



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-117413-CTRM (Aug. 25, 2011) – A majority of the Board concluded that the claimant, the president and partial owner of two corporations, was not entitled to benefits under the doctrines set forth under White or State Street Bank. Unlike the claimant in White, who was a low-level employee with no control over his pending layoff, and the claimants in State Street, who had no information to assess their vulnerability to layoff, the claimant had complete information and control over his separation from employment. *[Note: The District Court affirmed the Board of Review.]*

**BR-117413-CTRM**  
**BR-117414-CTRM**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits. Benefits were denied on the ground that the claimant left work voluntarily pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on May 8, 2008. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on June 11, 2008. 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.

In an order dated May 4, 2009, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the same review examiner to take additional evidence and issue consolidated findings of fact. Both the claimant and the employer attended the remand hearing. The review examiner filed his consolidated findings of fact with the Board. In decisions rendered on March 9, 2010 (BR-109925-CTRM) and March 12, 2010 (BR-109924-CTRM), the Board affirmed the denial of benefits. Subsequently, the claimant appealed the Board's decisions once again to the District Court.

On December 30, 2010, the District Court remanded the cases back to the Board of Review for further proceedings to consider whether the claimant's separation from employment was based upon a reasonable belief that his employment would soon be terminated by any means. The District Court further ordered that the appeals involving both employers be consolidated. Consistent with this order, we remanded the consolidated case to the review examiner to take additional evidence concerning the specific issue framed by the District Court. Both parties attended the remand hearing. Thereafter, the review examiner issued his second set of consolidated findings of fact.

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

The issue on appeal is whether the claimant, a co-owner of two related close corporations who separated from his job when he sold his interest in the companies and resigned as president, made the sale based upon an objectively reasonable belief that his employment would soon have terminated in any case if he did not do so.

### Findings of Fact

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

1. The claimant was President of two corporations formed to equip and operate a plumbing and heating business from September 1, 2007 until voluntarily resigning to sell his interest in the corporation to his brother on April 16, 2008.
2. The claimant was paid \$1,700 per week to operate the plumbing business. He held 25 of 100 shares issued by the corporation. The claimant's brother also held 25 shares. The remaining 50 shares were held by their father's estate.
3. The claimant's employment ended when the claimant elected to sell his interests in the corporations to his brother as part of a buy-out. The claimant was not ousted by his brother, who held an equal number of shares.

4. The claimant agreed to the buy-out via signed agreement. The claimant and three others received 8.1 million dollars.
5. The claimant also opted to sell his interest in the businesses to his brother because of the cost of litigation between family members initiated by the claimant and costing \$50,000, and because his brother withdrew business generated by his real estate holdings representing 90% of the corporation's clientele.
6. The corporations were not dissolved or faced with bankruptcy.
7. At the time the claimant sold his interests, the corporations had gross sales of \$400,000 and the claimant received an annual salary of \$80,000.
8. Based on the above facts regarding the claimant's reasons for selling his interest in the corporation, the claimant's testimony that he believed the businesses would dissolve if he did not sell them was not credible. As testified by the claimant at the original hearing, he sold his interests in order to put an end to ongoing litigation between family members, and also testified that the sale of his interests would not have occurred but for the litigation. The purpose of unemployment benefits is to provide financial assistance to individuals who are thrown out of work through no fault of their own, not to salaried individuals of ongoing corporations who voluntarily sell their corporate holdings to end litigation and obtain millions of dollars in profits from the sale of them.

#### Ruling of the Board

The Board adopts the review examiner's second set of consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25(e), provides in pertinent part, as follows:

. . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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 District Court asks whether financial circumstances created an urgent, compelling and necessitous reason for the claimant to sell his interest in the corporations to his brother and to resign as president. The terms of the settlement agreement forced the claimant to resign as

president.<sup>1</sup> Therefore, we look closely at whether he was compelled to sign the settlement agreement, which ended the litigation with his brother and transferred the claimant's interests in the companies.

As stated in the District Court's Order, the Supreme Judicial Court has stated that the purpose of the unemployment laws is to provide temporary relief to those who are out of work through no fault of their own and to discourage those who are not truly compelled to leave by denying benefits to those who leave their jobs voluntarily. Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593 596 (1974). Raytheon involved a night shift factory assembler who lost her transportation to work and had no other means to get to work. Id. at 597. In a later case, the SJC also found departure from employment to be involuntary for urgent, compelling and necessitous reasons where a claimant could no longer perform her welding job due to her pregnancy, Fitzgerald v. Dir. of the Division of Employment Security, 382 Mass. 159 (1980); where a maid's severe skin infection seemed to be caused by her work environment, Carney Hospital v. Dir. of the Division of Employment Security, 382 Mass. 691 (1981); and where a laundry worker could not work her new hours because she had to be home to care for her child, Manias v. Dir. of Division of Employment Security, 388 Mass. 201 (1983). Thus, it has been established that health or domestic responsibilities may constitute urgent, compelling, and necessitous circumstances, under G.L. c. 151A, § 25(e).

However, the decision to leave work merely to maximize one's financial benefit and minimize one's financial risk does not constitute a compelled separation from employment. In Crane v. Comm'r. of the Department of Employment and Training, the SJC refused to award unemployment benefits to a department store sales associate who quit his job to avoid losing his supplemental security income (SSI) benefits. 414 Mass. 658, 661 (1993). The Court expressly rejected the claimant's argument that the financial harm and stress of losing his SSI benefits rendered his decision to leave involuntary. Id. Similarly, the Court in Jahn v. Dir. DES, 397 Mass. 61 (1986) (Hennesy, C.J., Francis X. Bellotti for the Division of Employment Security) found that a claimant's sale of a business merely because it had low profitability was not compelled and was a disqualifying voluntary separation under G.L. c. 151A, § 25(e)(1).

The claimant in the present appeal makes the same argument as the claimant in Jahn. He asks us to conclude that he was compelled to sell his portion of the businesses — for \$8.1 million — notwithstanding the business's \$400,000 gross sales and his \$80,000 salary at the time, because: the companies had lost the lion's share of their customer base; increased competition and the recession rendered the companies' prospects dim; his brother refused to pay \$600,000 that the claimant believed he was due; and the continued litigation would have cost \$50,000.<sup>2</sup> While

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<sup>1</sup> The settlement agreement was introduced into evidence in the June, 2008 hearing as Exhibit 21. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

<sup>2</sup> Although not all in the findings, these were reasons asserted by the claimant during his sworn testimony at the remand hearing.

these may have constituted sound business reasons for selling the companies, we think that the \$8.1 million of sale proceeds speak for themselves and make clear that the various additional reasons as to why the claimant may also have been motivated to sell the business do not constitute urgent, compelling, and necessitous reasons, under G.L. c. 151A, § 25(e). *See Id.* (evidence that the claimant continued to draw a salary while the business was in operation and that there was a net gain from the sale of the business supported the conclusion that the sale of the business was not compelled as an economic matter.)

We also consider whether the claimant is entitled to unemployment benefits under the White standard. In White v. Dir. of the Division of Employment Security, the SJC held that a claimant who leaves employment based upon a reasonable belief that his employment would soon be terminated is entitled to benefits, because his decision to leave cannot fairly be regarded as voluntary under G.L. c. 151A, § 25(e)(1). 382 Mass. 596, 598-599 (1981). The claimant in the White case was a low-level employee who, so far as the record reveals, had no ownership interest in the company where he worked and no control over the pending layoff. That decision was made by those who ran the company. Similarly, in Morillo v. Dir. of Division of Employment Security, 394 Mass. 765, 766 (1985), the first and last steps in the termination process were taken by the employer. In State Street Bank & Trust Co. v. Deputy Dir. of Division of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006), the employer's choice to withhold information from the claimants regarding their individual vulnerability to a possible upcoming layoff was the basis for creating a reasonable fear of involuntary separation. The employees' lack of control over their ability to influence or even predict their employment tenure in these cases is what rendered their leaving involuntary.

In contrast, the claimant in the present appeal had complete information and control over the termination of his employment. For this reason, we conclude that he is not entitled to benefits under White and its progeny.

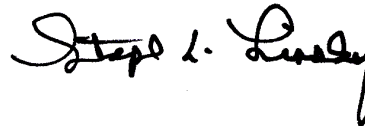
We, therefore, conclude as a matter of law that the claimant's separation from employment was not involuntary within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is ineligible for benefits for the week ending April 19, 2008 and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - October 17, 2011**



John A. King, Esq.  
Chairman



Stephen M. Linsky, Esq.  
Member

Member Sandor J. Zapolin declines to sign the majority opinion.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**  
**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – September 26, 2011**