

The claimant resigned his position when he ceased communicating with the employer's owner in part because he was worried the owner might be angry that he filed a wage claim against the employer. He did not show good cause attributable to the employer or urgent, compelling, and necessitous reasons for resigning, and the claimant is ineligible pursuant to G.L. c. 151A, § 25(e)(1). Further, he was not in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r) during the periods when he was medically unable to work, and when he turned down suitable work.

Board of Review
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Issue ID: 0078 2718 06

Introduction and Procedural History of this Appeal

The claimant 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 we affirm in part and reverse in part.

The claimant separated from his position with the employer on October 5, 2022. He filed a claim for unemployment benefits with the DUA, effective September 18, 2022, which was denied in a determination issued on November 4, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 11, 2023. 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 July 19, 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 separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 was not entitled to benefits because he was not capable of work, 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 as a full-time kitchen associate for the employer, a soup retailer, beginning August 10, 2015.

2. The claimant operated an electric bicycle as he did not have a vehicle for transportation.
3. The claimant has known the owner for approximately twenty-three (23) years.
4. The owner allowed the claimant to live in a rent-free room at the employer's [City B] location for approximately three (3) and a half years.
5. The employer had locations in [City A], [City B], and [City C].
6. The claimant was assigned to the employer's [City B] location.
7. The claimant's direct supervisor was the kitchen manager.
8. At the onset of the COVID-19 pandemic, the claimant went from working forty (40) hours to sixty-five (65) hours.
9. Upon the claimant moving to sixty-five (65) hours, the claimant was transitioned from an hourly employee classification to a salaried employee classification.
10. On June 20, 2022, the claimant began an approved leave of absence due to being in a June 17, 2022, electric bicycle accident which resulted in the claimant breaking his leg, shoulder, and clavicle.
11. The claimant's last physical day of employment was June 17, 2022.
12. Following the accident, the claimant and employer discussed that the claimant's rehabilitation would likely take three (3) to four (4) months.
13. Following the accident, the claimant and owner discussed the owner providing the claimant with a car that belonged to the recently deceased father of his wife.
14. The owner indicated the car would need a new battery and air in the tires.
15. On September 9, 2022, the claimant and owner spoke on the phone whereby the owner indicated the claimant's position with the [City B] location was eliminated, he could no longer live at the [City B] location, and he could continue employment at the [City C] location upon providing a medical record clearing him to return to employment.
16. During the September 9, 2022, phone conversation, the claimant asked the owner about the previously discussed vehicle, whereby the owner indicated he would take care of it.

17. The owner and claimant did not discuss pay or hours pertaining to new employment at the [City C] location.
18. The owner did not provide the claimant with a formal offer of employment with the [City C] location detailing pay or hours.
19. On approximately September 17, 2022, the claimant moved out of the employer's [City B] location.
20. The claimant moved to New Hampshire once he moved out of the employer's [City B] location.
21. On September 19, 2022, the claimant filed for unemployment benefits.
22. On September 23, 2022, at 8:38 a.m., the claimant sent a text message to the owner, which included a medical record from the claimant's medical provider.
23. The medical record, dated September 23, 2022, indicated the claimant could return to work as soon as possible with full duty.
24. The claimant was separated from his employment at the time the September 23, 2022, text message was sent.
25. The claimant sent the September 23, 2022, text message to the owner for the possibility that the owner would allow him to continue living in the employer's [City B] location.
26. On September 23, 2022, at 8:40 a.m., the owner sent a response text message to the claimant stating, "Wow!! That is awesome."
27. On approximately September 30, 2022, the claimant contacted the Massachusetts Labor Board to file a complaint regarding his previous pay with the employer when he was transitioned from an hourly employee to a salaried employee at the onset of the COVID-19 pandemic.
28. The Labor Board began an investigation into the employer, which included notifying the employer within a week.
29. On October 3, 2022, the owner called the claimant at 11:35 a.m., but the claimant did not answer.
30. On October 3, 2022, at 11:38 a.m., the owner sent a text message to the claimant stating, "Call me."
31. On October 3, 2022, the owner called the claimant at 7:02 p.m., but the claimant did not answer.

32. On October 3, 2022, at 7:03 p.m., the owner sent a text message to the claimant stating, “Yo, what is up? Everything alright? Call me when you can.”
33. The claimant did not respond to the October 3, 2022, text messages from the owner.
34. On October 4, 2022, the owner called the claimant at 9:47 a.m., but the claimant did not answer.
35. On October 4, 2022, at 9:48 a.m., the owner sent a text message to the claimant stating, “Yo, are you ok? Give me a call.”
36. The claimant did not respond to the October 4, 2022, text message from the owner.
37. On October 5, 2022, the employer sent a text message to the claimant stating, “Not sure why you are not calling me back or answering my texts, but should I assume you changed your mind about coming back to work?”
38. The claimant did not respond to the October 5, 2022, text message from the owner.
39. The claimant separated from his employment on September 9, 2022, when the owner informed him that his position with the [City B] location was being eliminated.
40. On April 8, 2023, the employer paid the claimant \$9,774.11 in back pay and penalties for wages not correctly paid between December 26, 2020, and July 9, 2022.

Credibility Assessment:

During the remand hearing, the claimant provided direct testimony that on September 9, 2022, he had a phone conversation with the owner in which the owner explained the claimant’s position with the [City B] location was eliminated, but he could continue employment at the employer’s [City C] location upon providing a medical record clearing him to return to employment. The claimant credibly testified that pay and hours were not discussed. The controller asserted that the owner had a phone conversation with the claimant on September 15, 2022, to explain that the claimant could return to his previous employment in the [City B] location or transfer to the [City C] location at the same pay, and would be an easier return to work from his injury as he would not have to go up and down stairs, and would have limited lifting and carrying of items. As the employer did not present the owner for the hearing, the claimant’s direct and consistent testimony is deemed more credible than the controller’s second-hand testimony.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 15 that indicates the employer eliminated the claimant's position at its [City B] location as well as Consolidated Findings ## 24 and 39, as they are unreasonable in relation to the evidence presented. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. 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 determined that the claimant was ineligible for benefits for the period between June 19, 2022, and September 24, 2022, because he was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during that period. However, the District Court's July 19, 2023, order instructed the DUA to further explore the claimant's eligibility for benefits under the provisions of G.L. c. 151A, § 25(e)(1) and § 25(e)(2). Pursuant to this order, the Board remanded the case for the review examiner to obtain additional evidence relevant to the claimant's separation from his employment.

Following remand, the review examiner accepted as credible the claimant's contention that he was laid off on September 9, 2022, when the employer eliminated his position at its [City B] location. 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).

The review examiner explained that he accepted the claimant's testimony about his separation as more credible, because the employer's witness did not have first-hand knowledge of September 9th, and because the claimant had provided direct and consistent testimony about the reason for his separation. Based upon the record before us, we cannot accept this assessment.

As an initial matter, there was no dispute that the employer offered the claimant a position at its [City C] location when he had been medically cleared to return to work. Consolidated Finding # 15. Assuming that the employer had eliminated the claimant's position at the [City B] location, its offer of other suitable work evidenced the employer's clear intention to continue employing the claimant. Thus, the purported elimination of the claimant's [City B] position is not evidence that the employer laid off the claimant.

We further note, contrary to the review examiner's assessment, several material inconsistencies in the claimant's testimony about the reasons for his separation. For example, the claimant initially testified that he did not return to work for the employer because it had eliminated his position after

deciding to deliver food directly to its other locations. However, he later testified that he was told that he could not return to work at the [City B] location because the employer had hired someone else to fill his position. Assuming the employer had eliminated the claimant's position, it would not have a reason to hire someone to fill a position that no longer existed.

Second, the claimant's own testimony indicates that he initiated his separation from the instant employer. During the remand hearing, the claimant testified that he decided not to return to work for the instant employer when its owner informed him that he could no longer stay at the employer's [City B] location.¹ If the employer had laid the claimant off after eliminating his position at the [City B] location, the claimant would not have reason to decide whether he wanted to return to work for the employer. That decision would already have been made when the employer laid him off.

Third, the claimant's actions on September 23, 2022, are inconsistent with his contention that he was laid off because his position was eliminated. *See Consolidated Findings ## 22–25.* At the remand hearing, the claimant testified that he chose to send the owner medical documentation clearing him to return to work on September 23, 2022, because he hoped to return to work at his previous position at the employer's [City B] location.² If the claimant was told on September 9, 2022, that his position at the [City B] location had been eliminated, he would not have had a reason to send the owner medical documentation two weeks later in an attempt to return to a job that he understood no longer existed.

In contrast, the employer's comptroller provided consistent testimony that the owner had informed the claimant that he could no longer live at the [City B] location but offered the claimant a choice of returning to his position at that location or accepting a new position at the employer's [City C] location. This testimony is also consistent with the information the employer provided in each of its filings with the DUA, which were admitted into evidence as Exhibit 4.³ Weighed against the substantial inconsistencies in the evidence presented by the claimant, the comptroller's consistent testimony leads us to conclude that the review examiner's assessment accepting the claimant's testimony as credible is unreasonable in relation to the record.

We agree that the employer's witness, its comptroller, could not present firsthand testimony about the September 9th conversation between the claimant and the employer's owner. However, hearsay evidence is not only admissible in informal administrative proceedings, but it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988).

As comptroller of the employer business entity, we can reasonably infer that he had first-hand knowledge of accounting and financial decisions made by the employer, such as the decision to

¹ The claimant's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings, 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* 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).

² The claimant's uncontested testimony in this regard is also part of the unchallenged evidence presented at the hearing and admitted into evidence.

³ Remand Exhibit 11 is also part of the unchallenged evidence presented at the hearing and admitted into evidence.

cut payroll. Thus, his testimony that the employer had not eliminated the claimant's position at the [City B] location bears an indicia of reliability.

Inasmuch as both parties provided testimonial and documentary evidence indicating the claimant resigned his position with the employer, the review examiner's credibility assessment is unreasonable in relation to the evidence presented. For that reason, we reject the review examiner's finding that the claimant was discharged on September 9, 2022, because his position at the [City B] location had been eliminated.

Instead, we conclude that the claimant resigned his employment on October 5, 2022. *See Consolidated Findings ## 37 and 38.* While the claimant may have made his decision not to return to work in September, there is nothing in the parties' communications prior to October 5th to indicate that the employer was aware of the claimant's decision not to return to work. *See Consolidated Findings ## 15, 16, 22, 26, and 29–35.* The claimant's decision not to respond to the owner's inquiry on October 5, 2022, is what changed the nature of the claimant's employment relationship, as it conveyed his intention not to return to work for the instant employer. *See Consolidated Finding # 38.*

Because the record shows that the claimant initiated his separation from employment, his eligibility for benefits is more appropriately analyzed under the following provisions of 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.

The express language of these provisions places the burden of proof upon the claimant.

The claimant provided two explanations for his decision to cease communication with the employer, thereby severing their employment relationship. He explained that he chose not to contact the owner because he knew the owner would accuse him of contacting the labor board, and because the owner was no longer allowing him to live at the employer's [City B] location.⁴

When a claimant contends that his 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 held that an employer's failure to pay the claimant wages earned in violation of the Massachusetts Wage Act constitutes good cause for a claimant to quit. *See, e.g., Board of Review Decision BR-116407-A* (May 2, 2011). In this case, however, the claimant never contended that he resigned because the employer had switched him to a salaried employee. He testified that he severed communications with the employer because he was

⁴ This portion of the claimant's testimony is also part of the unchallenged evidence presented at the hearing.

concerned that the owner would react negatively when he learned the claimant had filed a complaint with the labor board.

The claimant's assumption in this regard is not evidence of any employer conduct. It is merely speculation about how the employer's owner *might* react. Absent any evidence of employer actions substantiating the claimant's assumption, his concern over how the owner might react to his decision to file a wage complaint is not evidence that the claimant resigned for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1).

As discussed above, the claimant testified that he made the decision not to return to work once he learned that he would no longer be able to live at the employer's [City B] location. While the employer's owner did instruct the claimant to vacate his residence at the [City B] location, there was no dispute that the owner was allowing the claimant to live there as a personal favor and not as part of the terms of his employment. Consolidated Findings ## 3 and 4. Absent evidence that the employer took some action that altered the terms of the claimant's employment, and we see none, the owner's request to move out did not present good cause attributable to the employer for resigning under G.L. c. 151A, § 25(e)(1).

Because the claimant was also limited in his ability to commute to and from work, we next consider whether the claimant's loss of housing at the [City B] location rose to the level of urgent, compelling, and necessitous reasons for resigning. *See* Consolidated Finding # 2. Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. 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). The Board has recognized loss of housing as an urgent, compelling, and necessitous reason for leaving employment where a claimant shows that he could not find alternative housing within reasonable commuting distance of the employer, or that he could not afford to stay in the area. *See e.g.*, Board of Review Decision BR-107914 (Jan. 14, 2009).

In discussing the owner's request that he move out, the claimant testified that he stayed at the employer's [City B] location three or four nights a week.⁵ While the review examiner did not inquire into where the claimant stayed for the remainder of the week, this testimony suggests that he had another place to stay within reasonable commuting distance of the employer's [City B] location. Additionally, the claimant was aware that he had the option to accept new work at the employer's [City C] location. Consolidated Finding # 15. Nothing in the record indicates that the claimant explored the feasibility of other housing options near either the employer's [City B] or [City C] locations. Therefore, the claimant has not presented substantial and credible evidence showing that he could not find alternative housing within reasonable commuting distance of the employer or that he could not afford to stay in the area. Absent such evidence, the claimant has not shown that his loss of residence at the [City B] location constituted urgent, compelling, and necessitous reasons for his resignation under G.L. c. 151A, § 25(e).

⁵ This is also part of the claimant's uncontested hearing testimony.

Even assuming that the claimant had shown he resigned for good cause attributable to the employer or for urgent, compelling, and necessitous reasons, he did not take reasonable steps to preserve his employment. To qualify for benefits, a claimant who resigns from employment must also show that he had “taken such ‘reasonable means to preserve his employment’ as would indicate the claimant’s ‘desire and willingness to continue his employment.’” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–598 (1974). In other words, a claimant must pursue a feasible course of action which would enable him to remain employed.

The parties agreed that the employer’s owner had offered to give the claimant a vehicle to address any potential transportation issues. Consolidated Findings ## 13 and 16. There was also no dispute that the employer offered the claimant work at its [City C] location following his accident because the work at that location was less physical. This shows the employer’s willingness to take steps to retain the claimant as an employee. *See* Consolidated Finding # 10. However, by severing communications with the employer, the claimant chose not to pursue either course of action. Consolidated Findings ## 27–37. These circumstances demonstrate that the claimant did not take reasonable steps to preserve his employment. We also see no evidence to suggest that he reasonably believed any such steps would have been futile.

As the facts of this case support the conclusion that the claimant separated from employment on October 4, 2022, we must also consider whether he was entitled to benefits between September 18, 2022, the effective date of his claim, and October 1, 2022. To be eligible for unemployment benefits during those weeks, the claimant must show that he is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week
- (2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

Pursuant to these provisions, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. They may meet these requirements even though they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980).

The claimant was not medically cleared to return to work until September 23, 2022. Consolidated Finding # 23. Since he was not capable of working prior to that date, he was not in total or partial

unemployment under G.L. c. 151A, §§ 29 and 1(r), for the week of September 18, 2022, through September 24, 2022.

Once he was medically cleared to return to work, the claimant did not have any other restrictions on his ability to work. Consolidated Finding # 23. He was also aware that the employer had work available for him once he had received medical clearance. *See* Consolidated Finding # 15. However, according to his own testimony, the claimant had already decided not to return to work for the instant employer by the time he received medical clearance. Because the claimant chose not to accept the work offered by the employer, and as there was no indication from the record that the work the employer offered the claimant was unsuitable, he was not in total or partial unemployment under G.L. c. 151A, §§ 29 and 1(r), for the week of September 25, 2022, through October 1, 2022.

We, therefore, conclude as a matter of law that the claimant was not eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r), during the weeks of September 18, 2022, through October 1, 2022. We further conclude that the claimant resigned from his employment and he did not meet his burden to show that he left for good cause attributable to the employer or for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week of September 18, 2022, 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 - June 14, 2024



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
(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