



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

In the matter of:

Appeal number: **BR-117158**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

S.S. # _____
Hearings Docket # _____

EMP. _____

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Michele Lerner, a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from his position with the employer on March 7, 2010. He filed a claim for unemployment benefits with the DUA and was awarded benefits. On July 29, 2010, the agency sent a Notice to Claimant of Disqualification and Constructive Deduction Redetermination and Overpayment, informing the claimant that he was not entitled to benefits and had been overpaid \$2,109.00. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and denied benefits in a decision rendered on December 14, 2010.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and provided the parties with an opportunity to submit written reasons for agreeing or disagreeing with the review examiner's decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who quit his job after his work hours were cut from five shifts to four shifts and who made his concern about his hours known to his manager, whereupon his hours were cut to three shifts, had good cause for leaving work attributable to the employer.

Findings of Fact

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

1. The claimant worked, as a cashier, for the employer, a donut shop, from May 28, 2009 through March 7, 2010.
2. The claimant was a full time employee. He was paid \$8.25 an hour. He also had a part time job where he worked 16 hours a week.
3. On March 7, 2010, when the claimant reported for work the manager was finishing his shift and spent sometime pointing out his dissatisfaction with the claimant's attention to certain parts of his job as a "closer." This including failing to clean certain areas and rotating merchandise in the fridge. The claimant found the manager's way of showing him what he wanted to be rude.
4. When they left the fridge the manager told the claimant that if he was not able to do the work he had "a girl" who was ready to work all day. The claimant told him that he was there because he was able to work.
5. The manager then took the claimant to the front of the store and showed him how to clean the areas which had not been adequately cleaned. The claimant did not like his tone of voice while he did this.
6. Some customers came in and the claimant went to the register to help them.
7. After about a half hour the manager asked the claimant if he had checked the schedule which had been posted the prior Friday. The claimant went to look at the schedule and saw that he was scheduled for 4 instead of 5 shifts.
8. The claimant asked why his hours had been cut. The manager told him that those were all the hours he had for him. He told the claimant that he had "a girl" waiting to be hired if the claimant did not want those hours. The claimant again asked why his hours had been cut. He complained that he should not be penalized because the manager decided to hire a new person.
9. The manager told the claimant to get away from him. He told him he could quit if he was not happy. He then erased another day off of the schedule.

10. The claimant waited awhile for the manager to calm down and continued to work at the register. The manager then came over and told him that he took away the claimant's hours for Monday and that he was therefore [sic] his next day of work would be Wednesday. He told the claimant that if he did not like this it was not his problem and that if the claimant complained about it he would call the police. He told the claimant that if he did not do what he told him to do more of his hours would be cut.
11. The manager left for the day.
12. The claimant called the owner and complained that the manager had cut his hours. The owner told him that he himself did not make the schedules but, as he was ultimately responsible for everything in the store, he would look into the matter. The claimant indicated that he would finish his shift and wait for the owner to review the matter.
13. The claimant left work a short time later without saying anything to anyone, before his shift was over. His co-worker called the manager who called the owner. The manager went into the store to cover the claimant's shift.
14. The owner left one or two messages for the claimant asking that he call him back. He placed the claimant on an administrative suspension while he investigated why the claimant had left work without notice, on or about March 8, 2010.
15. The claimant was laid off from his second job on March 6, 2010. This job paid less than his job with the present employer.
16. The claimant filed his first sequence claim for unemployment benefits, on March 8, 2010.
17. The claimant did not return the owner phone calls, until on or about March 11, 2010. At this time he requested documentation that his employment had terminated so that he could present it to a state agency from which he was requesting assistance. The owner told him that he still had a job if he wanted it. He explained that if the claimant was willing to return to work he would have to first serve a week of disciplinary suspension for having walked off the job without notice, on March 7, 2010. The claimant agreed to this.
18. The claimant was put on the schedule, for March 21, 2010.
19. The claimant came into work, on March 21, 2010. He checked the schedule and saw that he was still only scheduled to work 4 days a week. He abandoned his job over this issue.
20. The claimant was paid partial benefits plus a \$25 Federal Supplemental payment each week from the week, ending March 20, 2010, through the week, ending June 19, 2010, for a total payment of \$2,109.

21. On July 29, 2010, DUA issued a Notice to Claimant of Disqualification and Constructive Deduction Redetermination and Overpayment which stated that the claimant was disqualified under Section 25(e)(1) of the law for the week ending March 13, 2010 and until he had 8 weeks of work and in each week earned an amount equal to or in excess of his weekly benefit rate. The notice also stated that the claimant was overpaid \$2,109 for the weeks ending March 20, 2010 through June 19, 2010. In addition the notice stated that the overpayment was due to an error without fraudulent intent.

Ruling of the Board

The Board adopts the review examiner's 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)(1), provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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 . . .

Under this section of law, the claimant has the burden to show that he is entitled to benefits. Following the hearing, the review examiner concluded that the claimant had not carried his burden. The review examiner found that the claimant did not have good cause for leaving employment because the reduction in his hours was merely temporary. We disagree with this characterization of the facts. The claimant started his job in May of 2009 as a full-time employee. On March 7, 2010, a manager told the claimant that his number of shifts had been reduced from five per week to four. After inquiring as to why his hours had been reduced, the manager erased another day from the claimant's schedule, leaving him with three shifts. The manager also told the claimant that it was possible that more hours could be cut. At no point after March 7, 2010 was the claimant assigned a full-time, five-shift work week such as the one he had been working until that date. Moreover, at no time was the claimant told that the reduction in hours was going to be temporary.

An employer's unilateral decision to change the underlying terms of employment may render a job unsuitable and give a claimant good cause attributable to the employer for resigning. *See e.g. Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 (1981). We have previously held that a drastic decrease in the amount of work hours assigned to a claimant was good cause to quit. *See BR-110763 (March 29, 2010)* In this case, the claimant's number of hours was initially decreased by forty per cent. One shift was subsequently restored, but it still left him with a part-time schedule of hours. It is not clear whether the change in hours was temporary, but the employer's actions, including criticizing the claimant's performance, hiring a new employee, and repeatedly taunting the claimant with threats of possible further cuts

in his hours, gave the claimant a reasonable belief that he was no longer going to be working full-time. Since the employer unilaterally changed the terms of the claimant's employment to his detriment, we conclude that, under the facts of this case, the claimant had good cause to resign.

We also disagree with the review examiner's conclusion that the claimant did not make adequate efforts to preserve his employment. The claimant made his concerns about his reduced schedule known to his manager. The manager's immediate response was to remove another of the claimant's shifts. When the claimant tried to return to work on March 21, 2010, he still did not have a full-time schedule. We think that the employer had enough time to address the claimant's problem. Nothing the employer did on March 21 gave any more indication that the change in hours was temporary. As we have stated before, when an employee raises his concerns with his supervisor, who then responds repeatedly that nothing will be done to address them, he has satisfied the job preservation requirement imposed on those who quit voluntarily. See BR-111647 (Sept. 28, 2010); Kowalski v. Director of the Division of Employment Security, 391 Mass. 1005 (1984).

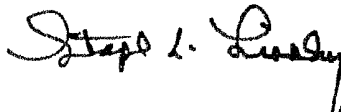
We, therefore, conclude as a matter of law that the claimant quit his job for good cause attributable to the employer when the employer changed the terms of his employment by significantly reducing the claimant's work hours.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 8, 2010, and for subsequent weeks, if otherwise eligible. He has not been overpaid.

BOSTON, MASSACHUSETTS
DATE OF MAILING - May 9, 2011



John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

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- June 8, 2111

COMMONWEALTH OF MASSACHUSETTS
GENERAL LAWS CHAPTER 151A, SECTION 42
APPEALS TO THE COURTS

"The commissioner or any interested person aggrieved by any decision in any proceeding before the board of review may obtain judicial review of such decision by commencing within thirty days of the date of mailing of such decision, a civil action in the district court within the judicial district in which he lives, or is or was last employed, or has his usual place of business, and in such proceeding, every other party to the proceeding before the board of review shall be made a defendant. If an appeal to the board of review is denied pursuant to subsection (a) of section 42A, an appeal may be obtained by commencing such action in the proceeding in which such action was denied. The plaintiff shall state the cause of the appeal and the relief sought by the plaintiff within thirty days of the date of the denial of the appeal. The plaintiff shall file an answer to the complaint, except by way of answer, file in court a certified copy of the record of the proceeding under review.

Except as otherwise provided in this section, or if inconsistent with the provisions of this section, such proceeding shall be governed by the Rules of Civil Procedure for the district courts and the municipal court of the city of Boston. The findings and decisions of the board shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. Any proceeding under this section shall be given precedence over all other civil cases.

An appeal may be taken from the decision of the justice of the district court directly to the appeals court. Notice of appeal shall be filed in the office of the clerk of the district court within thirty days after entry of the judgment by the clerk. The completion of such appeal shall be made in accordance with the Massachusetts Rules of Appellate Procedure. Benefits shall be paid or denied in accordance with the decision of the trial court justice during the pendency of such appeal."

Copies need to be done

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IMPORTANT
This notice contains information about your rights or obligations, and should be translated immediately. If you need a translator, ask for a listing of translation services at your DUA office.

ВАЖНОЕ СООБЩЕНИЕ
В этом сообщении содержится информация о Ваших правах и обязанностях, и оно должно быть срочно переведено Вам. Если Вам нужен переводчик, попросите список переводческих компаний в своем DUA офисе.

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Este aviso incluye información sobre sus derechos y obligaciones, y debe traducirse de inmediato. Si necesita un traductor, solicite el listado de servicios de traducción en la oficina de la DUA correspondiente.

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Questo avviso contiene informazioni sui Suoi diritti ed obblighi e deve essere tradotto immediatamente. Se ha bisogno di un traduttore, chieda l'elenco dei servizi di traduzione presso la DUA.

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ສຳຄັນ
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ສຳຄັນ
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Nót sa a genyen enfòmasyon sou dwa w oubyen obligasyon ke ou genyen, epi ou fèt pou ou fè tradwi l kounyè a. Si ou bezwen an moun ki pou tradwi pou ou, mande ou lis li ki genyen sèvis ke yo ofri pou tradiksyon nan biwo DUA ke ou koun ale a.

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重要
本通知包含有關於下權利或義務的資訊，應即刻翻譯。如果閣下需要翻譯人員，請到閣下的DUA辦事處要求一份翻譯社的名單。