0022 5079 11 (April 24, 2018) – Claimant resigned because the involuntary transfer of his junior manager meant he could not take a planned vacation, he believed he would be forced to work even more hours than the usual 45 plus-hour week, and he thought the employer would reduce his pay at the end of the year when he could not meet new production goals. Losing a planned vacation is not good cause attributable to the employer under G.L. c. 151A, § 25(e)(1). Claimant did not stay in the job long enough to show that the staffing transfer actually had this detrimental effect on his hours, or that the employer would actually reduce his pay at the end of the year. *[Note: the District Court affirmed the Board of Review's Decision.]*

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Issue ID: 0022 5079 11

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 employment on July 14, 2017. He filed a claim for unemployment benefits with the DUA and was initially approved. However, on September 1, 2017, the DUA determined that he was ineligible for benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on November 22, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without either good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, he 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 obtain further evidence about discussions between the claimant and his employer prior to his last day of work. Only the claimant attended the remand hearing.[1] Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

[1] Due to its failure to return a DUA fact-finding questionnaire, the claimant's former employer did not have interested party status but was invited to participate in the original and remand hearings as a witness.

The issue before the Board is whether the review examiner's original conclusion that the claimant did not have good cause attributable to the employer to resign, is supported by substantial and credible evidence and is free from error of law, where the findings after remand show that due to the employer's removal of one of the claimant's junior managers, the claimant realized that he could not take his planned vacations and anticipated having to work an unreasonable number of hours.

Findings of Fact

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

1. The employer is a restaurant. The claimant worked for the employer as a full-time manager. The claimant worked for the employer from 1/01/96 until 7/14/17.

2. The employer expected the claimant to field work-related telephone calls late at night and early in the morning. This expectation went into effect when the claimant's employment started. The claimant fielded the calls. He did this for twenty years. The employer expected the claimant to cover shifts for workers who called out. This expectation went into effect when the claimant's employment started. The claimant covered these shifts. He did this for twenty years. The employer expected the claimant to sometimes work double shifts. This expectation went into effect when the claimant's employment started. The claimant sometimes worked double shifts. He did this for twenty years.

3. On 6/28/17, the claimant met with [one of the] employer's [owners] (Owner X). Owner X told the claimant that he must meet certain productivity criteria. Owner X wanted the claimant to meet a certain PACE (profit after controllable expenses) percentage. Owner X wanted the claimant to achieve thirty percent PACE. At the time of this conversation, the claimant was at twenty percent PACE for the month. In the claimant's four years of work, he was able to achieve thirty percent PACE for only four months. The largest impact on the percentage was staff levels. In order to achieve the thirty percent, the claimant anticipated that he would have to reduce staff levels. The claimant did not believe that he could meet the goal.

4. In the 6/28/17 meeting, the owner told the claimant that it would meet with him about a possible pay reduction if he did not achieve thirty percent PACE by 12/31/17. The employer never told the claimant that it certainly planned to reduce his pay. The employer did not tell the claimant that it would certainly cut his pay if he did not meet its criteria. The claimant thought that the employer would reduce his pay. He thought this based on his overall experience with the owner over his twenty years of employment with the owner.

5. The claimant wanted to take a vacation in July 2017 and another vacation in August 2017. He put these vacations on the employer's schedule months in advance. The claimant's supervisor knew about the vacations. The claimant eighty-seven year old mother-in-law wanted to travel to [Location A]. The claimant had promised her for months that he would take her there. The claimant wanted to do this for the July vacation. The claimant's grandson was leaving for the U.S. Marines at the end of August 2017. The claimant wanted to have a vacation with his grandson in August before his grandson was shipped out. The employer never promised the claimant that he could take the desired vacations in July 2017 and August 2017. The claimant and the employer never executed an employment [contract] that indicated that the claimant could take the desired vacations in July 2017 and August 2017.

6. The claimant had seven or eight junior managers. He relied on these managers to cover shifts. Most of these managers had immutable work schedules because they attended school and had young families. The claimant especially relied on one particular junior manager (Junior Manager X) because that junior manager had generally unlimited availability.

7. On 6/30/17, the owner told the claimant that he planned to transfer three of the claimant's junior managers to other locations. This included Junior Manager X. The claimant told the owner that he needed these three junior managers. The owner told the claimant that he would only transfer Junior Manager X. On or around 7/03/17, Junior Manager X ceased work at the claimant's location and he was no longer available to assist the claimant.

8. The claimant would not have had coverage issues for his planned vacations in July and August 2017, if the employer had not transferred Junior Manager X. After the employer transferred Junior Manager X, the claimant believed that he would not have adequate coverage for the desired vacation periods because he could not rely on Junior Manager X for coverage. The other junior managers had inflexible schedules and they could not work the hours that Junior Manager X could have worked. The claimant determined that he must work his desired vacation periods due to lack of coverage. He never asked the employer for help with coverage for these planned vacations.

9. Junior Manager X's transfer burdened the claimant. As a result of the transfer, the claimant would have to periodically work longer hours than he did before the transfer. Also, if a subordinate called in, the claimant could not rely on Junior Manager X for coverage.

10. Prior to 6/30/17, the claimant never complained to the employer about his work hours, any schedule issues, or any vacation time issues. Prior to 6/30/17, the claimant was not displeased with his work hours, any schedule issues, or any vacation time issues to the point where he felt compelled to resign.

11. The claimant decided to resign because he was dissatisfied with his anticipated longer work hours as a result of Junior Manager X's transfer and because he believed that he could not take his desired vacations in July and August 2017 as a result of Junior Manager X's transfer. The claimant also resigned because he thought he would not meet the employer's production criteria by 12/31/17 and that employer would reduce his pay.

12. Health concerns did not factor into the claimant's decision to resign.

13. On 7/07/17, the claimant submitted a resignation note to the employer's operations manager. The note indicated that he would continue to work until 7/22/17. The claimant told the operations manager that he had decided to resign because he had issues with his work hours, schedule, and vacation time. The operations manager handed the note back to the claimant. She told the claimant to wait until the next week. She directed the claimant to meet with the employer's two owners to discuss the resignation. The claimant did not discuss his issues with the operation manager because he believed he would have an opportunity to discuss them with the employer's owners.

14. The claimant's resignation note was dated 7/07/17. The note read, "It has been a great honor and pleasure working for you. I am giving you notice that Saturday 7/22/17 will be my last day of work. I plan to take a couple of weeks off and then look for something that will be less strenuous physically and with a less demanding schedule."

15. On 7/14/17, the claimant met with the employer's two owners to discuss his resignation. Before the claimant met with the owners, he had already decided to resign. He did not plan to retract his resignation.

16. At the start of the 7/14/17 meeting with the owners, the owners asked the claimant if he had won the lottery. The claimant responded that he had not. The owners asked the claimant whether he had secured employment elsewhere. The claimant responded that he had not. One of the owners (Owner X) told the claimant to "get the fuck out." The claimant asked Owner X if he was sure about this instruction to leave. The Owner repeated, "Get the fuck out." The meeting lasted for about two minutes. The claimant did not have an opportunity to discuss his work issues because Owner X told him to leave. The claimant would have discussed his work issues if Owner X had not told him to leave. The claimant complied with the owner's instructions and left. The employer ceased communication with the claimant.

17. The claimant filed a claim for unemployment insurance benefits. The effective date of the claim is 7/23/17.

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 except as follows. In Consolidated Finding # 9, the review examiner's use of the word "periodically" to describe the need for the claimant to work longer hours is accurate as to the claimant's experience prior to the transfer of Junior Manager X, but it does not reflect the claimant's testimony as to the frequency that he would have to work longer hours going forward. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question is whether the claimant voluntarily resigned or was fired. He submitted a resignation with two-weeks' notice on July 7, 2017, but the employer forced him to leave prematurely on July 14, 2017. Because the claimant did not file his claim for unemployment benefits until after his originally anticipated resignation date of July 22, 2017, it is not necessary to decide whether he was involuntarily out of work during the prior week. He cannot be paid unemployment benefits before the effective date of his claim, July 23, 2017. *See* G.L. c. 151A, § 23. Since the claimant intended to voluntarily leave his employment by July 22, 2017, his eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e), 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.

In Consolidated Finding # 11, the review examiner describes three reasons why the claimant resigned: (1) his anticipated longer work hours, (2) his belief that he could not take his July and August vacations, and (3) his thought that the employer would reduce his pay because the claimant could not meet the employer's stated production goal by December 31, 2017. We agree with the review examiner that none of these reasons constituted urgent, compelling, and necessitous circumstances for leaving his job. Alternatively, the claimant has the burden to show that these reasons, alone or together, created good cause attributable to the employer to resign.

General and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1). Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). However, leaving employment due to an employer's detrimental change of the conditions of employment may. A job which was suitable at one time may become unsuitable with changing circumstances. Graves v. Dir. of Division of Unemployment Assistance, 384 Mass. 766, 767 (1981). "Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.'" Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*.

We address first the claimant's belief that he would not be able to take his scheduled July and August, 2017, vacations. In order to show 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). After the employer transferred Junior Manager X to another location, the claimant realized that he would be unable to take those vacations because he would not have coverage. *See* Consolidated Finding # 8. To be sure, the claimant had deeply meaningful, personal reasons for taking the two pre-scheduled vacations in July and August, 2017. *See* Consolidated Finding # 5. Nonetheless, requiring an employee to postpone or forego a family vacation due to staffing needs does not amount to unreasonable employer conduct. However disappointing, this circumstance did not constitute good cause attributable to the employer to resign.

Next, we consider the fact that on June 28, 2017, the owner told the claimant that his pay might be reduced if the claimant's restaurant did not meet the 30% profit after controllable expenses (PACE) goal by December 31, 2017. *See* Consolidated Findings ## 3 and 4. Even if the claimant was correct that he could not possibly meet that goal and that the employer would reduce his pay, the fact remains that any such pay reduction would not have taken place for at least six months. For this reason, the anticipated pay reduction did not create good cause to resign in July 2017.

The detrimental impact of Junior Manager X's transfer on the claimant's regular working hours was, conceivably, more immediate. Before he lost Junior Manager X, the claimant worked from 9:00 a.m. to 6:00 p.m., 45-hours per week, but usually more than that because he received work-related calls late at night or in the early morning hours, he came in early to open the restaurant if someone overslept, and he would sometimes have to cover or work a double shift if someone called out at the last minute and there was no other coverage. *See* Consolidated Finding # 2.[2] The claimant worked long hours, and, as the review examiner observed, this had been going on for 20 years. *See* Consolidated Finding # 2. That does not mean, however, that the employer was justified in piling on yet more responsibilities and hours of work. Because Junior Manager X was the only junior manager on staff that had unlimited availability to work a variety of hours and shifts, the claimant lost this flexible managerial coverage for when an employee called in. *See* Consolidated Findings ## 6 and 9. In this situation, we think the claimant's belief that he would likely be working additional hours was reasonable, particularly in light of the employer's new PACE goals, which could only be achieved by a reduction in staff. *See* Consolidated Finding # 3.

A permanent change in working conditions that forces an individual to work well beyond full-time hours is not reasonable employer conduct. However, after losing Junior Manager X, the claimant did not stay in his job long enough to establish that he could not get his other junior managers to cover vacant shifts that arose. Junior Manager X was transferred on July 3, 2017. The claimant submitted his resignation on July 7, 2017. *See* Consolidated Findings ## 7 and 13. Although the claimant testified that, once Junior Manager X was taken away, he was working

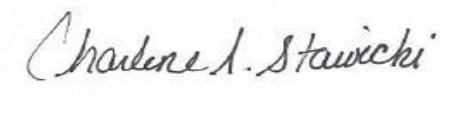
[2] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

more,[3] there is no testimony, time sheets, or pay stubs to show us just how much more he had to work. Because we do not know how much his own hours actually increased, nor can we tell whether any such elevated hours were short or long term, the evidence falls short of proving that the employer's action substantially increased the claimant's work hours.

We, therefore, conclude as a matter of law that the claimant has failed to show good cause attributable to the employer for voluntarily leaving his job pursuant to G.L. c. 151A, § 25(e)(1). The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning July 23, 2017, 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 - April 24, 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

[3] The claimant's testimony about working more once they transferred Junior Manager X is also part of the undisputed evidence in the record.