

Where the employer demoted the claimant and reduced his pay, the claimant had good cause attributable to the employer to resign. Since the person who demoted him was his supervisor, the owner, and there was no one else to speak with, the claimant has established that efforts to remedy the situation before quitting would have been futile. He is eligible for benefits under G.L. c. 151A, § 25(e)(1).

**Board of Review
19 Staniford St.
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: 0033 3986 08

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 affirm.

The claimant separated from his position with the employer on December 22, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 23, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner reversed the agency's initial determination and awarded benefits in a decision rendered on April 16, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to allow the employer an opportunity to provide additional evidence. 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 left work for good cause attributable to the employer when the employer made unilateral changes to the claimant's employment by demoting him and decreasing his pay rate, 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 assessment are set forth below in their entirety:

1. The employer is a transportation company and staffing agency. The claimant worked as a full-time dispatcher for the employer. The claimant worked for the employer from 5/27/19 to 12/22/19.
2. The employer's owner hired the claimant. The owner supervised the claimant.
3. The owner hired the claimant to work as a full-time dispatcher. The employer paid the claimant between \$17.00 and \$17.50 per hour. The claimant performed administrative tasks and assisted the employer's workers. The claimant generally oversaw the employer's drivers.
4. The claimant's pay rate as a dispatcher was more than the employer's drivers' pay rates.
5. The claimant did not drive the employer's clients as part of his dispatcher role.
6. The owner demoted the claimant to a wheelchair van driver position.
7. The owner sent a text message to the claimant. The message read: [Claimant's name], Starting Monday, Dec 22, 2019, you will continue to serve the company as a driver working at least 40 hours or as you desire. I spoke to a number of drivers and clients as they described your attitude on the phone as negative. The image of the company has tarnished as a result and most administrative tasks in the office do not get done properly and on time. The incompetence in the office has resulted in the revenue loss for the company.
8. After the owner demoted the claimant to the driver position, the owner told the claimant that his pay was decreased to \$15.00 or \$15.50 per hour.
9. The claimant performed all of his work duties to the best of his abilities.
10. Other workers called the claimant to ask for assistance. The claimant did not antagonize these others [sic] workers when they called.
11. The claimant resigned from his employment because the employer demoted him to the driver position and decreased his pay rate.

Credibility Assessment:

In the hearing, the claimant testified that the owner told him that he decreased the claimant's pay rate as part of the change from the dispatcher position to the driver position. In the hearing, the employer's owner testified that he did not tell the claimant that he decreased the claimant's pay rate. This requires resolution. Given

the totality of the testimony and evidence presented, the claimant's testimony is considered more credible than the employer's testimony in its entirety because it is more likely that the employer decreased the claimant's pay. Indeed, the record features several indicators that, when considered together, compel a conclusion that it is more likely that the employer decreased the claimant's pay. First, the driver position pay rate was lower than the dispatcher position pay rate. Second, the change in duties amounted to a demotion. Third, the owner's text message indicates that the owner was dissatisfied with the claimant's attitude. Fourth, the owner's text message indicates that the owner was dissatisfied with the claimant's work product. Fifth, the owner testified in the hearing that the claimant was hostile and that the claimant performed poorly.

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 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. Moreover, as discussed more fully below, we affirm the review examiner's legal conclusion that the claimant had good cause for leaving his employment.

As noted above, the review examiner initially concluded the claimant was entitled to benefits 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. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993). In this case, the review examiner concluded that the claimant had carried his burden. We agree.

When a claimant contends that his 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). In this case, the review examiner found that the claimant resigned from his employment "because the employer demoted him to the driver position and decreased his pay rate." Consolidated Finding of Fact # 11.

Unilateral changes to the terms and conditions of employment can render a position unsuitable and provide an employee with good cause for leaving. *See, e.g., Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 (1981). *See also Manias v. Dir. of Division of Employment Security*, 388 Mass. 201, 202–204 (1983).

Here, the review examiner found that as a condition of the claimant’s continued employment, he would have to accept a demotion to a position of a driver from his previously held position of dispatcher. He would no longer have the duty of overseeing the employer’s drivers and his pay rate would be cut commensurate with the other drivers’. We believe such a demotion constitutes a material and adverse change to the terms and conditions of the claimant’s original employment contract.

We are also mindful that the DUA itself has certain policies in place regarding changes to job duties and positions. For example, Chapter 7, Section 3(B) of the DUA Adjudication Handbook provides that when “[a] claimant leaves work because the employer made a substantial change to the claimant’s duties, such as:

- Permanently or indefinitely transferring the claimant to unsuitable work; or
- Permanently transferring the claimant to new duties that are outside of the claimant’s general work classification or that will not permit continued use of the claimant’s highest skill, the claimant [will be deemed to have] left work with good cause attributable to the employer.”

While the Consolidated Findings fail to address the suitability of the driver’s position for the claimant, it is clear that these new duties were outside of the claimant’s general work classification for which he was hired. Together with his reduction in pay rate, we conclude the claimant left his employment with good cause attributable to the employer.

Although the employer argued that the claimant’s new duties would not result in a pay decrease, the review examiner discredited this testimony, finding that it was “more likely the employer decreased claimant’s pay.” *See Credibility Assessment*. Such assessments are 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). Based upon the record before us, we find no reason to disturb the review examiner’s findings.

While we believe that the claimant has shown good cause attributable to the employer, our analysis does not end there. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer’s action has the burden to show that he 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).

In this case, the consolidated findings establish that the decision to demote the claimant was made by the claimant's supervisor, who was also the employer's owner, leaving the claimant without further authority to whom he could appeal for help. Thus, the record indicates that the only way the claimant could have preserved his employment was to accept the demotion, which constituted a material and adverse change to the conditions of his employment. The claimant has, therefore, established that efforts to preserve his employment would have been futile.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending April 16, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 29, 2020



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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, 2020¹. 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

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.

¹ 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.

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