

Claimant did not have good cause or urgent, compelling and necessitous reasons for leaving his employment. He was moved into an hourly position due to tardiness early in his employment. As a result, he lost the potential to obtain paid holidays and vacations. Board held that his leaving, after more than two years, was due to general dissatisfaction with his working conditions. He was not eligible for benefits.

**Board of Review
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Issue ID: 0020 9137 95

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Leslie Branco, a review examiner of the Department of Unemployment Assistance (DUA), to deny 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 4, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 14, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 12, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was 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 claimant's appeal, we remanded the case to the review examiner to afford the claimant an opportunity to present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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 had neither good cause, or urgent compelling and necessitous reasons for quitting his employment is supported by substantial and credible evidence and is free from error of law, where, following remand, the record indicates that the claimant quit because he was dissatisfied with the type of benefits he received from the employer as an hourly employee.

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 for the employer, an embroidery business, from 10/01/14 until 01/04/17, most recently as a shipper.
2. The claimant was originally hired as a full time, salaried (40 hours per week) customer service representative. The claimant's hours were from 9 a.m. until 5 p.m. with a half hour lunch.
3. The claimant would have been eligible for paid holidays after a 6 month period working in a full time salaried capacity as a customer service representative.
4. During the first 3 weeks, the claimant was unable to arrive for his 9 a.m. start time on time approximately 80-90% of the days.
5. The claimant did not give specific reasons for being late.
6. The claimant did not complete a week over 35 hours while working in customer service.
7. The claimant worked in customer service for approximately 3 weeks.
8. Due to the claimant's inability to arrive to work on time, he was assigned to a shipping position at the same rate of pay. The claimant was moved because the staffing need was not as critical as the customer service department.
9. The claimant's schedule would remain the same, 9 a.m. until 5 p.m., Monday through Friday and the pay rate would remain the same.
10. The claimant was notified of the change by the production manager and was told that it was because he couldn't hold the schedule required in the customer service department. The claimant was notified that he was now an hourly [employee].
11. The employer did not explain to the claimant that he would lose benefits because he had not acquired them yet by working in a full time salaried capacity for 6 months.
12. The claimant would typically show up at 9:30 a.m. – 10 a.m. and work until about 5 p.m.
13. The claimant did not give specific reasons for being late.
14. On unknown dates, the claimant was given 2 pay increases after being moved to shipping.

15. After the Christmas holiday in 2016, the claimant asked the production manager for paid holidays. The claimant did not mention paid vacations.
16. The production manager notified the claimant that he was not eligible for paid holidays as an hourly employee.
17. The claimant left employment at this time with the employer.
18. The claimant returned to work a few days later and was allowed to start working back with the employer.
19. The claimant returned to work and worked until 01/04/17.
20. On 01/04/17, the claimant spoke with the production manager and again asked if he could be paid for holidays.
21. The claimant asked at this time because he “had never found time to take a vacation prior to that.”
22. The production manager explained again that paid holidays were not offered to hourly employees such as himself.
23. On 01/04/17, the claimant walked off the job and did not return.
24. The claimant left his job because he was not allowed paid holidays and vacations and had been “transferred back and forth to different departments, thought it wrong to ask all that and demote him and he didn’t think he deserved that after working his butt off for them.”
25. A few days later, the claimant sent emails to the production manager and the owner that he couldn’t afford not to work and would come back and work for them regardless of pay and benefits.

Credibility Assessment:

At the initial hearing, which the claimant did not attend, the employer testified that the claimant walked off the job after being told that he was not eligible for paid holidays as an hourly employee. The employer testified that the claimant had never been eligible for paid holidays or vacation time because he never made it past the 6 month probationary period as a full time salaried employee. The employer testified that the claimant never made it past the probationary period to earn these benefits because he was unable to maintain his full time schedule because he could not show up for work on time. The employer testified that he hadn’t earned any benefits at this point and that is why there wasn’t a conversation regarding this matter at the time the change was made.

At the remand hearing, which both parties attended, the claimant testified that he left his job because his employer [sic] was no longer getting paid holidays and vacations. The claimant testified that he was told that he was becoming an hourly employee approximately a month after starting the job, but was not given any other details regarding his benefits. However, it is unreasonable for an employee to work 2+ years and never question the benefits and/or time that the employer provides to them.

Based on the testimony and evidence presented, it is concluded that the claimant's testimony cannot be deemed 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment and deems them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant is subject to disqualification.

Since the claimant quit his employment, his eligibility for benefits is governed by 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that he left work for good cause attributable to the employer, or for urgent, compelling and necessitous reasons. After the initial hearing, based solely upon the employer's testimony, the review examiner concluded that the claimant had not met his burden. We remanded the case to afford the claimant the opportunity to present testimony and evidence.

Following the remand hearing, which both parties attended, the consolidated findings establish that the claimant left his job after more than two years because he was not receiving paid holidays and vacation. The claimant was hired initially as a salaried full-time customer service representative. He would have become eligible for paid vacation and holidays after working for six months in his full-time customer service position. However, due to the claimant's tardiness, after about one month, the employer reassigned the claimant to an hourly shipping position with the same rate of pay, and the same schedule. As a result, the claimant never became eligible for employer benefits. The employer did not explain to the claimant that he would lose his eligibility for benefits because in fact, the claimant had never acquired any such benefits, having not worked for six months in a full-time salaried position.

In rendering these findings, the review examiner provided a detailed credibility assessment. In this assessment, the review examiner concluded that, based on the testimony and evidence presented, the claimant was not credible. Such credibility assessments are within the scope of the fact finder's role, and, unless they 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). On the basis of the evidence in its entirety, we see no reason to disturb the review examiner's credibility assessment.

The record before us indicates that, during the two years of his employment, the claimant was an hourly and not a full-time employee. As such, he was not entitled to the paid vacation and holiday time he sought from the employer. The employer's denial of this request was consistent with the terms and conditions of the claimant's employment and thus this denial was reasonable on the employer's part. The claimant ultimately quit his job because he was dissatisfied with the lack of holiday and vacation pay. Under Massachusetts law, such general and subjective dissatisfaction with working conditions does not constitute good cause to leave one's job within the meaning of the unemployment statute. *See Sohler v. Dir. of Division of Employment Security*, 399 Mass. 785 (1979).

We, therefore, conclude as a matter of law that the claimant did not have good cause attributable to the employer and that there is nothing in the record to indicate that he had urgent, compelling, or necessitous reasons to voluntarily leave his job.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending January 1, 2017, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to, or in excess of, his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 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.

SPE/rh