



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-116407-A (May 20, 2011) -- An employer's violation of the Massachusetts Wage Act constitutes good cause for a claimant to quit under G.L. c. 151A, § 25(e)(1). Claimant who quit because his employer would not pay him for the time to take an employer-mandated drug test was entitled to benefits.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to award the claimant benefits following his separation from employment. We review pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant resigned from his position with the employer on August 27, 2010. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on September 17, 2010. 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 November 2, 2010.

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 back to the review examiner to allow the employer the opportunity to testify. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who was not paid for the time that he spent to take an employer-mandated drug test and raised his concern about not being paid to the employer, but was told that he would not be paid because that was not company practice, thereupon had good cause attributable to the employer to quit his job.

Findings of Fact

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

1. The claimant had been employed as a full-time security officer for the instant employer from May 30, 2009 until his separation took effect on August 27, 2010. The claimant earned \$13.50 hourly.
2. The claimant had been dissatisfied with the policies of the employer that took over the business in 2009. The claimant lost \$54 of "anniversary pay" because of a change in policy and many other concerns were disconcerting to the claimant. The claimant lost four (4) hours of vacation leave as a result of the change.
3. The "straw that broke the camel's back" so-to-speak occurred when the claimant was docked 1 ½ hours of pay because he submitted to a required drug test offered at the clinic where the company is located in Wilmington.
4. The claimant was not aware that he was not going to be paid for the time spent submitting to the drug test because he was uninformed of this as a fact when he accepted employment with the instant employer.
5. The claimant's shift began at 8 a.m. on August 3, 2010. Therefore, the claimant submitted to a drug test during his scheduled shift. The claimant did not return to his post until 9:30 a.m., 1 ½ hours after the start of his scheduled shift.
6. The claimant was not paid for the time that he took the required drug test.
7. The claimant made several attempts to speak with the head of payroll to determine why he was not paid for the time he was on the clock.
8. The claimant never received a response from the head of payroll. However, a payroll clerk eventually informed the claimant that the company did not pay for the time an employee took the drug test.
9. The claimant was made aware of this after he had returned from a week's vacation, which began on 8/12/10 and ended on 8/18/10.

10. The decision to leave the company was prompted by the employer's failure to pay him for the time he was "on-the-clock" taking the required drug test.
11. The claimant left work on August 27, 2010 not only because he disagreed with the employer's policies, but mainly because he was not paid for time that he was on-the-clock submitting to the required drug test.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 25 (e)(1), provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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 this section of the law, the claimant has the burden to show that he is entitled to benefits. After the initial hearing, the review examiner concluded that the claimant had carried his burden.

The review examiner found that the claimant quit his employment due to disagreements with the employer about new policies instituted in 2009. These policies included a cut in four hours of vacation leave and the elimination of paid time to take mandatory drug tests. We believe that the employer's failure to pay the claimant for the time it took to take the required test was a violation of G.L. c. 149, § 148, commonly known as the Massachusetts Wage Act, which requires employers to pay "bi-weekly each . . . employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned" We believe that the non-payment here also violated G.L. c. 149, § 158A, which prohibits compelled uncompensated work. In this case, the claimant was "on-the-clock," acting under the direction of the employer when he was required to take the drug test. He earned wages during that time and should have been paid them.

Arguably, not every violation of a statute by an employer would necessarily entitle a claimant who left work because of it to be eligible for benefits. However, we do not need to raise that question, because it is well-settled law that violations of the statute at issue here do. A well-reasoned and persuasive District Court decision has concluded that a violation of the Wage Act constitutes good cause attributable to the employer to resign, qualifying the claimant for benefits. See Lee v. Dir. of Division of Unemployment Assistance, 0556 CV 2136 (November 1, 2006) (employer's payroll policy always paid claimant one week later than was permissible under the Wage Act, and this created good cause for claimant to leave his job). The agency has adhered to the reasoning of that case, and we do so here as well.

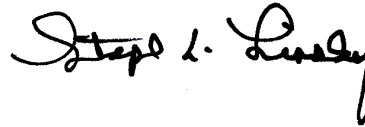
We, therefore, conclude as a matter of law that the claimant resigned his job for good cause attributable to the employer.

The review examiner's decision is affirmed. The claimant is allowed benefits for the week ending September 4, 2010 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - May 20, 2011



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

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

LAST DAY TO FILE AN APPEAL IN COURT – June 20, 2011