

**Claimant, a part-time nail technician, failed to establish good cause attributable to the employer or that he made reasonable efforts to preserve his job before resigning, where the review examiner accepted as credible the employer's testimony that it only gave paid vacation to full-time employees, and the employer established a fair rotation of assigning clients to employees based on who arrived at its salon first each day.**

**Board of Review  
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**Issue ID: 0032 7330 25**

### 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 resigned from his position with the employer on September 7, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 13, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 23, 2020. 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, 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 take additional evidence regarding the claimant's decision to quit and any efforts he made to preserve his job before quitting. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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's claim that the employer was assigning clients to a new employee did not constitute good cause attributable to the employer because the employer continued to assign clients to the claimant, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. On November 1, 2017, the claimant started working part-time for the employer, a nail and spa establishment, as a nail technician. The claimant was scheduled to work Tuesday through from [sic] Friday from 1PM-6PM or 2PM-6PM. The claimant worked 22-25 hours per week for the employer. The claimant was paid a gross weekly salary of \$250 plus tips.
2. The claimant's supervisor was the female owner.
3. The owner started to assign a new worker some of the claimant's clients. This occurred for about one month.
4. The employer has the right to assign clients to other workers. The employer assigns clients to other workers to meet client needs. Sometimes clients request a different nail technician.
5. The employer treats workers fairly with regards to assigning clients.
6. The claimant continued to have clients.
7. Prior to resigning, the claimant complained to the owner that the owner was assigning the claimant's clients to the new worker. The owner continued to assign clients to the new worker.
8. The employer did not promise the claimant paid vacation at the time of hire. The employer does not provide part-time employees with paid vacation. The employer only provides fulltime employees with paid vacation. The claimant was a part-time employee. The female owner did not verbally promise the claimant a paid vacation period.
9. The claimant took a three-week vacation leave period in January 2019 that was approved by the employer that was unpaid.
10. The employer hired the employee "[A]" on January 2, 2019. The employer promised [A] paid vacation at the time of hire. The employee [A] is a fulltime worker. The employer promise [A] paid vacation time off of one-week vacation after working one year for the employer. [A] did not take the paid vacation promised to her yet as [A] had not worked for the employer for 1 year yet. In July 2019, [A] took a one-week vacation period that was unpaid.
11. With regard to the claimant's complaint that the employer was assigning "his" clients to a new employee, the new employee about whom he complained was [A].
12. The employer was assigning to the new employee clients whom the claimant had previously taken care of as "regulars," clients who requested someone other than the claimant.

13. The claimant does not know specifically when he complained to the owner about her assigning “his” clients to the new employee. The claimant complained to the female owner about 1–2 times about the employer assigning the clients to the new worker over the claimant. The owner’s response was that sometimes the clients want a female worker as opposed to a male worker.
14. The claimant believed the employer treated him unfairly because the claimant worked for the employer for over a year and employees hired before and after him were getting paid vacation time. Also, sometime in 2018, the claimant got into a quarrel with the employer when the female owner commented that the claimant was in secret relationship with another worker. During this quarrel, the claimant yelled at the female owner, and the female owner yelled at the claimant. After the quarrel, the claimant did not speak with the female owner. The claimant’s quitting his job was not connected with the quarrel the claimant had with the employer surrounding the claimant’s relationship with another worker.
15. The claimant was prompted to resign on September 7, 2019 by the way the employer was assigning clients to the claimant. The claimant felt the female owner was not assigning clients to the claimant equally.
16. The claimant’s last day of work was on September 7, 2019. The claimant quit his job with the employer on his last date of work.
17. The claimant quit for two reasons. The claimant quit his job because the claimant believed the employer was assigning clients unequally to the claimant in comparison to the worker [A]. The claimant also quit his job because the claimant was not being provided with paid vacation.
18. The claimant did not complain to the employer prior to quitting regarding concerns about not being paid vacation time. The employer did not discover the claimant had concerns about unpaid vacation time until the employer received a letter from unemployment about the claimant.
19. The employer assigns clients to its employees by using a rotation method in a written queue. The female owner keeps a written list at her work counter listing when workers arrive to work. The employer then assigns the clients to the workers based upon the order the workers arrive to work. For example, the first worker that arrives to work for the day is assigned the first client. For the next rotations, the employer assigns the clients to whichever worker is available next unless a client requests a particular worker or has an appointment with a particular worker. The female owner verbally assigns the workers to the clients.
20. The employer alleged the claimant was working at another employer at the time he quit his job with this one because a few weeks after the claimant quit a customer of the employer’s establishment informed the employer that the claimant was working at another nail salon located on [Name A] Street in [City

A], Massachusetts, and the employer saw the claimant's motor vehicle parked outside of the other nail salon.

21. The claimant did not quit his job with the employer in good faith to accept new employment on a permanent, full-time basis with another employer. The claimant has not worked since he worked for the employer. The claimant is friends with the sister of the owner of the nail salon on [Name A] Street in [City A], Massachusetts. The claimant has parked his motor vehicle in front of the nail salon on [Name A] Street in [City A], Massachusetts as it is a plaza area that that the claimant goes to obtain his medicine.
22. The employer treats every worker equally. The employer adored the claimant and considered the claimant to have high skills. The employer did not want the claimant to leave work. The employer treated the claimant fairly.
23. On September 30, 2019, the claimant filed an initial claim for unemployment benefits.

Credibility Assessment [1]:

During the hearing, the claimant contended that the employer was not treating him fairly with regards to assigning clients. However, the employer's contention to the contrary is assigned more weight. It is concluded that the employer treats workers fairly including the claimant with regards to assigning clients, where it was reasonable for the employer to assign clients to its employees by using a rotation method in a written queue, that the female owner keeps a written list at her work counter listing when workers arrive to work then assigning the clients to the workers based upon the order the workers arrive to work, unless a client requests a particular worker or has an appointment with a particular worker.

Credibility Assessment [2]:

The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's overall testimony was more specific and easier to follow compared to the testimony of the claimant.

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. We further believe that the review examiner's credibility assessments are reasonable in relation to the evidence presented.

The review examiner denied benefits after analyzing the claimant's separation 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 . . . .

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that his separation was for good cause attributable to the employer. The review examiner concluded the claimant had not met his burden. We remanded the case to take additional evidence regarding the claimant's separation, as well as any efforts the claimant made to preserve his job before quitting.<sup>1</sup> After remand, we also conclude that the claimant has not met his burden.

Initially, the review examiner found that the claimant quit his job because he believed the owner was assigning clients to a new employee, and concluded the claimant did not establish good cause attributable to the employer for quitting, since the employer had a reasonable right to assign clients to meet its clients' needs, and the employer continued to assign clients to the claimant.

After remand, the review examiner found that the claimant quit because he believed the employer was not assigning clients to him fairly, and also because he was not being provided with paid vacation. *See Consolidated Finding # 17.*

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).

With regard to the assignment of clients to employees, the review examiner found the owner keeps a written list of which employees arrive at the salon first each day, and assigns the clients to employees based on the orders in which the employees arrived at work. Thereafter, the employer assigns clients to employees based on who is available, unless a client requests or has an appointment with a particular employee. *See Consolidated Finding # 19.* At times, the employer assigned clients who had previously seen the claimant to other employees, because they had asked for someone other than the claimant. *See Consolidated Finding # 12.* When the claimant complained to the owner about how she assigned clients to employees, she noted that sometimes clients want a female nail technician rather than a male one. *See Consolidated Finding # 13.* Based on the review examiner's findings, we cannot conclude that the employer acted unreasonably. The claimant's decision to quit because of how the employer assigned clients did not constitute good cause attributable to the employer for quitting.

With regard to the question of paid vacation, the review examiner found that the claimant was a part-time employee. *See Consolidated Finding # 1.* The employer does not provide paid vacation to part-time employees. It only provides paid vacation to full-time employees. The review

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<sup>1</sup> Our remand order also explored allegations made by the employer at the initial hearing that the claimant quit this job in order to accept employment elsewhere. The review examiner found that the claimant has not worked anywhere else since separating from this employer on September 7, 2019 (*see Finding # 21*), so he did not quit this job in good faith, to accept new employment on a permanent, full-time basis with another employer. *See G.L. c. 151A, § 25(e), paragraph three.*

examiner found the employer did not promise the claimant paid vacation because he was not a full-time employee. *See Consolidated Finding # 8.*

As for whether the employer treated the claimant unfairly in relation to his coworker, the review examiner found that the employer hired “[A]” as a full-time employee on January 2, 2019, and because she was a full-time employee, she was promised one week of paid vacation after working for the employer for one year. When [A] took a one-week vacation in July of 2019, her vacation was unpaid because she had not yet worked for a year. *See Consolidated Finding # 10.* Again, we cannot conclude that the employer’s treatment of this full-time coworker with regard to vacation time was unreasonable. Thus, the claimant’s decision to quit because he did not get a paid vacation did not constitute good cause attributable to the employer for quitting.

In addition to establishing good cause attributable to the employer for resigning, an employee who quits also has the burden to show that he made a reasonable attempt to preserve his job, or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984). We further conclude that the claimant has not met his burden regarding the requirement that he try to preserve her job before quitting.

The claimant resigned without notice on September 7, 2019. The review examiner found that the claimant never complained to the employer before he quit about not receiving paid vacation. The review examiner credited the employer’s testimony that it only learned of the claimant’s concern about paid vacation after it received correspondence from the DUA after the claimant filed his claim for unemployment benefits. *See Consolidated Finding # 18.* Thus, we cannot conclude that the claimant made reasonable attempts to preserve his job before quitting.

The review examiner’s findings after remand were supported by credibility assessments where she accepted the employer’s version of events over the claimant’s testimony. The review examiner’s credibility assessments fall within the scope of the fact finder’s role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). We believe the assessments are reasonable in relation to the evidence presented.

In sum, the claimant quit because he believed the employer was assigning clients unfairly, and because he believed he was entitled to paid vacation. The review examiner found the claimant was not treated unfairly with regard to his assignment of clients or his vacation benefits, and he had not raised his concerns about vacation with the employer before he quit. We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 25(e)(1), the claimant quit without good cause attributable to the employer, and without making reasonable attempts to preserve his job before quitting.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week ending September 7, 2019, 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.

*Charles J. Stawicki*

**BOSTON, MASSACHUSETTS**

Stawicki, Esq.

**DATE OF DECISION - May 29, 2020**

Charlene A.

Member



Michael J. Albano

Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS  
STATE DISTRICT COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020<sup>2</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day following the thirtieth day.

To locate the nearest Massachusetts District Court, see:

[www.mass.gov/courts/court-info/courthouses](http://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.

JPC/rh

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<sup>2</sup> See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.