

The claimant quit before he could show that the employer's new pay plan would be financially detrimental to him and without making efforts to preserve his job. He did not have good cause attributable to the employer to resign.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 8821 56

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 the claimant benefits following his separation from employment on February 2, 2018. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On March 7, 2018, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on April 19, 2018, the review examiner affirmed the agency determination, concluding 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). The Board accepted the claimant's application for review.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not voluntarily quit with good cause attributable to the employer because the employer's new pay plan would not have caused the claimant to suffer a financial loss, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact:

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

1. The claimant worked for the employer, a car dealership, from May 16, 2016 to February 2, 2018 as a Sales Representative.
2. Effective May 16, 2016, the claimant worked under a pay plan that paid an hourly rate of \$10.00 per hour (\$15.00 over forty hours), which was characterized as a draw against future pay or minimally \$1,750.00 per month. If the draw did not exceed the \$1,750.00, the draw would then be deducted from future bonuses. The employer paid a 20% commission or a flat per unit rate of \$150.00 (minimum)

and a monthly unit bonus of \$500.00 for at least 15 units sold, \$700.00 for 18, \$1,000.00 for 20, and \$1,500 for 24 or more.

3. On January 1, 2017, the employer introduced a temporary pay plan during a remodel effective until December 31, 2017, which also reflected the new minimum wage of \$11.00 per hour. The per unit flat rate increased to \$200.00 and the monthly unit bonus changed to \$750.00 for at least 12 units sold, \$1,500.00 for 15, \$2,500.00 for 20, and \$3,500.00 for 25 or more. The plan was implemented in recognition of greater difficulty to sell cars during a remodel.
4. It was understood that once in the new facility, the plan would change.
5. On December 7, 2017, the claimant began a leave of absence under FMLA with an anticipated return to work date of February 17, 2018.
6. By December 31, 2017, the employer was uncertain of what the new pay plan would look like, so it extended the temporary pay plan.
7. Around February 1, 2018, the claimant heard from co-workers that the pay plan changed.
8. Effective February 1, 2018, the employer paid a draw based on \$11.00 per hour (\$16.50 over forty hours per week) or a minimum of \$1,500.00, a 20% commission or \$125.00 per Jeep/\$150.00 per Chrysler/ \$175.00 per Dodge/ \$225.00 per Ram/\$300.00 per Fiat, and a monthly bonus of \$1,000.00 for 15 to 17.5 units sold, \$1,500.00 for 18 to 20.5 units sold, \$2,000.00 for 21 to 25.5 units sold, and \$3,000.00 for 26 or more units sold.
9. The claimant confronted the employer about the change because he believed it to be to his detriment and the employer remained steadfast. The claimant, who consulted an attorney, was informed that an employee on leave is not to suffer a change to salary upon return to work.
10. On February 2, 2018, the claimant tendered his resignation effective immediately.

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 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. As discussed more fully below, however, we disagree with the review examiner's conclusion, but affirm the decision on different grounds.

Because it was undisputed that the claimant resigned his position as a sales representative, his qualification 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

Under this section of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. The review examiner concluded that the claimant failed to meet this burden. In doing so, the review examiner attempted to compare the claimant's old pay plan from 2016 to the new pay plan, which went into effect in 2018. By way of speculation, conjecture, and arbitrary numbers, the review examiner concluded that the claimant would not have suffered a financial loss under the pay plan. We are not so persuaded and reject the plan comparison used by the review examiner.

Where a claimant argues that the change in his pay plan would have been financially detrimental to him, we note that a reduction in pay may be good cause for leaving employment, but the reduction must be more than just speculative. Here, the claimant's decision to resign was made before he could reasonably project how much he could earn under the new pay plan.

Even if the claimant had shown that the new plan was financially detrimental to him, the facts establish that the claimant made no attempt to preserve his employment, as required by the foregoing statute, and thus, he is subject to disqualification on that basis. *See Kowalski v. Dir. of Division of Employment Security*, 391 Mass. 1005, 1006 (1984) (rescript opinion).

We, therefore, affirm the review examiner's decision that the claimant has failed to sustain his burden to prove that he left his employment for good cause attributable to the employer. We further agree that there is insufficient evidence that his separation was driven by urgent, compelling, and necessitous reasons. He is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 28, 2018, 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 - June 6, 2018



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.

spe/jv