Where the claimant had to take more than his allotted time off for medical reasons, but made up for it by working seven days in a row and up to 80 hours a week, it was unreasonable for the employer to change his status from a salaried back to hourly due to taking too much time off. Held claimant had good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1).

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Issue ID: 0028 3826 35

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 November 28, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 16, 2019. 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 September 21, 2019. 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 clarify and expand her findings of fact about the claimant's pay, time off, and reasons for leaving employment. 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 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 consolidated findings show that the employer was about to discipline the claimant by reverting him from salaried back to hourly status, even though the claimant had made up the time off taken for necessary medical reasons.

Findings of Fact

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

1. Beginning in November, 2015, and until mid-April, 2018, the claimant worked full-time in the kitchen of the employer's restaurant located in [Town A], MA. He reported directly to the owner.

2. The owner believed the claimant was a hard worker and gave him six pay raises over a 2-year period. In mid-April, 2018, he was earning $16.50 per hour.

3. The owner asked the claimant to manage her new location opening in [Town B], MA. As the kitchen manager, the claimant earned a salary of $1000 weekly for 55 to 60 hours of work. He also received 2 weeks of paid vacation time annually and 1 week of paid sick time.

4. During the first two weeks of April the claimant was paid as an hourly employee at a rate of $16.50 per hour. The claimant worked at least 40 hours per week at the [Town A] location. He also worked approximately 40 hours per week at the [Town B] location, setting up the kitchen and preparing it to open. He did this before and after his regular work schedule and on weekends.

5. The claimant understood the employer expected him to continue to perform his full-time job at the [Town A] restaurant as well as set up the kitchen at her new restaurant location in [Town B]. The owner did not pay the claimant for the extra hours he worked during each of those two weeks.

6. In late April, the claimant began working at the [Town B] location as the kitchen manager. He worked at the [Town B] location until November 28, 2018.

7. As the kitchen manager, he opened and closed the restaurant, ordered products and scheduled staff for both of the employer's locations. The claimant scheduled himself to have Mondays and Tuesdays off.

8. The claimant was unhappy he was not compensated for the additional hours he worked setting up the [Town B] location. The owner did not agree to pay the claimant. She told the claimant she would "take care of him" when his baby was born in the fall. The claimant understood this to mean he would be paid for any time off he took when his new baby arrived.

9. The claimant perceived the owner's business was run inefficiently and believed each location was understaffed. Approximately 4–8 kitchen staff members, including line cooks and a dishwasher, rotated between the two locations each week.

10. The claimant was particularly concerned with the manner in which staff was scheduled to work at each location. Staff was routinely scheduled to work 30 hours per week at one location and 30 hours during the same week at the other location. Although they worked in excess of 40 hours per week, the hours were split between each location.

11. The claimant believed the owner was asking him to do something illegal, in scheduling the hours between locations to avoid paying overtime to the staff. When he addressed his concerns with the owner, she told him the accountant would take care of it. The claimant perceived the owner was morally corrupt and unethical.

12. Although he believed she was acting unethically and illegally, he did not report the owner's business practices to any labor departments or agencies at any time while working for her.

13. In August, 2018, the claimant bought a home. The claimant needed to maintain his weekly salary of $1000 per week to afford his monthly mortgage payment.

14. Over the next months, the claimant missed work for a variety of reasons which also included his wife's pregnancy complications and injuries he received to each of his ankles. In August, the claimant injured his left ankle, in November, he injured his right ankle.

15. Between April and November, the claimant missed approximately 4.5 to 5 weeks of work in total. The claimant had exhausted his 2 weeks of paid vacation and 1 week of paid sick time.

16. Throughout this time, the owner continued to pay the claimant his $1000 salary even when he failed to work 55–60 hours per week and had no vacation or sick time remaining. The owner required the claimant to make up days he missed work and was paid for once he was out of time. To do this, the claimant came in on scheduled days off and worked additional hours in subsequent weeks. At times, he worked up to 80 hours per week over 7 days to make up for time he had previously missed. It is unknown if the claimant made up for all of the additional time off he had taken.

17. The claimant was aware the owner believed he was taking too much time off from work.

18. In early November, the claimant injured his right ankle while working. The following day he was diagnosed with a severe sprain, and placed in a hard brace. Despite his doctor's suggestion he stay off his foot for 4 to 6 weeks, the claimant remained out of work for only 3 to 4 days. The claimant felt forced to return to work after the owner informed him she would have to find someone to do his job if he were unable to work.

19. The claimant did not file a worker's compensation claim for his work-related injury in November. Although she told him to see a doctor for his injury, at some point she stated that if he went on worker's compensation, she would be unable to pay him at the rate he got paid. She also stated it would be tough making mortgage payments on worker's compensation. The claimant felt discouraged by the owner's comments and took them to mean he should not apply for worker's compensation. He also believed he would be unable to afford his mortgage or the upcoming holidays if his rate of pay were decreased.

20. On November 26, the claimant's baby was born. He took the following day off to be with his wife and baby.

21. On the morning of November 28, prior to the start of his shift, the claimant texted the owner a picture of his baby and asked her if they could find a way for him to take his son home from the hospital the following day. The owner responded they would talk later.

22. On November 28, the clamant arrived to work at 8 a.m. and met with the owner around 4 p.m. The claimant became upset when the owner denied his request to take the following two weeks off for paternity leave with pay. The owner informed the claimant that once he returned from his unpaid paternity leave, he would be taken off salary and returned to an hourly status because he was taking too much time off from work.

23. The claimant was unhappy the owner refused to pay him for his time off. The claimant felt the owner still owed him money for the additional hours he spent getting the new restaurant ready in April. He was also unhappy she planned to return him to an hourly rate of pay. As a result, he decided to quit.

24. On November 28, around 5:30 p.m., the claimant informed the owner he was quitting and walked out of the restaurant.

25. The claimant quit his job because he was denied additional paid time off by the owner. He also quit because the owner informed him she was changing his classification of employment from a salaried to an hourly employee when he returned from his paternity leave.

26. The claimant filed a claim for unemployment insurance benefits with an effective date of December 16, 2018.

Credibility Assessment:

Both parties agree the claimant was informed on his last day of work that his status would change from a salaried to an hourly employee upon his return from his unpaid paternity leave. The owner did not attend the hearing. In her response

to an initial fact-finding questionnaire, she confirmed the claimant's direct testimony that this conversation occurred. Although the owner maintained she told the claimant it was to avoid future abuse of his salaried position, the claimant denied this assertion. However, he did acknowledge she told him it was because he was taking too much time off of work. The claimant's testimony the owner had never discussed that she had a problem with him abusing his salaried position is not credible. The claimant acknowledged that despite using in excess of approximately 1.5 weeks of his annual allotment of paid time off, the owner continued to pay him his full weekly salary of $1000. He also admitted the owner *made* him make up days of work he missed in excess of his allotted time, and further asserted this is why he sometimes worked 7 days per week and up to 80 hours weekly. Given that the owner *required* the claimant to make up this time suggests that she and the claimant had some discussion about him being in excess of his annual allotment of time. In addition, the claimant's text to the owner on the morning of November 28, suggest[s] he knew the owner would have a problem with him taking any additional time off. It is concluded the claimant was well aware the owner had a problem with him abusing his salaried position and that she had discussed it with him.

Although there is no dispute the claimant was informed his status would change to hourly upon his return from an unpaid paternity leave, the claimant's testimony that his hours would be reduced and limited to 40 per week at that time is not credible. Nor is his contention he would be demoted from kitchen manager to a line cook.

To begin with, the claimant made no mention of a reduction in hours or job title in his initial response to a factfinding questionnaire and only asserted both in response to the Review Examiner pointing out his salary would only be reduced by $10 per week if he worked his minimum of 60 hours per week at $16.50 per hour. Although he stated in his questionnaire that he "wouldn't be paid for his overtime hours", this statement alone does not support his sudden contention at hearing that the owner told him his hours would be reduced. Rather it suggests the claimant would not be paid at an hourly rate of time and a half (overtime pay) for any hours he continued to work in excess of his full-time position. This seems logical as the employer's decision to change his status was preempted by the claimant taking almost 60% more paid time off in a 7- month period than he was allotted for an entire year. It was also supported by his earlier testimony that the owner did not like to pay overtime and only did so "kicking and screaming" and that employees were scheduled at different locations to avoid doing so. The claimant never alleged the employer did not pay employees for the *number* of hours they worked. He only alleged she did not pay them at the correct overtime rate. Even if it were to be believed the owner demoted him to a line cook, (despite the claimant's admission he was never told this by the owner but imagined he could be), the claimant's assertion that he would be limited to 40 hours and his pay significantly reduced is still not credible as it contradicts his earlier testimony that the employer was consistently short staffed, specifically with regard to line cooks. It is not logical that she would further reduce her

> staffing levels or prohibit the claimant from working at least 60 hours per week between both locations as he directly testified the line cooks did routinely and weekly.
>
> The claimant's testimony that he has filed a lawsuit against the employer and also gone to Worker's Compensation about his injuries is not credible as the claimant did not provide any substantial information as to what his lawsuit alleges nor did he provide any further details or documentation regarding either.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Since the claimant voluntarily left his employment, his eligibility for benefits is 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 . . . .

The express language of this statutory provision places the burden of proof upon the claimant.

When a claimant contends that 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). It is evident from the consolidated findings that the claimant had several concerns regarding the way the employer ran its restaurant business. The claimant believed the owner asked him to make schedules that improperly avoided paying overtime to his kitchen staff. *See* Consolidated Findings ## 9–11. After two separate work-related injuries, he felt she pressured him to return to work without filing a Workers' Compensation claim and before his doctor's recommended period for recuperation. *See* Consolidated Findings ## 14, 18, and 19. The claimant was unhappy about the owner not paying him for the extra hours he spent in early April setting up the kitchen in the new restaurant, not giving him two weeks of paid compensation time for that work when his new baby arrived in November, and stating he would revert back to being an hourly employee upon return from his parental leave. *See* Consolidated Findings ## 8, 22, 23, and 25. Thus, on November 28, 2018, he quit. Consolidated Finding # 24.

The claimant testified that the owner also intended to reduce his pay by limiting his work hours after his parental leave. This is not in the findings, because the review examiner did not find this

testimony to be credible. Although we might view the evidence differently, such assessments are within the scope of the fact finder's role, and we may not disturb them on appeal, unless they are unreasonable in relation to the evidence presented. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Because the review examiner articulated a reasonable basis for rejecting this particular testimony, we do not disturb it. Moreover, because we cannot say that, as written, the remainder of the consolidated findings are unreasonable in relation to the evidence presented, we accept them as being supported by substantial evidence.[1]

We consider whether the consolidated findings show that the employer acted unreasonably such that the claimant had good cause attributable to the employer to resign. We believe they do.

Consolidated Finding # 22 states that when the claimant asked for two weeks of parental leave on November 28, 2018, the employer told him that, when he returned, he would be taken off salary and returned to an hourly status. The employer was changing the claimant's status from salaried to hourly, because she believed that he was taking too much time off. *See* Consolidated Finding # 22.

More specifically, the finding states that the owner informed the claimant that, once he returned from paternity leave, he would be taken off salary and returned to hourly status because he was taking too much time off from work. Consolidated Finding # 22. As noted in the credibility assessment, the employer believed the claimant was "abusing his salaried position," because he had taken more than his allotted vacation and sick time between April and November. *See also* Consolidated Finding # 15 and Exhibit 9.[2] However, we believe that the consolidated findings show that the claimant had not "abused" his paid time off, but that he had to be absent for necessary medical reasons. Between April and November, he missed work due to his wife's pregnancy and two separate work-related injuries. *See* Consolidated Finding # 14. Moreover, the employer had him make that time up. To do this, the claimant came in on scheduled days off and worked seven days in a row, up to 80 hours per week. *See* Consolidated Finding # 16. In our view, this does not reflect someone who is abusing his salary, but rather an employee who was diligently and in good faith trying to make up the hours he missed work, and for which he had been paid.

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[1] We note that the credibility assessment's last paragraph rejects the claimant's assertion that he has filed a lawsuit and a Workers' Compensation claim. This is unreasonable in relation to the evidence presented. When the claimant testified about his work injuries and concern about the employer not paying overtime, the review examiner asked if he ever contacted any labor division. He testified that he has a lawsuit pending and also went to Workers' Comp. about his injuries. The review examiner asked nothing else about this, thus, there is nothing more in the record. That does not make his testimony not credible. However, rejecting this portion of the credibility assessment does not affect our decision, because the consolidated findings are limited to stating that the claimant did not file a Workers' Compensation claim in November, and that he did not report the owner's business practices to any labor departments while still working for her. *See* Consolidated Findings ## 12 and 19. We see no reason to disturb these findings.

[2] On page 9 of the employer's completed DUA fact-finding questionnaire, Exhibit 9, the employer writes, "[The claimant] was offered an hourly position going forward to avoid abusing his salary position in the future." While not explicitly incorporated into the review examiner's findings, the employer's written 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).

Because the claimant missed work for reasons beyond his control and then worked an extraordinary number of hours to make up the missed work, we believe that the owner unfairly characterized the claimant as abusing his salaried position and further believe that she acted unreasonably in penalizing him by reverting his job back to an hourly position.[3]

The Massachusetts Supreme Judicial Court has held that 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. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). On the record before us, we are not convinced that, prior to quitting, the claimant possessed a viable and feasible means to preserve his employment. The findings establish that owner of the employer's business made what appears to have been a final decision to change the claimant's job back to an hourly position. Given this decision, we do not see how the claimant could have preserved his employment other than by accepting this decision, which was both unreasonable and detrimental to the claimant. Thus, the record before us suggests that any attempt by the claimant to preserve his employment would likely have been futile.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he left his employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).[4]

[3] In rendering our decision, we take note of the recently enacted Massachusetts Parental Leave Act, which requires that workers who take less than eight weeks of parental leave after the birth of a child be restored to their previous position with the same status and pay. *See* G.L. c. 149, § 105D. However, we need not consider the applicability of this statue, because we decide the case on other grounds.

[4] Though also not dispositive to our decision, we note that the record indicates that the employer never paid the claimant for 80 hours of work that he performed in April. The findings provide that, in early April, 2018, while the claimant was still an hourly employee, he was asked to set up the kitchen at the new [Town B] restaurant location while he continued to work full-time at the [Town A] restaurant. *See* Consolidated Findings ## 4 and 5. During the first two weeks of April, he worked an extra 80 hours that the owner never paid him for. Consolidated Finding # 5. In Massachusetts, employers must pay their employees all wages earned within six days of the end of the pay period. G.L. c. 149, § 148. There is no question that the claimant asked to be paid and that the owner declined. *See* Consolidated Finding # 8. Whether or not the claimant reasonably believed that he would be compensated when his baby was born in November is immaterial. *See* Consolidated Finding # 8. Massachusetts law does not permit an employer to make such an agreement. *See* M.G.L. c. 149, § 148. The owner's failure to compensate him for those 80 hours was one of the claimant's reasons for quitting. *See* Consolidated Finding # 23. This reason alone could constitute good cause attributable to the employer to resign.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 25, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 20, 2020

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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