

The claimant has not met her burden of demonstrating that she quit with good cause attributable to the employer where the review examiner reasonably concluded that the employer's actions—a new work schedule and a disciplinary warning—were not motivated by gender discrimination or retaliation for reporting alleged discrimination but rather due to legitimate business reasons.

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Issue ID: 0021 4997 39

BOARD OF REVIEW DECISION

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 resigned from her position with the employer on March 15, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 14, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties via telephone, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 30, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left her employment with 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 in order to obtain additional evidence. Both parties participated in the remand hearing via telephone, which was conducted over three dates. Thereafter, the review examiner issued his consolidated findings of fact. The case was then remanded again for the review examiner to make subsidiary findings from the existing record, in order to clarify some of the findings. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant quit with good cause attributable to the employer because the claimant's supervisor discriminated and retaliated against her, 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 assessment are set forth below in their entirety:

1. The claimant worked as an Operations Supervisor for the employer, an arts and crafts retailer. The claimant began work for the employer in 1997.
2. The claimant worked at the employer's [City A], MA location. She earned \$17.50 per hour. She was one of a few hourly managers. Her immediate supervisor was the General Manager (GM). There were also three Assistant General Managers (AGM) at the store.
3. The claimant's responsibilities included front-of-the-store operations. Her duties included ensuring the cashiers were promoting the employer's service and rewards programs. She was also responsible for the store's cash office and payroll.
4. In about 2007, the claimant began taking college classes. Some semesters she took one class and some she did not take a class. The classes were on-line and only required her to be physically in a classroom for about 2 hours each week.
5. In 2012, the claimant informed the GM she was taking college classes.
6. In 2013, a new GM was assigned to the claimant's store.
7. The claimant felt the GM did not like her because he seemed to favor male employees more than female employees. She believed his dislike of her and favoritism increased in 2015 and 2016. She discussed some of her concerns with the District Manager, who had been her prior GM. She also complained to one of the AGMs, who had sarcastically commented to her that the GM really did not like her. She did not make a formal complaint because she did not feel his favoritism affected her work.
8. The employer considers a full-time schedule to be 37.5 hours per week. The position of Operations Supervisor is a full-time position.
9. Before February, 2017, the GM created the claimant's weekly schedule. The claimant provided him with her availability. The claimant's schedule varied.
10. Prior to 2017, the GM usually scheduled the claimant to work approximately 30 hours each week. The GM told the claimant that scheduling her fewer hours actually helped him with the store budget.
11. The claimant did not complain about the fewer hours because she was taking college classes and had other personal interests. She never asked the GM for an accommodation to her work schedule because there were no conflicts with her classes.

12. The GM was aware the claimant took college classes.
13. A Vice President and the District Manager visited the store. They were dissatisfied with the store's cash office and front-of-store operations, including service and rewards sign-up performance. They advised the GM to require the claimant to work mornings and more weekend hours.
14. In February, 2017, the claimant was scheduled to begin a new class. The in-class part of the class was scheduled for Tuesday mornings. Before the class began, the GM told the claimant he wanted her to work Tuesday mornings. The claimant switched her in-class time to Friday evenings.
15. On Friday, February 10, 2017, the claimant left a written "Time Off Request Form" on a bin attached to the GM's door. On the form she requested the day-off on Monday, February 20, 2017. She also wrote a note on the request that she was switching her Tuesday class to Friday night so that she would be available for work on Tuesday. (Remand Exhibit 7)
16. The GM did not receive the request. The GM did not reply to her request.
17. The employer schedules its employees Monday through Sunday. The GM was supposed to post the schedule for the week beginning Monday, February 20th by Thursday, February 16th. He did not do so.
18. The claimant had scheduled days off on Saturday, February 18th and Sunday, February 19th.
19. Because the GM did not usually advise the claimant if he approved days-off, she assumed he approved the request.
20. On Saturday, February 18, 2017, the GM posted the schedule assigning the claimant to work on Monday, February 20th.
21. The claimant did not call or show up for work on Monday, February 20, 2017.
22. The GM believed the claimant was a no-call, no-show. He did not counsel her about it immediately because he first wanted tell her about her increased hours and also wanted to discuss the issue with the Area HR Manager.
23. On Tuesday, February 21, 2017, the claimant went to work. She assumed she was scheduled to work because on the Time Off Request Form she told him she could work Tuesdays.
24. Based on his supervisors' advice, and the legitimate needs of the store, the GM decided give the claimant a full-time, set schedule. Because she was responsible for the cash office he scheduled her to work four mornings each week. He also

wanted her to work one weekend day to oversee the customer loyalty program signups.

25. The GM and an AGM met with the claimant. The GM told the claimant he was advised by his supervisors to give her a new schedule. He gave her a note with the schedule. The note states the schedule was effective March 6, 2017. The note assigned the claimant to work on Monday, Wednesday, Thursday and Friday from 7 a.m. to 3:30 p.m. and Saturday from 9 a.m. to 6 p.m. The note states the claimant could switch one Saturday each month to a Tuesday. The schedule includes a 30-minute unpaid break each day.
26. The change resulted in a total of 40.5 scheduled hours each week for the claimant. (Remand Exhibit 12)
27. The claimant was upset with the schedule and complained. The GM told her that she needed to work the new schedule or she would not be scheduled after March 6, 2017.
28. The employer maintains a Management Schedule Policy which includes a section on Hourly Management. The section states in part: "Scheduled shift length is not to exceed 8 hours per day." The policy also states: "One weekend (Sat/Sun) may be scheduled off per month – to be considered the 2 days off for the week." The policy states: "Hourly MOD (manager on duty) associate schedules are not to exceed 40 hours. (Remand Exhibit 10 p. 2) The policy does not prohibit the scheduling of hourly supervisors on weekends.
29. The GM also offered the claimant the option of working two part-time hourly positions at lower pay-rates.
30. When the claimant did payroll, she gave herself a paid day-off on Monday, February 20, 2017.
31. The GM is required to review payroll. He did not say anything to the claimant about her pay.
32. On Thursday, February 23, 2017, or Friday, February 24, 2017, the GM told the Area Human Resources Manager (Area HR Manager) that the claimant was a no-call, no-show on Monday, February 20, 2017.
33. On Thursday, February 23, 2017, the claimant emailed the Area HR Manager. She complained the GM was unfair in his scheduling. She told him she had always had a varied schedule. She told him she was now being scheduled for over 40 hours. She told him she believed the GM's requirement she work every weekend was a violation of the employer's policies. She told him she was told she had to accept the schedule or leave. She told him she felt she was being bullied and pushed out the door. She complained the GM discriminated against women.

34. The Area HR Manager responded to the claimant's email with his own email on Thursday, February 23, 2017. In his email he states that the change to her schedule is for business needs. He states that it does not make sense from a business standpoint to have the Operations Supervisor off on weekends since she is "primarily responsible for driving service and rewards sign ups at the front end." He states that her working under 30 hours a week has negatively impacted her overall performance.
35. On Saturday, March 3, 2017, the GM issued the claimant a final warning for her absence on February 20th. The claimant told him she gave him a vacation request and was paid for the day. The GM told her he did not receive the vacation request. The claimant told the GM he was out to get her.
36. The warning was written due to the GM's belief the claimant was a no-call, no-show on Monday, February 20, 2017.
37. The GM did not give the claimant the warning before March 3rd because he wanted to discuss her schedule with her first, needed to review it with the Area HR Manager and needed to have another manager present for the meeting.
38. The employer's disciplinary policy regarding no-call, no-show is a final written warning for the first offense and termination for the second offense.
39. On or about Sunday, March 4, 2017, the claimant called the Area HR Manager. She told him about the final warning. She told him she believed the GM's behavior was escalating. She told him she believed he was retaliating.
40. The Area HR Manager told the claimant he would begin an investigation into the GM's treatment of her. The claimant gave him the names of five employees she believed he should speak with.
41. The Area HR Manager began speaking with the claimant's coworkers. It is not known exactly when he spoke with them.
42. The Area HR Manager did not immediately give the claimant an update on the status of his investigation.
43. Another hourly manager, who worked a flexible schedule, informed the claimant he was leaving the employer. The claimant asked the GM if she could have his job after he left. The GM told her she could not.
44. The claimant complained to the Area HR Manager about her request for the other hourly manager's job. The Area HR Manager told the claimant the GM's decision not to give her the job was a scheduling decision made for business purposes.

45. The Area HR Manager discussed with the claimant the option of working as an hourly employee at a lower rate of pay. He discussed the GM's performance expectations of her. He told her he was giving her a new deadline date of 30 days (effective Saturday, March 17, 2017) to make a decision.
46. During the week beginning March 11th 2017, the GM began treating the claimant differently. He did not acknowledge her or give her instruction. He did not do anything else the claimant was dissatisfied with.
47. It is not known why the GM was not acknowledging her or giving her instruction. It is not known what the GM was thinking.
48. On Wednesday, March 15, 2017, the claimant and the Area HR Manager spoke by phone. They discussed the status of the investigation. The Area HR Manager told her he was still working on it. He did not provide her with any additional information.
49. The Area HR Manager asked the claimant if she was going to work the new schedule. He offered the claimant the option of extending her current schedule until the fall.
50. The claimant felt the Area HR Manager and the employer were not defending her. Because of the schedule change, the final warning, and the GM not talking to her, she felt mistreated. She decided not to accept the offer.
51. The claimant told him she had classes in the fall too. He told her that she would then be accountable for the schedule.
52. The claimant told the Area HR Manager she did not really have a decision to make. She told him to consider her last three weeks to be her resignation.
53. The Area HR Manager informed the GM the claimant was leaving. He advised the GM to tell his managers not to discuss the claimant's leaving with her. The GM did this.
54. The managers began speaking with the claimant less. They told her that the GM told them not to talk to her. They did not tell her why.
55. The Area HR Manager told the claimant of the possibility of an open supervisor position at the employer's [City B], MA location.
56. Later on Wednesday, March 15, 2017, the claimant sent the Area HR Manager [an] email telling him she was looking for her copy of the time-off request. She complained that there were many employees who did not call or show up for work and received no discipline. She named these employees.

57. Because she was suspicious of the GM's motivation in issuing the final warning, she asked the Area HR Manager exactly what date the GM told him she was a no-call, no-show. She complained that the GM was telling employees not to talk to her. (Remand Exhibit 8)
58. On Thursday, March 16, 2017, the Area HR Manager responded to the claimant's email. He stated he was [still] in the process of investigating the circumstances of the final warning. He told her that he had advised the GM to tell his staff they should not discuss with her why she was leaving. He told her that he was still investigating her allegations. He did not answer the claimant's question about exactly what date the GM told him she was a no-call, no-show.
59. The claimant responded that there was a difference between being told not to discuss something and being told not to talk to someone. She also asked again when, specifically, the GM complained about her no call, no show.
60. On Friday, March 17, 2017, the Area HR Manager emailed the claimant stating that he could not discuss the specific dates or details of an ongoing investigation. He did not give her a specific date of when the GM told him about her no-call, no show. He told the claimant she would be coded as eligible for rehire based on having worked her two weeks' notice and leaving in good standing.
61. He told the claimant he had confirmed the availability of a Merchandise Supervisor position at the [City B] store. He told her that because it was a smaller store, the work schedule there could be more restrictive and might vary. He told her that if she was interested she should contact the GM there. He provided no other details.
62. The claimant last performed work for the employer on March 17, 2017.
63. None of the employer's actions toward the claimant were motivated by discrimination, bias, retaliation for filing complaints or any other malicious intent.
64. The claimant found her copy of the Time Off Request Form. She emailed it to the Area HR Manager on Saturday, March 18, 2017.
65. The Area HR Manager continued the investigation after the claimant left. He spoke with several of the claimant's coworkers. Based on these interviews, he was not able to conclude the GM mistreated the claimant. He also reviewed the prior five years of human resources records for the location. He was not able to conclude there was any difference in the ways that men or women were hired or paid. He concluded the claimant was not mistreated.

66. After the claimant left, the employer rescinded the final warning because they were not able to prove the claimant had not left it for the GM and because the GM posted the store schedule late.
67. The claimant filed a complaint against the employer with the Commission Against Discrimination (MCAD).
68. At the time of her separation, the claimant did not know the warning was rescinded. She learned it was rescinded during the process of her MCAD claim.
69. Shortly after the claimant left, the GM was separated from the employer due to business restructuring.
70. On August 31, 2018, the MCAD made a probable cause finding which determined there is probable cause to credit the claimant's complaint. (See Document # 1)

Credibility Assessment:

The claimant testified at the hearing that she left her job because she was mistreated. She testified she felt mistreated by the GM, and finally the Area HR Manager. Although the GM did change the claimant's schedule, issued her a final warning and spoke with her less, the record does not establish this was due to ill will toward the claimant. The claimant did not prove this conduct was motivated by discrimination, bias, retaliation or any other malicious intent. She did not prove that he mistreated her. There is also insufficient proof in the record to conclude the Area HR Manager did not defend her.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant quit her employment with good cause attributable to the employer. Rather, we believe that the review examiner's consolidated findings of fact support the conclusion that the employer did not engage in the discrimination or retaliation alleged by the claimant.

As the claimant alleged that she left her employment due to the actions of the employer, G.L. c. 151A, § 25(e)(1) applies. That section of law 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 explicit language in § 25(e)(1) places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985). The claimant alleged that she left her employment because the employer discriminated and retaliated against her. Specifically, the claimant alleged that, due to gender discrimination, the General Manager unilaterally changed the claimant's work schedule such that it interfered with her school schedule. The claimant further alleged that, after complaining about this to the Area Human Resources Manager, the General Manager retaliated against her by issuing her an unjustified final warning, by no longer speaking to the claimant, and by instructing coworkers not to speak to the claimant as well.

To determine if the claimant has carried her burden to show good cause under the above-cited statute, the first step is to address whether the claimant had a reasonable workplace complaint. *See Fergione v. Dir. of Division of Employment Security*, 396 Mass. 281, 284 (1985). 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). If the employer took adverse actions against the claimant that were motivated by unlawful intent such as sex discrimination or retaliation for reporting alleged sex discrimination, this would certainly constitute a reasonable workplace complaint and good cause to leave.

The consolidated findings show no indication that any of the employer's actions were motivated by discrimination, bias, retaliation or any other malicious intent. Rather, the employer's actions were explained as being done for legitimate business purposes. The decision to place the claimant on a consistent 40.5 hour-per-week schedule was due to performance issues within the claimant's job duties, combined with human resources' realization that the claimant was not working the necessary hours of her full-time position. The decision to issue the claimant a final warning appears to have been motivated by the good-faith belief that the claimant was actually a no-call no-show. Other findings indicate the employer's good faith and lack of animus towards the claimant, including the fact that the employer was in the midst of a bona fide investigation into the claimant's allegations, the fact that the employer made several efforts to offer the claimant alternative positions that would be more accommodating of her school schedule, and the fact that the employer offered to delay the claimant's new schedule until the end of the summer. In short, the claimant has not proven that the employer discriminated against, harassed, or retaliated against her, and thus has failed to demonstrate a reasonable workplace complaint.

We, therefore, conclude as a matter of law that the claimant left her employment without good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending March 18, 2017, 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 - March 28, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**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.

JRK/rh