

The claimant alleged that the employer demoted him from a full-time sales position to a non-commission based part-time position. However, the review examiner found that it was the claimant who had initiated a request to work a reduced number of hours. Therefore, the claimant did not show he had good cause attributable to the employer for resigning and is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0067 1498 99

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 reverse.

The claimant separated from his position with the employer. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 12, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 16, 2021. 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 testify and allow both parties to present additional evidence. Both parties attended the remand hearing, which took place over two sessions. 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 had good cause for resigning because the employer unilaterally changed his position, hours, and schedule, 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 claimant worked as a sales representative for the employer, a car dealership, from April 2017 until February 5, 2021, when he separated.
2. The claimant's job duties as a sales representative included greeting customers and completing the sale of new or used vehicles.
3. Sales [representatives] for the employer worked a lot on the weekends because that is when a lot of car sales occurred.
4. The claimant earned \$12.75 an hour for work up to forty (40) hours a week and earned time and a half for any hours over forty (40) for any given week.
5. Additionally, the employer paid the claimant commission on any vehicles that the claimant sold.
6. For the sale of new or used vehicles, the claimant earned the greater of either one hundred dollars (\$100) or twenty percent (20%) of the commissionable gross profits.
7. The claimant received his commission pay in his weekly paycheck.
8. The frequency at which the claimant received commission varied[,] based on when he made sales.
9. The claimant did not earn sale commissions each week.
10. The claimant earned an approximate average of sixty-eight dollars (\$68.00) a week in sales commission.
11. The claimant's immediate supervisor was the employer's Sales Manager (Sales Manager).
12. The claimant worked full-time for the employer from April 2017 until September 3, 2020.
13. The claimant approached the Sales Manager to have his status changed from full-time to part-time, effective September 3, 2020.
14. The claimant signed a "Payroll Status Change Form" to change his hours with the employer from full-time to part-time.
15. After switching from full-time to part-time, the claimant remained a salesperson and continued to earn sales commissions until his separation.
16. The claimant fell on ice at the employer's workplace and was out of work from December 18, 2020, until December 24, 2020.

17. The claimant told the Sales Manager that he was having difficulty walking on the employer's car lot, he was not feeling comfortable while working, and he was having difficulty keeping up with the employer's younger salespeople.
18. The claimant asked the Sales Manager about becoming a runner and told the Sales Manager that he could not do sales anymore.
19. The Sales Manager believed that the claimant was physically struggling to keep up with the job due to his health.
20. The employer was open to the claimant becoming a part-time runner, but never compelled the claimant to become a part-time runner.
21. If the claimant worked for the employer as a part-time runner, he would earn the same hourly rate, without the additional sales commissions, and work different days of the week.
22. The duties as a runner included registering vehicles for customers, going to insurance companies for documents, and working during the week, when these other businesses were open.
23. The claimant did not ever work for the employer as a part-time runner.
24. On February 5, 2021, the claimant texted the Sales Manager, "Retired take care."
25. The claimant retired from employment on February 5, 2021.
26. The Sales Manager responded to the claimant's text with a text message that stated, "Stay healthy and take care my friend."
27. The Owner did not respond to the claimant's retirement notification.

Credibility Assessment:

As an initial matter, the claimant's testimony was vague, evasive, inconsistent, and illogical, particularly regarding specific questions. The claimant was confused about if or when he switched to part-time employment, and who initiated that switch. The employer supplied time card business records and a "Payroll Status Change Form" that support a conclusion that the claimant did voluntarily switch to part-time employment on September 3, 2020. The claimant also did not know if he had worked as a part-time runner or when he had worked as a part-time runner. This is directly refuted by the employer's pay statement records displaying that the claimant earned sales commissions up until the time that he retired, indicating that the claimant still worked in a sales capacity at that time. Furthermore, the employer's witnesses offered direct, credible, and contradictory testimony to that

of the claimant. As such, it is concluded that the claimant's testimony is not credible and has no indica of reliability.

The employer offered three witnesses, the Owner, the Sales Manager, and the Controller, who offered consistent testimony that directly refuted the claimant's assertions regarding the claimant switching to the part-time sales position and the runner position. The Owner directly and credibly testified that he never told the claimant that he was being forced to take the part-time runner job. The claimant could not state when the supposed conversation with the Owner regarding the switch in his position took place. As such, it is concluded that the Owner never told the claimant that he was being forced to take a position as a part-time runner. The Sales Manager offered direct, credible, and firsthand testimony that the claimant told him that he was having difficulty walking on the employer's lot and keeping up with the employer's younger employees. Furthermore, the Sales Manager directly and credibly testified that the claimant initiated his switch to part-time and it was the claimant who inquired about the part-time runner position. The claimant further confirmed that he was injured after falling on some ice at the employer's workplace in December 2020, supporting the notion that the claimant was having physical issues. As such, it is concluded that the claimant initiated his switch to a part-time sales position, the claimant brought up the possibility of becoming a runner, and the Sales Manager never told the claimant that he had to take the position as the runner.

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, except Findings of Fact ## 1, 24, and 25, to the extent that they erroneously reference February 5, 2021, as the claimant's separation date. The parties' testimonies and documentary evidence establish that the claimant resigned via text message on February 8, 2021. *See* Remand Exhibits 9–10. 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 record. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant quit his job, we analyze 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under the above provision, it is the claimant's burden to establish that he left his job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

“[A] ‘wide variety of personal circumstances’ have been recognized as constituting ‘urgent, compelling and necessitous’ reasons under” G.L. c. 151A, § 25(e), “which may render involuntary a claimant’s departure from work.” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm’r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Medical conditions are recognized as one such reason. *See* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 335–336 (1979). In this case, the record does not show that the claimant’s decision to leave employment is based on urgent, compelling, or necessitous circumstances.

The employer’s Sales Manager testified that he believed that the claimant’s health may have been a reason for his decision to resign when he did. Consolidated Finding # 19. Prior to separation, the claimant told his immediate supervisor that he was having difficulty walking on the employer’s car lot, was not feeling comfortable while working, and was having difficulty keeping up with the employer’s younger salespeople. Consolidated Finding # 17. The claimant also asked the Sales Manager about becoming a runner and told the Sales Manager that he could not do sales anymore. Consolidated Finding # 18. However, the claimant denied resigning for health reasons. Although the claimant testified that he sustained injuries in December, 2020, when he slipped and fell on black ice at the employer’s workplace and was away from work for about a week to recover, he offered no additional testimony or documentary evidence about his health status, or whether any medical condition influenced his decision to separate from employment. *See* Consolidated Finding # 16.

The remaining question, then, is whether the claimant left for good cause reasons that are attributable to the employer. 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). 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).

The review examiner’s consolidated findings include a detailed credibility assessment, in which she deemed the employer to be the more credible party. 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). Here, we see no reason to disturb the review examiner’s credibility assessment.

As the review examiner noted in her credibility assessment, the claimant offered testimony that was considerably vague, evasive, inconsistent, and illogical throughout the initial and remand hearings. The review examiner also noted that, along with the consistent testimonies offered by each of the three employer’s witnesses, the employer also presented documentary evidence that

explicitly contradicted the claimant’s allegations that the employer had demoted him from a full-time sales representative to a part-time runner. *See* Remand Exhibits 8–9, and 11–13.

Specifically, the review examiner found that, prior to separation, the claimant, not the employer, initiated a reduction of hours from a full-time to part-time work schedule when he approached his immediate supervisor with the request and subsequently signed a “Payroll Status Change Form” to change his hours with the employer from full-time to part-time. Consolidated Findings ## 13–14. Moreover, the findings show that the claimant remained working as a salesperson, continued to receive commission pay until his separation, and never as a part-time runner exclusively on an hourly basis. Consolidated Findings ## 15 and 23. Since the reduction in hours was requested by the claimant, we decline to attribute the change in terms to an action by the employer.

We, therefore, conclude as a matter of law that the claimant did not establish good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner’s decision is reversed. The claimant is denied benefits for the week beginning January 31, 2021, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 2022



Charlene A. Stawicki, Esq.
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 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.

JMO/rh