review examiner initially denied benefits pursuant to the following provision under G.L. c. 151A, § 25(e), which provides 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.

Under G.L. c. 151A, § 25(e), it is the claimant's burden to establish that he left his job with the instant employer in good faith to accept an offer of permanent, full-time employment with another employer and that he became separated from such new employment for non-disqualifying reasons.

The claimant resigned his position with the instant employer to accept a new position as an independent contractor with another company. Consolidated Findings ## 9, and 15–16. Because the services performed by individuals classified as independent contractors are excluded from the definition of "employment" in G.L. c. 151A, we conclude the claimant did not resign to accept an offer of full-time employment within the meaning of § 25(e). *See* G.L. c. 151A, §§ 1(k) and 2. However, in this case, our inquiry does not end here.

As the claimant maintained that he resigned his employment because the employer had altered his pay scale, we must also analyze the claimant's separation under separate provisions of G.L. c. 151A, § 25(e), 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.

The express terms of these provisions place the burden of proof upon the claimant.

When claimants contend that their separation was for good cause attributable to the employer, the focus is on the employer's conduct. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). The Board has previously found that a claimant may show that he resigned for good cause attributable to the employer when his employer makes a decision or takes some

action that substantially impacts the claimant's earnings. *See e.g.*, Board of Review Decision 0014 5343 84 (Jun. 29, 2015) (holding that the claimant resigned for good cause attributable to the employer because the employer unilaterally reduced the claimant's draw from commission by approximately 75%).

Following remand, the review examiner rejected as not credible the claimant's contention that the employer had changed the claimant's pay scale when he returned in June, 2020, because the employer was able to read into evidence detailed information about the claimant's weekly earnings from contemporaneous business records that directly refuting the claimant's testimony. *See* Consolidated Findings ## 3, 5-7, and 13. 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 the claimant was unable to provide specific evidence rebutting the detailed information presented by the employer, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence. Absent any other credible evidence that the employer took some action that negatively impacted the claimant's earnings, we do not believe the claimant has shown that he resigned voluntarily with good cause attributable to the employer.

We also must consider whether the claimant resigned involuntarily for urgent, compelling, and necessitous reasons. In making such an assessment, we must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." *Reep v. Comm'r of Department of Employment and Training*, 412 Mass. 845, 848, 851 (1992). When claimants assert that they were compelled by to resign their employment because of financial need, the Board has required that claimants show that circumstances beyond their control negatively impacted their net earnings, resulting in an inability to cover their regular monthly expenses. *See e.g.*, Board of Review Decision 0012 5380 77 (Apr. 13, 2015) (holding a claimant had not shown she was compelled to resign her employment because her monthly expenses did not exceed her monthly net income at the time she resigned).

While it appears that the claimant did see an overall decrease in his average weekly gross earnings in the weeks leading up to his separation, the claimant did not provide any testimonial or documentary evidence indicating that this loss of income rendered him financially insolvent. *See* Consolidated Findings ## 3, 6, 7, and 13. Additionally, the agreement that the claimant signed with Company A indicated that his base pay would be \$500 a week, which is a \$115.39 decrease from the weekly base pay he was receiving from the instant employer. Consolidated Findings ## 5 and 17. Given the unpredictable nature of commissions, the claimant's willingness to take a cut to his base pay to accept a commission-based position with Company A detracts from a conclusion that the claimant was compelled to resign because of his financial situation. Instead, it appears that the claimant made the volitional choice to pursue a position with a different company, because he believed that it would afford him an increased income. Such a choice does not constitute urgent, compelling, and necessitous circumstances.

We, therefore, conclude as a matter of law that the claimant has failed to carry his burden to show that he left his job voluntarily for good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is denied benefits for the week of March 14, 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.

N.B.: As the claimant's UI Online profile indicates that he successfully established a new 2022-02 claim for benefits after separating from the instant employer in March 2021, it appears that the claimant earned sufficient requalifying wages prior to the effective date of his 2022-02 claim. Therefore, the end date for this issue has been set as October 22, 2022, the Saturday prior to the effective date of the claimant's 2022-02 claim.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 29, 2023



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.

LSW/rh