

**Board of Review  
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**Issue ID: 0002 2744 49  
Claimant ID: 2017349**

## **BOARD OF REVIEW DECISION**

0002 2744 49 (July 31, 2014) – Claimant who resigned rather than sign an over-broad non-compete agreement was eligible for benefits under § 25(e)(1), because the detrimental change to his terms and conditions of employment rendered his job unsuitable.

### **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 affirm.

The claimant separated from his position with the employer on January 28, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 17, 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 December 26, 2013. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, 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 remanded the case to the review examiner to make subsidiary findings of fact on a contract that the employer required the claimant to sign in order to continue his employment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion, that the claimant left work for good cause attributable to the employer when the employer required the claimant to sign a non-compete agreement as a condition of continued employment, 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 and credibility assessments are set forth below in their entirety:

1. The claimant worked as a General Manager for the employer, an electrical company, from 5/12/08 until he separated from the employer on 1/28/13.

2. The claimant was hired to work full time, 7:30 AM to 3:30 PM, Monday through Friday with some weekends, earning \$25.00 an hour.
3. The claimant worked for the instant employer as an Electrical Division Manager before he got his license and became the General Manager. His brother had also worked for the instant employer as a plumber until he left the company in January of 2013 to start his own business.
4. When the claimant's brother left the company the employer asked the claimant whether he planned on staying with him or if he was going to go work for his brother.
5. The claimant informed the employer that he was going to continue working with him. The employer liked the claimant and thought he was a good employee.
6. While the claimant's brother worked for the employer, the employer agreed to and paid for the brother's liability insurance. The binder would contain the brother's name and address as the named insured because he had a plumbing license. (Exhibit 19) Once the claimant's brother left the brother renewed his policy with the same insurer under his business name with the claimant's name as the electrician.
7. The claimant's brother used the claimant's name to limit any risk that may result if he had made a mistake on the job and with the intention of using his brother as the electrician if he needed to in order to save money.
8. On 1/23/13, the employer was doing a job in [Name of Town], MA and needed a copy of the employer's insurance policy for the job. When he requested a copy of the binder the claimant's name appeared with his brother's business name under the named insured. (Exhibit 20)
9. On 1/24/13, the claimant was out at a funeral when he received a text message from the employer. The employer asked the claimant why his name was on his brother's insurance policy, as the electrician. The claimant explained that his brother needed to use his name as an electrician because the contractors on a job had requested he have an electrician. The claimant explained that he would be used only in case of an emergency. The employer told the claimant they would discuss it that following day when he comes in.
10. On 1/25/13, when the claimant arrived to work, he met with the employer. The employer informed the claimant he wanted the claimant to sign a contract indicating that he planned on staying with the employer and that he could not work for any one in his service area or potential service area before or after employment. The claimant informed his wife who is an attorney of this via a

text message sent at 7:38 AM on 1/25/13. (Exhibit 13) The employer told the claimant if he did not sign it he could no longer work there.

11. The claimant told the employer that he was uncomfortable with the wording of the contract he wanted him to sign and refused to sign it. The claimant felt if he signed the contract his electrical license would be useless. The claimant had asked the employer to take home the contract he wanted him to sign for his wife to review. The employer said no. The employer offered the claimant the opportunity to have his wife draw up an alternative contract. The claimant did not have his wife draw up an alternative contract because the employer was putting the responsibility of creating a contract on the claimant.
12. The claimant went home and did not return to work. The employer would not allow the claimant to return to work unless he signed a contract.
13. On Monday, 1/28/13, the claimant called the employer and asked him to reconsider the contract. The employer said no so the claimant informed him he would not be returning to work.
14. On 1/15/09 and 3/17/09 the claimant signed the employee manual which stated an employee must not accept any side work offer from an employer's lead customer.
15. The claimant left work because he believed that he had been discharged for refusing to sign a contract not to compete with the employer.

#### Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. Moreover, as discussed more fully below, we affirm the review examiner's legal conclusion that the claimant had good cause for leaving his employment.

As noted above, the review examiner initially concluded the claimant was entitled to benefits under G.L. c. 151A, § 25(e)(1), which 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 . . . No disqualification shall be imposed if such individual establishes . . . that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary . . .

Unilateral changes to the terms and conditions of employment can render a position unsuitable and provide an employee with good cause for leaving. *See, e.g., Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 (1981). *See also Manias v. Dir. of Division of Employment Security*, 388 Mass. 201 (1983). Here, the review examiner found that, as a condition of the claimant's continued employment, the employer required him to sign a contract that would have severely limited his ability to work as an electrician. The consolidated findings of fact reflect that this "non-compete" contract, which was not presented to the claimant until five years into his employment with the employer, stated that the claimant could not work for anyone in his own service area or "potential" service area before or after his employment. The review examiner characterized this contract as unreasonably broad. We agree, as the contract's restrictive terms were not limited in geographic scope or timeframe. The review examiner found that the claimant consulted with his attorney, who advised him not to sign the contract, and when the claimant requested permission to review the contract at home, the employer refused. Given that the claimant was presented with an ultimatum to sign the contract in order to continue employment, we concur with the review examiner that this constituted a material and adverse change to the terms and conditions of the claimant's employment.

We note that the consolidated findings of fact suggest that the employer gave the claimant an opportunity to draft an alternative contract, and he did not do so. However, the review examiner also found that the claimant believed it was unreasonable for the employer to put this responsibility on him. We think the claimant's concern was reasonable, as the very existence of such a restrictive contract would constitute a detrimental change to the terms and conditions of the claimant's employment. Asking the claimant to draft a contract that would impair him economically strikes us as unreasonable. In light of the claimant's frustrated efforts to review the contract in private, as well as his repeated expressions of discomfort with its restrictive language, we conclude that the claimant made reasonable attempts to preserve his employment prior to separating. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93-94 (1984) (an employee who voluntarily leaves employment due to an employer's action has the burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile).

We, therefore, conclude as a matter of law that voluntarily left employment for good cause attributable to the employer, within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending February 9, 2013, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - July 31, 2014**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
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.

AM/rh