



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-113515-A**

CLAIMANT:



EMPLOYING UNIT APPELLANT:



Introduction and Procedural History of this Appeal

The employer appeals a decision by Jodi Ferullo, a review examiner of the Division of Unemployment Assistance (DUA), to award the claimant benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from her position with the employer on June 26, 2009. She filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on January 5, 2010. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 10, 2010.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to make additional findings of fact from the record. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the employer's appeal, and the consolidated findings of fact.

The issue on appeal is whether the claimant caused her own unemployment by failing to notify her employer of her decision to resume her position after the summer holiday.

Findings of Fact

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

1. The claimant worked as a teacher's assistant for the employer, a daycare facility, from September 3, 2008 until becoming separated from employment on August 24, 2009.
2. The claimant was hired for her position by the owner. [The claimant was hired to work thirty five hours per week.] The claimant was informed that she would be paid \$370 per week and that later in the year she would receive an increase in pay based upon her job performance. The claimant was not informed as to the amount of the increase.
3. The claimant had a contract with the employer indicating that she would be working during the school year beginning in September 2008. The claimant signed that contract with the employer.
4. When the claimant was hired for her position she informed the owner that during the vacation period she would be going to her country, the Dominican Republic, whereupon the owner indicated that it would not be a problem. The employer normally had some work available during the vacation period. (The vacation period began after the school year ended in June, until school began again during the first or second week of September.)
5. In March 2009, the owner offered the claimant an additional hour of work each day. The claimant was informed that she would be paid \$450 per week. The claimant accepted the additional hours, whereupon her salary was increased.
6. The claimant's last day at work for the employer was June 26, 2009, because it was the last day of regular classes.
7. On June 26, 2009 the owner met with the claimant to discuss what would be taking place for the next school year. The owner informed the claimant that she was happy with her performance. The owner asked the claimant if she wanted to return to work for the employer for the next school year. (The claimant asked the owner to decrease her hours back to thirty five hours per week, but continue to pay her \$450 per week.) (The claimant asked for the decrease in hours because she was studying English and she did not have enough time to get her children, bring them home and get to her English

class.) The owner informed the claimant that she could not provide her with a decrease in hours with increased pay, because three children had left the facility and she only had seven children. The claimant informed the owner that she would think about whether she would return. The owner informed the claimant that she would be traveling to Mexico on vacation and that the claimant could notify her of her decision by leaving a message. (At no time on June 26th did the owner instruct the claimant to contact her within two weeks as to whether she would be returning to work.)

8. (At no time during the June 26th meeting did the owner agree to hold the claimant's position open for the claimant until she returned in September 2009. The owner and the claimant concluded the meeting with the indication that the claimant would think about it, whereupon the claimant was free to accept or reject the employer's offer of June 26th.)
9. On June 26th, the owner did not tell the claimant the date that school would start and there was no discussion as to when the claimant would sign the contract with the employer. (The claimant believed that she would be presented with the contract in September 2009, when she returned to work, because she had received the prior contract in September 2008 when she started.)
10. At no time did the employer provide the claimant with a contract for the school year starting September 2009.
11. The claimant traveled to the Dominican Republic on July 4, 2009.
12. The owner was in Mexico from July 4, 2009 through July 20, 2009.
13. On or around July 19, 2009, the claimant tried to reach the owner while she was in the Dominican Republic. The claimant got the employer's answering machine, which was in English. The claimant's primary language is Spanish. The claimant has a limited understanding of English. The claimant could not understand the instructions in English and was unable to figure out how to leave a message. Thereafter the claimant contacted her husband and asked him to contact the owner regarding when she would be returning from the Dominican Republic.)
14. (On or around August 1, 2009,) while the claimant was in the Dominican Republic, the claimant's husband had contacted the owner to inform her that the claimant would be returning from the Dominican Republic on August 29th (20 days prior to the start of the school year) and that they could talk. The claimant's husband left a message, but did not indicate why he was calling. The owner did not return the claimant's husband's call, because she felt that her dealings were [sic] with the claimant.

15. On August 5, 2009 and August 19, 2009 the owner interviewed another individual for the claimant's position. The owner hired that individual on August 24, 2009.
16. On August 25, 2009 the claimant's husband came to the owner's house and informed the owner that his wife would be returning to work. The owner told the claimant's husband that she had hired someone else because the claimant had not given her a response.
17. The claimant returned from the Dominican Republic on August 29, 2009.
18. The claimant contacted the owner on Sunday, August 30, 2009. The owner told the claimant that because she did not give her an answer she had hired someone else, because the claimant did not guarantee that she would return. The owner informed the claimant that if the new person did not work out she would call the claimant.
19. The employer's school year was scheduled to begin on September 9, 2009. (At no time did the claimant work for the employer after June 26, 2009.)
20. The claimant filed her claim for unemployment benefits on October 30, 2009. The effective date of the claim is October 25, 2009.

Ruling of the Board

The Board adopts the review examiner's 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)(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 . . .

The claimant, who worked on a school year schedule, met with the employer in June, 2009 to discuss her employment in the coming school year. The claimant asked for a cut in hours and an increase in pay. The employer offered a continuation of the current hours and pay. The claimant left the meeting without accepting the offer and indeed, never did signify her acceptance until after the offer had become stale and the employer had hired the claimant's replacement. The review examiner's findings establish that the employer did not insist that the claimant communicate a decision about continued employment in the fall by a date certain, but neither did the employer promise to hold the claimant's job for her indefinitely. The claimant was obligated

to act reasonably in the circumstances, knowing that the daycare would reopen regular classes in September, and the employer could not fill the position at the eleventh hour. By failing to communicate a decision until August 25, 2009, the claimant effectively informed the employer that she did not intend to return.

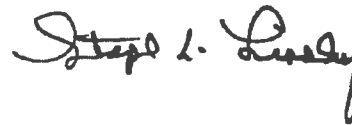
We, therefore, conclude as a matter of law that the claimant separated voluntarily, without good cause attributable to the employer under G.L. c. 151, §25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 31, 2009, and for subsequent weeks until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 8, 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- April 7, 2011