**Where the employer repeatedly told the claimant to call him to come back to work after he calmed down, the Board concludes that the claimant was not fired, but left his employment voluntarily. Because the claimant was working up to 65 hours a week, the employer refused to pay overtime, and then the employer insisted that the claimant start his delivery route at a time when traffic made his job that much more difficult, the claimant had good cause attributable to the employer to resign.**

**Board of Review**
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**Issue ID: 0024 9770 26**

# 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 we affirm on different grounds.

The claimant separated from his position with the employer on March 7, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 12, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on July 19, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged without having engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). 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 to obtain more detailed findings of fact about whether the claimant quit or was fired. Only the employer 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 decision, which originally concluded that the claimant was eligible for benefits after having been discharged by the employer, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant was not fired, and that he had good cause to resign.

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 as a Salesperson/Delivery Driver for the employer, a candy supplier, from August 30, 2017 until becoming separated from employment on March 7, 2018.

2. The claimant was hired for his positon by the Owner. The claimant was paid an hourly rate of $17.50 per hour. The claimant was informed that he would be working full-time, four days a week.

3. The claimant's first day of work he went out with the Owner on a route before starting to work alone.

4. In his position, the claimant was responsible for traveling to the various client locations, taking candy orders and providing the candy orders to the client.

5. The claimant was residing in [Town A], Massachusetts while working for the instant employer.

6. The claimant utilized the employer's work vehicle. Each day, the claimant would travel to the employer's office/warehouse located in [Town B], Massachusetts. The claimant would retrieve the employer vehicle from the office. If the employer office was not open at that time to allow the claimant to enter and punch in for work, the claimant would have to manually enter his time of arrival to work.

7. The employer had a camera on the outside of the office/warehouse.

8. The claimant's first client location was sometimes an hour and a half away from the employer office/warehouse.

9. The claimant was working an average of 40 to 65 hours per week for the employer. The claimant was working Monday through Friday, along with one Saturday per month.

10. The claimant reported to work at 6:00 a.m. up until November 13, 2017. Thereafter, the claimant was reporting to work prior to 6:00 a.m. to ensure that he got the first client location when they opened. (The claimant was reporting to work anywhere from 5:00 a.m. to 5:45 a.m.)

11. At no time did the Owner speak to the claimant regarding any concerns that he was arriving to work later than the time that he was reporting on his time record.

12. During the course of the claimant's employment, the claimant had asked the Owner about being paid for the overtime hours worked. The claimant was informed that he would not be paid overtime. The claimant was the only Driver working for the employer.

13. The claimant was no longer working Saturdays for the employer after Saturday December 2, 2017.

14. In February 2018, the Owner obtained 40 new stores. The claimant addressed his concerns about the workload and the employer's need for an additional Driver. The Owner refused to pay overtime. The claimant asked the Owner for more money because he was working over 40 hours per week and was not receiving any overtime pay. The owner provided the claimant with an increase in pay to $18.25, along with providing the claimant additional paid time off.

15. At the end of February 2018, approximately one week prior to the claimant's separation from work, the claimant informed the Owner that he was burning the claimant out. The claimant informed the Owner that he was working 60 hours a week, the employer had stores everywhere, and if the employer was not going to pay him for the additional hours worked, he should schedule him for only 40 hours per week. The Owner responded by indicating that he was going to try to locate another driver to perform some of the work.

16. At the end of each work day, the claimant would return to the employer office/warehouse and submit the money and paperwork for the day. The claimant would then prepare for the next day. At that time, the Owner and the claimant would discuss the work for the next day, while the claimant was picking the candy for his next shift.

17. On March 7, 2018, after completing his work for the day, while at the employer office, the claimant and the Owner were discussing the claimant's route for the next day. The claimant stated that the Owner should have had him do that route that day because the weather was bad and sent [sic] him to the Cape the following day. The Owner responded that the claimant complained too much.

18. The Owner then informed the claimant that he was not going to pay him for sitting waiting for the clients to open, that he would be reporting to work the next week starting at 6:00 a.m. The claimant responded that the Owner did not trust him, that he worked hard for the Owner and he did not even take a lunch break. The Owner stated that it was his business and he did not know why the claimant was giving him such a headache. The Owner began to discuss how he would work 12 hour days. The claimant responded that he should have worked 12 hour days, because it is his business. The claimant began walking away from the Owner. The Owner followed the claimant as the discussion continued and escalated.

19. The Owner, concerned that the claimant would leave with the employer vehicle, stated "[Claimant Name] give me my van keys and we will talk". The Owner wanted to get things under control at that time. The Owner instructed the claimant to "go home", "think about what you're doing", "you are very angry right now", "you can call me", "you can come back", "I need a salesman and you need a job".

20. The claimant gave the Owner the keys and walked out the back door. The claimant believed that he was being discharged at that time, as he had not previously been required by the employer to turn in the employer's vehicle keys at the end of his shift.

21. The Owner followed the claimant out of the work premises, whereupon both claimant and the employer were utilizing profanity towards each other.

22. The claimant was in contact with the Owner after the March 7, 2018 date, whereupon the Owner denied having discharged the claimant, repeating what he had stated to him on March 7th.

23. The claimant filed his claim for unemployment benefits on March 18, 2018. The effective date of the claim is March 18, 2018.

Credibility Assessment:

The claimant, although invited, did not attend the remand hearing. The Owner's direct and consistent testimony that he informed the claimant before and after leaving the work premises that he was not being discharged was accepted as credible, as his testimony at the remand hearing was unrefuted.

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. 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. Based upon the consolidated findings after remand, we agree with the review examiner's legal conclusion that the claimant is eligible for benefits, but on different legal grounds.

The first question we must decide is whether, on March 7, 2018, the claimant quit or was fired. In her original decision, the review examiner concluded that the employer involuntarily terminated the claimant's employment. We remanded the case to take a closer look at what was said and done between the employer and the claimant on that last day of work.

There is no question that the employer asked the claimant for his keys. *See* Consolidated Finding # 19. The review examiner found that the claimant believed at the time that he was being discharged, because this was the first time he had been asked to turn in his keys. *See* Consolidated Finding # 20. However, in light of what else the employer said to the claimant, we do not believe that this belief was reasonable. Specifically, during the heat of their argument and after that date, the employer told the claimant verbally and in a text message that he could call the employer and come back. *See* Consolidated Findings ## 19 and 22; *see also* Exhibit 5. Since the claimant did not return, we conclude that he voluntarily left his employment.

Voluntary separations from employment are 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 . . . .

This statutory provision places the burden of proof upon the claimant. In determining whether 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). To carry his burden to show good cause, we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985).

The findings reveal that the claimant had numerous workplace complaints connected to his workload. He was the employer's only salesperson/delivery driver, responsible for servicing client locations, which were, apparently, geographically spread out up to an hour and a half away from the employer's warehouse. *See* Consolidated Findings ## 4, 8, and 12. He worked 40 to 65 hours per week. Consolidated Finding # 9. Beginning in November, he began coming to work early, before 6:00 a.m., to reach client stores before they opened.[1] Consolidated Finding # 10. The findings also provide that the employer would not give him overtime pay for the long hours that he was working.[2] The claimant complained about this at various times during his employment. *See* Consolidated Finding # 12. A month before his separation, his workload increased with the addition of 40 more client stores. *See* Consolidated Finding # 14. When he complained again about his long hours and pay, the employer again refused to pay overtime, instead raising the claimant's hourly rate by 4.3% with an unspecified increase in paid time off. *See* Consolidated Finding # 14. The findings further show that, a week before his separation, the claimant told the employer he was burning out at 60 hours of work per week and asked to work only 40. Instead of reducing his hours, the employer said that he would try to find a second

[1] As explained in the claimant's DUA fact-finding questionnaire, Exhibit 4, he did this in an effort to avoid the rush hour traffic that started around 6:00 a.m. Although not explicitly incorporated into the review examiner's findings, this statement 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).

[2] With certain exceptions that do not appear to be applicable here, an employer must pay one and one-half times an employee's regular hourly rate for hours worked in excess of 40 hours in a work week. *See* 454 CMR 27.03(3).

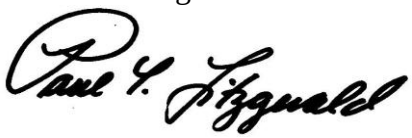
driver. *See* Consolidated Finding # 15. With this gesture, we think the employer implicitly acknowledged that the claimant's workload was too difficult. Yet, a week later, the employer insisted that the claimant clock in no earlier than 6:00 a.m. This triggered an argument and the claimant's departure. *See* Consolidated Findings ## 18–21.

By itself, the employer's decision to have the claimant start his day at 6:00 a.m. is not an unreasonable expectation. However, the record indicates that this would have made the claimant's long workweek even more difficult by forcing him to deal with rush hour traffic. The employer had the claimant working 60 hours a week, refused to pay overtime, recognized that the claimant was working too hard, and was now making his job more challenging by enforcing a 6:00 a.m. start time. We think that the conditions under which the employer expected the claimant to work were unreasonable and constituted good cause to resign.

In order to qualify for unemployment benefits, we also consider whether the claimant has met his burden to show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984). Here, the consolidated findings show that the claimant raised the issues about his pay and working conditions at least a couple of times before walking off the job. We think such attempts were reasonable.

We, therefore, conclude as a matter of law that the claimant's separation from employment was voluntary within the meaning of G.L. c. 151A, § 25(e). We further conclude that the claimant has established that he left work for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning March 4, 2018, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - November 29, 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.

AB/rh