

Claimant failed to show how the proposed change in terms to her employment contract, which amounted to a more generous compensation formula, amounted to good cause attributable to the employer to resign.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Matthew Shortelle, 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 October 29, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 31, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits held on two separate dates,¹ the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on June 23, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violating a reasonable and uniformly enforced rule or policy of the employer, and, thus, she 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 afford the employer an opportunity to present additional evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. 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 is eligible for benefits is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand now show that the claimant voluntarily left her job because she was not satisfied with the employer's proposed change in terms of pay.

Findings of Fact

¹ Both parties attended the first hearing session on May 25, 2017. The employer did not participate in the second hearing session on June 14, 2017.

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

1. The claimant worked as a hairdresser for the employer, a hair salon, from April 26, 2016 until October 29, 2016.
2. The employer's Owner (the Owner) supervised the claimant.
3. On April 26, 2016, the claimant and the Owner signed and agreed to the terms in the Employment Agreement – At Will Employee contract (the Agreement).
4. The Agreement stipulated [that] after one hundred and eighty (180) days, the claimant's pay would change from the agreed upon terms to "the standard tier based commission schedule (weekly); no hourly rate" for the remainder of her employment (the Pay).
5. The Pay stipulated [that] the employer would pay "50% on service revenue less than or equal to \$2,500.00. 55% on service revenue greater than or equal to \$2,500.01. 60% on service revenue greater than or equal to \$3,000.01."
6. The Agreement included a Non-Compete Agreement (the Non-Compete) prohibiting the claimant from "directly or indirectly... accept employment or engage in any business or activity which is directly or indirectly in competition with" the employer "either during employment... or for a period of one year thereafter within 5 miles of the address of" the employer.
7. The list of duties in the Agreement included the claimant ensuring product inventory is sufficient, ordering new products, and stocking products on display shelves.
8. From April 26, 2016 until November 1, 2016, the claimant worked for the employer under the terms of the Agreement.
9. After April 26, 2016, the employer provided the claimant with the Daily Front Desk/Assisting Duties document (the Duties).
10. The Duties included the folding of towels, maintaining stations, maintaining the restroom, maintaining work areas, working at the front desk, and other duties in the employer's location.
11. During the claimant's employment, the Owner and the claimant completed the duties in the Duties as needed.
12. During the claimant's employment, the Owner asked the claimant to enter the time she arrived and her activities in an iPad.

13. The claimant believed entering the time she arrived for work and her activities in an iPad to be insulting and failed to do so.
14. The Owner did not discipline the claimant for failing to enter her arrivals or log her activities in the iPad.
15. During the claimant's employment, the claimant and the Owner worked at the front desk between clients.
16. During the claimant's employment, the claimant and the Owner wiped down shelves and products and dusted as needed.
17. During the claimant's employment, the claimant and the Owner cleaned the employer's restroom as needed. The claimant cleaned the restroom because she believed she should. No employer personnel ever directed the claimant to clean the employer's restrooms.
18. The list of the claimant's duties included in the Agreement did not include the cleaning of bathrooms, any iPad, or the wiping down of shelves or product.
19. The employer did not issue the claimant any warnings or discipline during her employment.
20. On October 28, 2016, the Owner provided the claimant with a second Employment Agreement – At Will Employee contract (the Contract) to take the place of the Agreement after the initial one hundred and eighty (180) days of employment.
21. The claimant requested she be able to take the Contract home to review it. The Owner agreed.
22. The Contract included a Pay Schedule (the Schedule) indicating the claimant would be paid "50% on service revenue between \$800.00 and \$2,500.00. 55% on service revenue between \$2,500.01 and \$3,000.00. 60% on service revenue greater than or equal to \$3,000.01."
23. The Schedule indicated the claimant would be paid at an hourly rate of \$10.00 per hour if she failed to meet the minimum \$800.00 amount required for commission to be paid.
24. The Schedule included the hourly rate if she failed to meet the commission threshold so that she would make a "decent pay check" if she failed to meet the commission threshold.
25. The Contract included a Non-Competition Agreement (the Clause) prohibiting the claimant from "directly or indirectly... accept employment or engage in any business or activity which is directly or indirectly in competition with" the

employer “either during employment... or for a period of one year thereafter within 5 miles of the address of” the employer.

26. After reviewing the Contract, the claimant wrote down her concerns regarding the Contract and spoke with the Owner on October 29, 2016.
27. On October 29, 2016, the claimant told the Owner she believed the Clause to be restrictive and that she was willing to negotiate the time and distance restrictions contained in the Clause.
28. On October 29, 2016, the claimant told the Owner she wanted a 55% commission based pay on all service revenue and not the Schedule.
29. On October 29, 2016, the claimant did not discuss her concerns regarding any duties she completed in the salon or her use of the iPad but was concerned the Owner would add duties not included in the Contract to her employment.
30. On October 29, 2016, after speaking with the claimant, the Owner assisted a customer.
31. On October 29, 2016, the Owner told the claimant she could not pay the claimant 55% of all service revenue based on the needs of the company.
32. After the Owner told the claimant she could not accommodate the claimant’s requested 55%, the claimant packed her belongings, the Owner asked for the claimant’s keys, and the claimant left work.
33. The claimant quit her employment on October 29, 2016 when she refused to work under the terms of the Contract.
34. The claimant did not tell the Owner she wished to work under the terms of the Contract.
35. The Owner did not ask the claimant if she wanted to work under the terms of the Contract because she believed the claimant packing her belongings and leaving indicated she did not wish to do so.
36. The Owner did not tell the claimant she believed it would be best if the employer and the claimant “went their separate ways.”
37. The Owner did not offer the claimant the opportunity to continue working for the employer under the terms of the Contract.
38. The Owner completed a Department of Unemployment Assistance (the Department) questionnaire (the Questionnaire) indicating the claimant refused the Contract, the Owner offered her the chance to work under the terms of the

Contract, the claimant quit, and the claimant is self-employed as of the date of the Questionnaire's completion.

39. The claimant completed a Department questionnaire indicating the Owner discharged her on November 7, 2016 because "It was time to review my contract and terms of employment," the claimant expressed concerns about her contract to the Owner and the Owner was unwilling to compromise.
40. The claimant's questionnaire indicted [sic] she wished to renegotiate her contract because she did not want to put her career at risk.
41. The claimant's questionnaire indicated the Clause only benefited the employer and hurt the claimant's career and the pay was "unreasonable."
42. The claimant completed Telephone Fact Finding indicating the Owner wanted to pay the claimant \$10.00 per hour, was tampering with the commission, she was not an assistant, and the Owner added "all these duties that were an assistant's job not a hair stylist's job."

Credibility Assessment

There is no dispute the Owner and the claimant each completed duties the claimant considered to be "assistant" duties included in the Duties. Nor is there any dispute the Owner never disciplined the claimant or issued her any warning for failing to complete the alleged "assistant" duties or any other work duties.

At the remand hearing, the claimant initially testified the Duties were added and she would not have accepted the employer's offer of employment if she had known the Duties would have been added and the employer expected her to use the iPad. The claimant then testified the Schedule was unreasonable because salons pay employees fifty percent (50%) or fifty-five percent (55%) of revenues and she believed fifty-five percent (55%) of all revenues was fairer and she would make more money. When questioned as to how earning a minimum of \$800 for a forty hour week in which she failed to reach the goals in the Schedule [was unreasonable], the claimant again testified the Schedule was not reasonable. When questioned as to why the Schedule paying her sixty percent (60%) of revenues could be unreasonable, the claimant again reasserted the Schedule was unreasonable. During cross examination, the claimant directly testified the Duties were insulting and not the Schedule or the Clause. The claimant testified she wanted to continue working, but the Owner telling her they should "go" their "separate ways" meant she was discharged. The claimant testified the Owner asked for her keys before she began to pack her belongings.

The Owner directly testified she could not pay the claimant a minimum of fifty-five percent (55%) on all revenue sales up to \$2,500.00 because the business could not afford the pay agreement. The Owner admitted the claimant had a list of concerns, but testified the claimant packed her belongings and began to leave

work when she told her the Schedule could not be changed. The Owner testified the claimant returned her keys when leaving work. The Owner admitted she provided the claimant with the Duties but testified she completed the Duties as needed as well. The Owner testified she did not discipline the claimant for any failure to complete the Duties. The Owner testified the Schedule was drafted so that the claimant would feel comfortable and make a minimum each week until she had enough clients.

Based on the claimant's inconsistent testimony as to what part of the Contract was objectionable, the claimant's testimony [about] receiving a higher percentage of revenue commission was unreasonable, and the claimant's testimony [about] receiving an amount of money larger than her commission if she failed to meet the \$800.00 threshold was unreasonable, it is concluded the claimant's testimony was not credible or reasonable. [A]s a result, it is concluded the Owner's testimony [that] the claimant began packing her belongings and quit when she said she could not meet the claimant's pay demands is credible.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. The credibility assessment includes a statement that inaccurately suggests that, under the new pay terms, the claimant would have earned a minimum of \$800 for a forty-hour week if she failed to meet the service revenue goals. The employer's new pay terms offered only \$10 per hour for a forty-hour week, which would amount to only \$400 a week. *See Exhibit # 5a*. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is not eligible for benefits.

A primary issue in this case is whether the claimant voluntarily resigned or was discharged. In rendering his initial decision, the review examiner did not have the benefit of hearing from the employer's witness, who was to testify at the continued portion of the hearing. Thus, the review examiner accepted the claimant's version of events, concluding that she had been fired, and he rendered a decision under G.L. c. 151A, § 25(e)(2). After hearing from the employer's witness at the remand hearing, the review examiner has now found that the claimant quit.

In doing so, the review examiner made a credibility assessment in favor of the employer's testimony. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless such assessments are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). The review examiner stated that he did not find the claimant's testimony to

be credible, because it was inconsistent and unreasonable. We believe this assessment is reasonable in relation to the evidence presented.

Since the review examiner found that the claimant voluntarily separated from employment, her eligibility for benefits is properly analyzed pursuant to 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] . . . (e) 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 express terms of this provision assign to the claimant the burden to prove that she had good cause attributable to the employer to resign.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Although the claimant had complaints about some of her assigned duties, the consolidated findings show that she had been performing most of her assigned tasks for months before her separation. *See Consolidated Findings ## 9–11 and 16.* The findings further provide that the employer never disciplined the claimant for failing to complete any of the tasks. *Consolidated Findings ## 14 and 19.* The only thing that was changing on October 29, 2016, the day the claimant resigned, was that she was being asked to accept a new employment contract with different pay terms. In all other regards, the terms and conditions of the claimant's employment were to remain the same. *Compare Exhibits ## 5 and 6.*²

A substantial decline in wages may render a job unsuitable and constitute good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 (1981) (citation omitted). Under the original contract that she had signed at hire, the claimant was being paid \$8.00 an hour and, since around August, had been earning a 50% commission for stylist services that generated revenue beyond the threshold amount of \$250. *See Exhibit 6a.* Under this original contract, the claimant had been scheduled for a change in the terms of her pay after 180 days. This 180 day period coincides with the presentation of the employer's new contract. The original contract provided that after 180 days, the employer would no longer pay the claimant an hourly rate, and that the claimant would earn a 50% commission on service revenue up to \$2,500.00, a 55% commission for revenue between \$2,500.01 and \$3,000.00, and a 60% commission for revenue beyond \$3,000.00. *Consolidated Findings ## 4 and 5.*

² Exhibit # 5 is the proposed employment agreement to be effective on October 24, 2016. Exhibit # 6 is the employment agreement which the claimant signed at the beginning of her employment in April, 2016. Although not explicitly incorporated into the review examiner's findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

The new contract, which the employer presented to the claimant on October 28, 2016, was in fact slightly different. The 55% and 60% commission rates for revenues beyond the \$2,500 and \$3,000 thresholds remained the same, as was the 50% commission for revenues below \$2,500.00. However, in the new contract, the employer would pay the claimant by commission only if the claimant generated at least \$800.00 in service revenue. If the claimant's service revenues fell below \$800.00, the new contract provided that the claimant would receive compensation at an hourly rate of \$10.00 per hour. Consolidated Findings ## 22–24. The new contract, by providing the claimant with a \$10 per hour cushion in those periods that she did not generate at least \$800.00 in service revenue, was more generous than the terms under her original contract.³ Because the pay formula was more advantageous, the claimant has not shown good cause to leave due to a substantial decline in wages.

Since the non-competition clause in the proposed contract was exactly the same as what the claimant had agreed to in the employment agreement which she signed at hire, the employer's conduct in expecting the claimant to continue her employment under the same terms was reasonable. In sum, the claimant has failed to sustain her burden to show that the new contract terms presented a detrimental change in the terms or conditions of employment.

We, therefore, conclude as a matter of law that the claimant did not establish good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1).

³ In reaching this conclusion, we note that the employer testified that the claimant was a full-time employee, but the findings do not state how many hours a week she was working, or whether these were weekly service revenue thresholds. Assuming a 40-hour-per-week schedule, and that the commissions were based upon weekly service revenues, it is evident that the \$10.00 per hour would be more than she could earn than if she were paid 50% commission on the first \$800.00 in service revenue. (Example: \$700.00 in service revenue x 50% = \$350.00. At 40 hours a week x \$10 per hour, the claimant would instead be paid \$400.00).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending November 5, 2016, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 24, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

AB/rh