Claimant is ineligible for benefits because he abruptly quit upon being told in the heat of an argument with his manager that he would not get a promised 2nd week of vacation that he sought to take during the busiest month of the year. A reasonable effort to preserve his employment would have been to wait for a calmer moment to explore taking the 2nd week at another time.

Board of Review
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Issue ID: 0020 6366 36

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Rachel Zwetchkenbaum, 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 resigned from his position with the employer on December 15, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 27, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on October 26, 2017. 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, he 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 before the Board is whether the review examiner's conclusion that the claimant had good cause attributable to the employer to resign due to a unilateral change to the terms of employment is supported by substantial and credible evidence and is free from error of law.

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 Mechanic for the employer, a Truck Dealership, from August 13, 2012 until December 15, 2016, when he was separated.

2. The claimant was hired to work full-time. The claimant was originally paid $17 per hour.

3. The employer has a written policy about benefits that informs employees that they will not be paid for sick days or holidays until they have worked there for at least three months.

4. As a benefit to employees, the employer gives employees one week of paid vacation during their first year of employment and two weeks of paid vacation during their second year of employment.

5. The employer does not usually pay employees for paternity leave.

6. The employer generally does not allow employees to take time off from work in December because it is such a busy month for the employer.

7. The claimant was informed of these policies after hire.

8. On July 10, 2015, the claimant informed the claimant informed the employer that he was resigning due to being dissatisfied with his current rate of pay.

9. On or about September 21, 2015, the manager spoke with the claimant and asked him if he would reconsider coming back to work for him. The employer told the claimant that if he came back to work for him then he would raise his hourly rate of pay from $17 per hour to $20 per hour. The manager also told the claimant that if he agreed to come back to work for him that all of his benefits would remain the same.

10. Had the employer not agreed to allow the claimant to have his benefits remain the same, he would not have accepted the job offer.

11. Although it was December, the employer allowed the claimant to take a week of paid time off as paternity time from December 15, 2015 until December 20, 2015. The paid time off did not count as the claimant's vacation time.

12. The claimant took a week of his vacation time during the summer of 2016.

13. In November 2016, the claimant requested to take his second week of vacation in December in order to celebrate his son's first birthday.

14. When the claimant's manager found out about the claimant's vacation request, he reminded the claimant that December was a very busy month, but he told the claimant that he would look into the request and try to give him that week off from work.

15. The manager did not say anything to the claimant about not being entitled to a second week of vacation when he received the claimant's vacation request in November 2016.

16. The manager never got back to the claimant about his request for vacation in December 2016.

17. On December 15, 2016, the claimant reported to the employer that he was not paid properly for his work for the prior week. The claimant and the manager got into an argument over whether the claimant was owed any money and if so, how much.

18. During the argument, the manager told the claimant that he could not have the requested time off in December because he was a new hire in September 2015 and therefore was not entitled to two weeks of vacation yet.

19. The claimant became very angry at hearing this and reminded the manager that when he was hired back by the employer that he was told that all of his benefits would remain the same and this was unfair.

20. Because the claimant felt that the employer had broken his promise of allowing him to return to work in September 2015 with the same benefits as he previously had before he left in July 2015, the claimant decided to quit.

21. Had the employer fulfilled its promise to the claimant about his benefits, the claimant would have continued to work for the employer.

22. The claimant filed for unemployment benefits and received an effective date of January 1, 2017.

[Credibility Assessment:][1]

The employer had its office manager testify on its behalf. The office manager was not privy to the discussions, which the claimant had with the manager.

In this case, the employer only offered hearsay testimony regarding its allegation that the manager never promised the claimant that his benefits would remain the same when he returned to working for the employer in September 2015 and therefore was only entitled to one paid week of vacation. The employer witness had no firsthand knowledge of the situation. The hearsay evidence of the employer was rebutted by the direct testimony of the claimant that the manager promised the claimant that if he came back to work for him that he would get both a raise in pay and retain all of his previous benefits. As the hearsay evidence of the employer is rebutted by the direct testimony of the claimant and it is not

[1] We have copied and inserted here the portion of the review examiner's decision from the conclusions and reasoning section, which states her reasons for accepting the claimant's evidence instead of the employer's.

> independently reliable, the hearsay evidence cannot be considered to be "substantial" as required by the Law.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

It is undisputed that the claimant resigned from his job. Therefore, his 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 language of this statutory provision assigns the burden of proof to the claimant. 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).

There is no dispute that the claimant had severed his employment in July, 2016, and that he was rehired two months later. *See* Findings of Fact ## 8 and 9. Although the terms of his rehire were in dispute, the review examiner found that the employer had promised the claimant that all his benefits would be the same. Finding of Fact # 9. In doing so, she rejected the employer's testimony that such a promise was never made. "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). Because her assessment is reasonable in relation to the evidence presented, we decline to disturb this finding on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

The question before us is whether the claimant is entitled to benefits under G.L. c. 151A, § 25(e)(1), not whether he made the correct personal decision to resign upon realizing that the employer would not give him the same vacation benefit that he had been entitled to before he resigned in July. Specifically, the claimant believed that his negotiated terms of re-employment in September entitled him to the two weeks of vacation granted to employees with at least two years of employment, and not simply the one vacation week granted to new hires. Because the review examiner found that the claimant had been promised the same benefits upon his return, we shall assume these benefits included two weeks of vacation.

The review examiner concluded that the reduction from two weeks to one week of vacation was a unilateral change to the terms of employment, and that this constituted good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). Not every unilateral change to terms of employment amounts to good cause under the statute. The Supreme Judicial Court has held that a *substantial* decline in wages may be viewed as good cause for leaving a job. Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n. 3 (1981); *see also* North Shore Aids Health Project v. Rushton, No. 04-P-503, 2005 WL 3303901 (Mass. App. Ct. Dec. 6, 2005), *summary decision pursuant to rule 1:28* (relative to claimant's modest $35,000 salary, a 16% reduction was a substantial change in the terms of employment). But, *compare* Board of Review Decision 0010 6444 71 (July 31, 2014) (6.25% reduction in hours did not constitute good cause to quit).[2] Considering that the employer raised the claimant's wage rate from $17 to $20 per hour upon his return, a loss of a week's vacation is not necessarily a substantial change in the claimant's overall compensation package. However, even if it was, the circumstances surrounding the claimant's departure do not warrant an award of benefits.

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. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). During the hearing, the claimant testified that he knew it was hard to take time off in December, and, if the employer had told him that he could take his week of vacation at another time, he would have stayed.[3] Findings of Fact ## 17–19 show that the claimant and manager were in the heat of an argument about his paycheck when the manager said he was not entitled to the two weeks of vacation. Instead of waiting for a calmer moment to explore whether he could take the second week at another time, the claimant abruptly quit. Such behavior does not demonstrate a reasonable attempt to preserve an employment relationship or that such an effort would have been futile.

We, therefore, conclude as a matter of law that, because the claimant failed to make a reasonable attempt to preserve his employment before leaving, he is disqualified under G.L. c. 151A, § 25(e)(1).

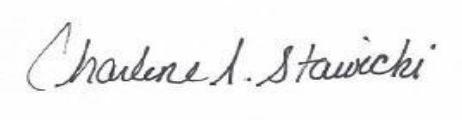
[2] Board of Review Decision 0010 6444 71 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

[3] While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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 review examiner's decision is reversed. The claimant is denied benefits for the week beginning December 11, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2018

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