Failure to pay overtime violated the Massachusetts Minimum Fair Wage law. Because the claimant complained to his employer about the problem a couple of times without any change, it constituted good cause attributable to the employer to resign. Claimant is eligible for benefits under G.L. c. 151A, § 25(e)(1).

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Issue ID: 0025 4741 79

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 reverse.

The claimant resigned from his position with the employer on May 5, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 30, 2018. 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 14, 2018. 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, 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 the claimant's overtime hours and how that affected his decision to resign. Only the claimant attended the remand hearing.[1] 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 original decision, which concluded 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 record after remand shows that the employer would not pay him for working overtime.

Findings of Fact

[1] The employer was invited to participate in each of the hearings as a witness only but did not appear.

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

1. The employer hired the claimant as a part time intern in November 2016. As an intern, the claimant was compensated at $16.00 per hour.

2. In January 2017, the claimant was offered a full time (40 hours per week) work schedule as an intern.

3. During the first two weeks of January 2017, the claimant worked approximately 40 hours of overtime and was compensated for that time. At no time thereafter was the claimant compensated for overtime.

4. The claimant was not compensated for working 2.5 hours of overtime during the week of January 15, 2017.

5. The claimant was not compensated for working 2.5 hours of overtime during the week of January 22, 2017.

6. The claimant was not compensated for working 2.5 hours of overtime during the week of January 29, 2017.

7. The claimant was not compensated for working 2.75 hours of overtime during the week of April 16, 2017.

8. In or around June 2017, the claimant was promoted to director of video production (director). As director, the claimant was scheduled to work 40 hours per week at a rate of $23.00 per hour.

9. The claimant believed he would be compensated for working overtime. At no time as the director was the claimant compensated for working overtime. The claimant was dissatisfied he was not being compensated for working overtime.

10. The claimant was not compensated for working 12 hours of overtime during the week of July 2, 2017.

11. The claimant was not compensated for working 12 hours of overtime during the week of July 9, 2017.

12. The claimant's supervisor was the employer's CEO. The claimant asked the CEO why he was not being compensated for overtime and informed him he would not continue to work additional hours if not compensated. The CEO advised the claimant he would look into it. At no time was the claimant promised he would be compensated for working overtime.

13. The claimant was not compensated for working 8.75 hours of overtime during the week of January 7, 2018.

14. The claimant was not compensated for working 3 hours of overtime during the week of April 8, 2018.

15. The claimant was not compensated for working 3 hours of overtime during the week of April 15, 2018.

16. The claimant was not compensated for working 1.5 hours of overtime during the week of April 22, 2018.

17. During his employment, the claimant continued to discuss his dissatisfaction with not being paid overtime to the CEO. The CEO continued to advise the claimant he would look into it.

18. The claimant was unhappy with the direction and communication he received from the CEO. The claimant wanted more guidance from the CEO. The claimant felt he could not successfully complete his job duties without further guidance from the CEO. At no time was the claimant warned or disciplined for his job performance.

19. During his employment, the claimant was dissatisfied with the late night, early morning and weekend emails he received from the CEO. The claimant felt the CEO's communications were condescending and asking him to sacrifice his personal time to work without added compensation.

20. The claimant felt the emails from the CEO caused him to suffer from heightened stress and anxiety.

21. During his employment, the claimant occasionally saw his therapist to manage his depression and PTSD. The claimant was diagnosed with depression and PTSD in 2014.

22. On Friday, April 27, 2018, at 1:20 a.m., the CEO asked the claimant to communicate with a coworker in preparing videos for a meeting the CEO was having on Monday morning. The claimant responded in part, "I do not feel that you gave me enough heads up for these kinds of things. I do not work on the weekends as that is my personal time. If something like this is [sic.] comes up it would be appreciated if I was given more than one days [sic.] notice. Your expectation of new videos turned around in a few days is not possible when there isn't any communication." The CEO responded by stating he had just learned of the meeting himself and that the claimant could use preexisting videos.

23. At no time was the claimant discipline[d] for not working outside the normal work week.

24. On or around May 4, 2018, the claimant had a meeting with the CEO. The claimant wanted to discuss the communication issues he was having with the CEO. The meeting did not go as the claimant planned. The claimant felt the CEO was discussing things not relevant to his meeting agenda.

25. On May 5, 2018, the claimant resigned from his position effectively immediately. In his resignation letter the claimant stated in part, "Please accept this as official notice of my resignation. As you know, over the last several months, we have had many differences of opinion regarding the processes, work assignments, and goals for the video and marketing team. Your expectations of me without clear direction from you, has made this relationship a difficult one to manage and made my role as Director of Video Production a position that you have not valued." "Based on the lack of support and the continued the [sic.] expectations to work above and beyond my role, as previously demonstrated with the numerous weekends and late nights I have worked at your instruction in order to insure the continuity of day to day business, without added compensation, I feel that resigning is the only option for me."

26. The claimant quit because of his personality conflict with the CEO and not receiving overtime compensation.

27. At no time did the claimant look into transferring into another position because all positions worked directly with the CEO.

28. At no time did the claimant look into a leave of absence. It is unknown if the claimant would have been eligible for a leave of absence.

Credibility Assessment:

In this case, the claimant indicated he quit due to his dissatisfaction with not being compensated for overtime and interpersonal conflicts with the employer's CEO. I find the claimant's testimony as to the reasons he quit his employment credible. The claimant's testimony was consistent with his resignation letter and the information provided to the DUA prior to the hearings where he indicated he quit for a few reasons.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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 # 26, the review examiner characterizes a reason for the claimant's resignation as a personality conflict with the CEO, which is not fully supported. Based upon the claimant's testimony and his email evidence, the conflict is more fairly described

as an interpersonal communication problem. In adopting the remaining findings, we deem 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 original legal conclusion that the claimant is ineligible for benefits.

Since the claimant voluntarily separated from employment, his eligibility for benefits is properly analyzed under 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 . . . .

The express provisions of this section of law place the burden of proof upon the claimant.

To determine if the claimant has carried his burden to show good cause under the statute, 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). Among the reasons why the claimant resigned was that the employer would not pay him for work in excess of 40 hours per week. Under G.L. c. 151, § 1A, employers in Massachusetts are required to pay for any hours worked in excess of 40 hours per week at the rate of one and one half times the regular rate of pay. In this case, it appears that in many weeks after January 2017, the employer did not pay the claimant *anything* for the hours that he worked beyond his regular 40 per week, let alone at the proper time and a half rate, in violation of the Massachusetts Minimum Fair Wage law, G.L. c. 151, § 1A.[2] *See* Consolidated Findings ## 4–7, 10, 11, and 13–16; *see also* Exhibit 12.[3] This created a valid workplace complaint and, potentially, good cause to resign. *See* Board of Review Decision BR-116407-A (May 20, 2011) (a violation of the Wage Act constitutes good cause attributable to the employer to resign).

Under these circumstances, an individual will be eligible for benefits under G.L. c. 151A, § 25(e)(1), provided he or she has made reasonable attempts to resolve the problem with the employer before resigning. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984) (an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile); *see* Boyer v. Dir. of Department of Unemployment Assistance,

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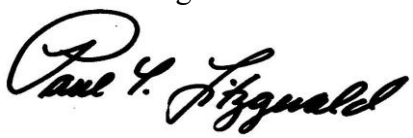
[2] There is nothing in the record to suggest that the claimant fell within any listed category of employee exclusions under G.L. c. 151, § 1A. During his employment, the claimant asked the employer twice about his right to overtime, and the employer demurred. *See* Consolidated Findings ## 12 and 17. The employer never responded to the DUA's fact-finding questionnaire about this unemployment claim and it failed to participate in either hearing to offer evidence demonstrating that the claimant was anything other than an hourly employee, as indicated in Consolidated Finding # 8.

[3] Exhibit 12 is a copy of the claimant's payroll log for the duration of his employment. While not explicitly incorporated into the review examiner's findings, it 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).

No. 16-P-555, 2017 Mass. App. Unpub. LEXIS 151 (Mass. App. Ct. Feb. 17, 2017), *summary decision pursuant to rule 1:28* (affirmed Board decision that claimant was ineligible for benefits even if the employer's excess weekly draw reduction violated the minimum wage requirement, because he did not take reasonable steps to preserve before quitting). Here, the claimant has shown that he complained to his CEO at least a couple of times about not getting paid for overtime, and the employer's only response was that he would look into it. *See* Consolidated Findings ## 12 and 17. Since the employer was aware of the overtime violation and did nothing about it, we agree that further attempts to remedy the problem would have been futile.

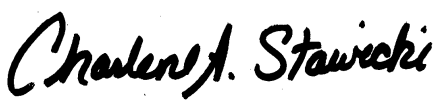
We, therefore, conclude as a matter of law that the claimant resigned for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 29, 2018, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - March 25, 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.

AB/rh