Board of Review
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Issue ID: 0002 2560 79

BOARD OF REVIEW DECISION

0002 2560 79 (Nov. 12, 2013) – Claimant's failure to make efforts to preserve her employment rendered her ineligible for benefits under G.L. c. 151A, § 25(e)(1), where she could have done so simply by asking the employer owner not to address her using foul language.

Introduction and Procedural History of this Appeal

The employer 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 reverse.

The claimant separated from her position with the employer on September 19, 2012. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 20, 2013. 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 April 22, 2013. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant resigned with good cause attributable to the employer, and therefore was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant was relieved of her obligation to make preservation efforts before leaving her job, since her complaint of harsh treatment was made against the company president himself.

Findings of Fact

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

1. The claimant started working as a fulltime administrative assistant for the employer, a construction/landscaping company, on September 19, 2012.

2. The employer paid the claimant an annual salary of approximately $50,000.00.

3. The claimant was scheduled to work as follows:

Mondays	8AM-5PM
Tuesdays	8AM-5PM
Wednesday	8AM-5PM
Thursdays	8AM-4PM
Fridays	8AM-3PM

4. The President was the claimant's supervisor.

5. The President holds the highest position within the employer's establishment.

6. The President allows cursing at the employer's establishment.

7. The Office Manager is the President's wife.

8. The Project Managers are the President's sons.

9. The President signed an Application and Certificate for Payment as he thought that the claimant had prepared the document correctly.

10. The claimant had incorrectly prepared the Application and Certificate for Payment. The claimant made a mistake.

11. The President was upset as the claimant had made a mistake on the Application and Certificate for Payment (Exhibit 12).

12. On January 18, 2013, the President called the claimant into his office for a meeting.

13. During the meeting, the President cursed at the claimant. The President told the claimant that the claimant had 'fucked up the invoice.'

14. The President told the claimant that the claimant had 'fucked up the invoice' as the president was upset with the claimant's mistake.

15. The claimant did tell the President not to speak to the claimant in such a manner.

16. The claimant subsequently decided to resign from the employer's establishment.

17. The claimant quit because the President cursed at her.

18. The claimant did not attempt to preserve her job before she quit.

19. The claimant did not speak with the Office Manager before she quit.

20. The claimant notified the employer by an e-mail that she was quitting.

21. The claimant also sent a letter of resignation by certified mail to the employer's establishment.

22. The claimant also had some concerns about nude photos displayed at the employer's establishment, the President commenting that the claimant looked nice, the employer's vendors commenting about the claimant's physical anatomy, the employer's vendor's inquisitions into the claimant's sex life, and the President displaying an antique gun while at work.

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.[1]

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 review examiner awarded benefits because she concluded that the employer's use of the word "fuck" in speaking to the claimant amounted to good cause for a voluntary separation, and that the claimant was not required to make preservation efforts before resigning because her complaint was against the owner himself. We reverse because the review examiner's decision is not consonant with governing law.

When a claimant alleges that a resignation was voluntary but for good cause attributable to the employer, it is generally her burden to show (a) that she left work with good cause attributable to the employer; and (b) that she took reasonable steps to preserve her employment unless the circumstances indicate that such efforts would have been futile or result in retaliation. *See* Tri-County Youth Programs, Inc. v. Acting Deputy Director of Division of Employment and Training, 54 Mass. App. Ct. 405, 410 (2002). Where, as here, the employee contends that she left employment because of conditions that justified her leaving, she must also prove "a

[1] The claimant was allowed to testify at length to a number of workplace conditions that might have amounted to a sexually offensive workplace. The record is clear, however, that the claimant denied that these aspects factored into her decision to resign, which she confirmed in unequivocal language to have been solely caused by the employer's use of the word "fuck" when chastising her for an error. We discern no error in the review examiner's decision to omit findings of fact on these points, in light of the claimant's own testimony which made them irrelevant.

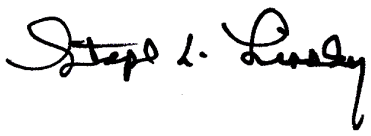
reasonable attempt to correct those conditions of employment which [she] now claims justified [her] leaving his employment" or that "such an attempt would have been futile." Kowalski v. Director of the Div. of Employment Security, 391 Mass. 1005, 1006 (1984).

At the outset, we are not persuaded that the use of offensive language in every workplace is *per se* ground for resignation. Workplace culture varies considerably, and language that would be patently improper in a school, for example, might not raise eyebrows on a construction site or between truck drivers. This issue need not be definitively resolved, however, since the claimant's case for benefits turns on her failure to communicate her concerns to the employer.

Assuming that the claimant was offended by this kind of language and unable to ignore or disregard it in the workplace, we can find no support in reported decisional law for the review examiner's sweeping assertion that preservation efforts are not necessary when the utterer of offensive language is the owner himself. Here, the claimant's obligation could have been as simple as a request that the owner not address her in foul language, followed by a reasonable opportunity for him to correct the matter.

We, therefore, conclude as a matter of law that the claimant is not entitled to unemployment benefits under G.L. c. 1 51A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 26, 2013, 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 - November 12, 2013

Stephen M. Linsky, Esq.
Member

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Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

LH/rh