

Payments in the severance agreement equal to eight weeks of base pay, were remuneration under G.L. c. 151A, § 1(r)(3), because the claimant did not have to sign a release of claims to receive the money. Bonuses and profit from sales of stock options the claimant received were also remuneration but were attributable to weeks during which he had already been disqualified. Other severance payments were not remuneration under G.L. c. 151A, § 1(r)(3), because the claimant had to sign a release of claims to receive the lump sum payment.

**Board of Review
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Issue ID: 0080 2143 22

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 for the period between May 7, 2023, and July 1, 2023. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his position with the employer on May 4, 2023. He filed a claim for unemployment benefits with the DUA, which was determined to have an effective date of May 7, 2023. On May 31, 2023, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not eligible to receive benefits from May 7, 2023, through July 1, 2023. 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 June 23, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had received severance payments for the period at issue and, thus, he was not in unemployment and was disqualified under G.L. c. 151A, §§ 29 and 1(r)(3), for the eight weeks identified in the May 31, 2023, determination. 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 evidence about payments made to the claimant following his separation. Only the claimant 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 is subject to disqualification for the period between May 7, 2023, and July 1, 2023, because he received disqualifying remuneration in the form of severance pay covering that period of time, 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 are set forth below in their entirety:

1. On June 23, 2020, the claimant started working full time for the employer [sic] a Principal Software Engineer.
2. The claimant was paid a base annual salary of approximately \$286,000.
3. The claimant was paid two times per month by the employer.
4. The claimant's gross weekly pay was approximately \$5,500.
5. The claimant's last date of work for the employer was on May 4, 2023. At this time, the claimant was discharged for a lack of work.
6. The employer's establishment officially was supposed to provide the claimant with specific allotments of vacation time and sick time. The claimant does not know the official allotment of vacation and sick time that the claimant was granted by the employer. The employer's establishment unofficially was flexible with the claimant using vacation time and sick time as needed. Vacation and sick paid time were loosely accounted for at the employer's establishment. The employer allowed the claimant to take off as much time needed from work as needed for either sick time or vacation time and continued to pay the claimant his regular wages as the claimant was a salaried worker. The claimant's prior paystubs did not list sick or vacation time that was used. The claimant does not know how much sick time or vacation time wages that the claimant still had available upon separation from work.
7. Upon separation from work, the employer provided the claimant with two lump sum extra payments.
8. Upon separation from work, the claimant signed a severance agreement as requested by the employer. The severance agreement listed the following in part:

"The Company will pay you for all accrued, but unused vacation time and compensation through the Separation Date." "...regardless of whether you sign the Agreement set forth in Part II of this letter, the Company will as a courtesy: (a) pay your base salary (less applicable withholdings) for the period beginning on the Separation Date and ending on July 3, 2023, (b) to the extent you receive medical, dental and/or vision insurance coverage as of the Separation Date, pay you an additional lump sum in an amount equal to 1 month of COBRA premiums representing your COBRA premiums due for June 2023 (subject to applicable tax withholdings)."..."The amounts described in this section will be paid to you no later than fifteen (15) days after your Separation Date."

"2. To the extent you receive medical, dental and/or vision insurance coverage as of the Separation Date, you shall continue to receive those benefits through the last day of May 2023."

“Part II”

“2. Severance Benefits. In exchange for your timely execution and non-revocation of this Agreement, the Company is prepared to offer you the following severance benefits:

Severance Pay. The Company shall pay you severance pay ("Severance Pay") consisting of a lump sum payment in the amount of \$USD 51,865.00, less applicable withholdings and deductions. By signing below, you authorize the Company to pay Severance Pay via direct deposit to the financial account on file. The Company shall pay Severance Pay within twenty one (21) days of the Effective Date (defined below).

Health Benefits. To the extent you are eligible for continuing medical and dental coverage under COBRA, the Company will pay you an additional lump sum in an amount equal to 4 months of the applicable COBRA premiums, subject to applicable tax withholdings. You may, but are not obligated to, use this lump sum payment toward the cost of COBRA premiums. You are responsible for paying COBRA premiums directly.

Outplacement. We would also like to offer you outplacement services as determined by the Company to support your search for new employment.

"Kickstart Allowance": In addition, you will be eligible to receive a one-time, lump sum payment of \$1000 USD, less applicable withholdings and deductions, called the "kickstart allowance."

The benefits in this Section 2 are offered in consideration of your execution of this Agreement and are in addition to any statutory or contractual amounts to which you are already entitled.”

9. In the past, the claimant was not issued any bonus payments from the employer.
10. In the past, the employer gifted stock options to the claimant. In the past, the claimant was issued period grants of stocks from the employer. On May 5, 2023, the claimant sold 204.866 employee shares on the open market for a gross profit of \$11,738.80. The net amount that the claimant received from the sale of the stocks was \$6,701.46. After the claimant sold the stock options on May 5, 2023, the claimant no longer had any stock with the employer’s company.
11. On May 15, 2023, the employer issued the claimant an earnings statement listing the following information:

	Hours Worked	Gross Pay	Non Cash Taxable Benefits	Employee Taxes	Deductions	Net Pay
Current	0.00	49,162.60	39.15	21,622.22	147.04	27,502.11
YTD	724.88	177,166.26	352.35	63,769.59	25,523.18	87,982.26

Earnings					Employee Taxes		
Description	Dates	Hours	Rate	Amount	YTD	Description	YTD
Cash Election Allowance			0	0	375.00	OASDI	2,049.69
Corporate Bonus	05/01/2023 - 05/04/2023	0	0	2,027.60	2,027.60	Medicare	711.29
Expense	05/01/2023 - 05/04/2023	0	0	108.77	108.77	Federal Withholding	16,038.46
Lifestyle Spending Account	05/01/2023 - 05/04/2023	0	0	0.00	750.00	State Tax - MA	2,715.73
RSU			0	0	27,211.97	MAPFL - MAPFL	37.03
Regular Salary			0	0	99,666.69	MAPML - MAPML	70.02
Termination Pay	05/01/2023 - 05/04/2023	0	0	47,135.00	47,135.00		
Earnings				49,271.37	177,275.03	Employee Taxes	21,622.22

Non Cash Taxable Benefits				Deductions			
Description	Amount	YTD		Description	Amount	YTD	
Life - ER	39.15	352.35		401K	4.97	4,779.22	
				Dental	50.00	450.00	
				FSA Health	91.37	822.33	
				Stock Offset		19,420.60	
				Vision-EE	0.70	6.30	
Non Cash Taxable Benefits	39.15	352.35		Deductions	147.04	25,523.18	

Employer Paid Benefits			
Description	Amount	YTD	
Health Insurance - ER	822.35	7,401.15	
Employer Paid Benefits	822.35	7,401.15	

		Federal	State
Marital Status	Married filing jointly (or Qualifying widow(er))		
Allowances		0	3
Additional Withholding		200	0

Payment Information				
Bank	Account Name	Account Number	USD Amount	Amount
Bank	Bank *****0846	*****0846	27,502.11	USD

12. The May 15, 2023, earnings statement includes the claimant's regular pay until July 3, 2023. The claimant assumes that the employer included the claimant's unused vacation pay, and unused sick pay into this earnings statement along with his regular pay as vacation pay and sick pay do not have a specific line item on the earnings statement. The claimant does not know what the details are of the line items listing Corporate Bonus in the amount of \$2,027.60 or the \$108.00 listed under the Expense line item.
13. On the May 15, 2023, earnings statement, the employer issued the claimant a gross lump sum payment of \$49,271.37. The employer did not require the claimant to sign a release of claims to receive this payment. This earnings statement lists a gross amount of \$47,135 next to the line-item termination pay.
14. The employer issued the claimant two earnings statement on May 31, 2023 (hereinafter 1st May 31, 2023, earnings statement and 2nd May 31, 2023, earnings statement).
15. On the 1st May 31, 2023, earnings statement, the following information is listed:

	Hours Worked	Gross Pay	Non Cash Taxable Benefits	Employee Taxes	Deductions	Net Pay
Current	0.00	60,975.40	0.00	18,485.71	0.00	42,489.69
YTD	724.88	244,843.12	352.35	84,211.56	30,268.38	130,471.95

Earnings						Employee Taxes			
Description	Dates	Hours	Rate	Amount	YTD	Description	Amount	YTD	
Cash Election Allowance			0		375.00	OASDI	0.00	9,932.40	
Corporate Bonus	05/16/2023 - 05/31/2023	0	0	9,110.40	11,138.00	Medicare	1,279.00	3,931.00	
Expense			0		108.77	Federal Withholding	13,414.59	57,157.89	
Lifestyle Spending Account			0		750.00	State Tax - MA	3,792.12	12,680.83	
RSU			0		33,913.43	MAPFL - MAPFL	0.00	176.22	
Regular Salary			0		99,666.69	MAPML - MAPML	0.00	333.22	
Severance	05/16/2023 - 05/31/2023	0	0	51,865.00	51,865.00				
Termination Pay			0		47,135.00				
Earnings				60,975.40	244,951.89	Employee Taxes	18,485.71	84,211.56	

Non Cash Taxable Benefits			Deductions		
Description	Amount	YTD	Description	Amount	YTD
Life - ER		352.35	401K		4,779.22
			Dental		44.73
			FSA Health		450.00
			Health-EE		822.33
			Stock Offset		24,165.80
			Vision-EE		6.30
Non Cash Taxable Benefits	0.00	352.35	Deductions	0.00	30,268.38

Employer Paid Benefits		
Description	Amount	YTD
Health Insurance - ER		7,401.15
Employer Paid Benefits	0.00	7,401.15

	Federal	State
Marital Status	Married filing jointly (or Qualifying widow(er))	
Allowances	0	3
Additional Withholding	200	0

Payment Information			
Bank	Account Name	Account Number	USD Amount
Bank	Bank *****0846	*****0846	42,489.69 USD

16. On the 1st May 31, 2023, earning statement, the employer lists a line item title “Severance Payment” and a gross amount of \$51,865.00. The employer required the claimant to sign a release of claims to receive the \$51,865.00 severance payment from the employer. On May 15, 2023, the claimant signed and submitted the release of claims to the employer electronically.
17. The employer calculated the amount the claimant received from the severance payment based upon years of service.
18. On the 1st May 31, 2023, earnings statement, the employer also listed a gross amount of \$9,110.40 next to a line item titled “Corporate Bonus.” The claimant does not know specifically what this payment amount is for and assumes it may be a cobra payment issued to the claimant or a kickoff payment issued to the claimant as outlined in the severance agreement.
19. On the 2nd May 31, 2023, earnings statement, the following information is listed:

Earnings						Employee Taxes			
Description	Dates	Hours	Rate	Amount	YTD	Description	Amount	YTD	
Cash Election Allowance			0		375.00	OASDI	0.00	9,932.40	
Expense			0		108.77	Medicare	97.17	2,652.00	
Lifestyle Spending Account			0		750.00	Federal Withholding	1,519.13	43,743.30	
RSU	05/16/2023 - 05/31/2023	0		6,701.46	33,913.43	State Tax - MA	339.96	8,888.71	
Regular Salary			0		99,666.69	MAPFL - MAPFL	0.00	176.22	
Termination Pay			0		47,135.00	MAPML - MAPML	0.00	333.22	
Earnings				6,701.46	181,948.89	Employee Taxes	1,956.26	65,725.85	

Non Cash Taxable Benefits			Deductions		
Description	Amount	YTD	Description	Amount	YTD
Life - ER		352.35	401K		4,779.22
			Dental		44.73
			FSA Health		450.00
			Health-EE		822.33
			Stock Offset	4,745.20	24,165.80
			Vision-EE		6.30
Non Cash Taxable Benefits	0.00	352.35	Deductions	4,745.20	30,268.38

Employer Paid Benefits		
Description	Amount	YTD
Health Insurance - ER		7,401.15
Employer Paid Benefits	0.00	7,401.15

		Federal	State
Marital Status	Married filing jointly (or Qualifying widow(er))		
Allowances		0	3
Additional Withholding		200	0

Payment Information				
Bank	Account Name	Account Number	USD Amount	Amount
Bank	Bank *****0846	*****0846		0.00 USD

20. On the 2nd May 31, 2023, earnings statement, line item “RSU” means “Restricted Stock Units.” The amount of \$6,704.46 next to line item “RSU” represents the net amount that the claimant received for selling the 204.866 stock options on the open market.
21. The claimant filed an initial unemployment claim effective the week beginning May 7, 2023.
22. On May 31, 2023, the Department of Unemployment Assistance (DUA) issued a Notice of Disqualification denying the claimant under Section 1(r)(3) of the Law from the week beginning May 7, 2023, through the week ending July 1, 2023. On the Disqualification, the DUA wrote: “You are not entitled to benefits beginning 5/7/2023 through 7/1/2023. As a result, the benefit year will be extended by 8 week (s) with a new benefit year expiration date of 6/29/2024” and “You are eligible to receive your base salary thru 07/03/2023, regardless of whether you signed the severance agreement/release of claims for the supplemental severance payment.” The claimant appealed the Notice of Disqualification.

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. As discussed more fully below, we agree with the review examiner’s legal conclusion that the claimant is not entitled to benefits for the period between May 7, 2023, and July 1, 2023.

In order to be eligible for unemployment benefits beginning May 7, 2023, the claimant must have been in a state of unemployment. Because there was no dispute he separated from the employer

on May 4, 2023, and did not provide any services for the employer after that date, the question is whether the claimant was in total unemployment. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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.

However, as the claimant received multiple payments from the employer after separating, the issue before the review examiner, and now the Board, is whether the claimant received any remuneration which could be attributable to the period beginning May 7, 2023. Under G.L. c. 151A, § 1(r)(3), remuneration is defined, in relevant part, as the following:

. . . any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses . . . and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice

As a general rule, G.L. c. 151A, § 1(r)(3), disqualifies a claimant from benefits while receiving severance pay. However, the Massachusetts Appeals Court has held that payments made to a severed employee in return for a general release of claims was not disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r)(3), but rather consideration in exchange for that release. White v. Comm’r of Department of Employment and Training, 40 Mass. App. Ct. 249, 252–253, *further app. rev. den’d.* (1996).

In Part I of the severance agreement, the employer stipulated it would pay the claimant’s base salary for the eight-week period between May 4, 2023, and July 3, 2023, regardless of whether he signed the severance agreement. Consolidated Finding # 8. As these payments were not contingent upon the claimant’s execution of the severance agreement, we conclude that the holding of White does not apply. Therefore, the claimant is not entitled to benefits for the eight weeks between May 7, 2023, and July 1, 2023, because the payments awarded to him in Part I of the severance agreement constitute disqualifying remuneration under G.L. c. 151A, § 1(r)(3).

In addition to the aforementioned pay, the claimant’s earnings statements show that he received two “Corporate Bonus” payments. Consolidated Findings ## 12 and 18. Bonuses awarded to employees are also generally considered disqualifying remuneration under G.L. c. 151A, § 1(r)(3). As these bonuses appear unrelated to the severance agreement, and, absent further information about the conditions under which they were awarded, they constitute disqualifying remuneration. However, we can only attribute the two sums to the weeks in which they were issued: May 14, 2023, and May 28, 2023. *See* Consolidated Findings ## 11, 12, and 15. As we have already determined that the claimant is not entitled to benefits during those two weeks, his receipt of these bonus payments does not further alter his eligibility for benefits.

Similarly, the findings provide that the claimant received payment for the sale of employee stocks following his separation from employment. Consolidated Finding # 20. Following his separation, the claimant sold 204.866 employee shares that he had been granted over the course of his employment for a gross profit of \$11,378.80 and a net profit of \$6,701.46. Consolidated Finding # 10. Because the record indicates that the shares were awarded to the claimant as consideration for services he performed, the value of the stocks, including any profit from their sale, also constitutes disqualifying remuneration under G.L. c. 151A, § 1(r)(3). However, absent further information about the award of these shares, we conclude that the remuneration he received from the sale of those stocks is properly attributed only to the week of April 30, 2023, through May 6, 2023, as that is the week during which the claimant actualized that profit. *See* Consolidated Finding # 10. Because the claimant filed his claim effective the following week, the week beginning May 7, 2023, the remuneration he received from the sale of his stocks does not have any impact on his unemployment status under G.L. c. 151A, § 1(r)(2).

In Part II of the severance agreement, however, the employer offered the claimant additional payments it termed “Severance Pay” and a “Kickstart Allowance” in exchange for the claimant’s execution of the severance agreement. Consolidated Findings ## 8 and 16. As the severance agreement incorporated a release of claims against the employer, we conclude that neither payment constitutes disqualifying remuneration pursuant to the holding in White. 40 Mass. App. Ct. at 252–253. Accordingly, the claimant’s receipt of the severance pay and kickstart allowance enumerated in Part II of the severance agreement also does not have any impact on his unemployment status under G.L. c. 151A, § 1(r)(2).

We, therefore, conclude as a matter of law, that the review examiner’s conclusion that the claimant was not in unemployment under G.L. c. 151A, §§ 29 and 1(r) between May 7, 2023, and July 1, 2023, is free from error of law and based on substantial and credible evidence, because the claimant received disqualifying remuneration attributable to that eight-week period.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning May 7, 2023, through July 1, 2023. Pursuant to G.L. c. 151A, § 1(c), his benefit year shall be extended by eight weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2024



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