THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Fax (617) 727-5874

BOARD OF REVIEW DECISION

BR-111647 (Sept. 28, 2010) – When an employee makes his concerns about changes to the terms and conditions of employment known to his immediate supervisor, who then responds repeatedly that nothing will be done to address them, the claimant has done enough to preserve his employment.

Introduction and Procedural History of this Appeal

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

The claimant separated from employment on May 16, 2009. He filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on August 3, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on October 20, 2009.

Benefits were denied after the review examiner determined that the claimant was disqualified under G.L. c. 151A, § 25(e)(1), because he left employment voluntarily under disqualifying circumstances. The Board accepted the claimant's application for review and provided the parties with an opportunity to submit their reasons for agreeing or disagreeing with the review examiner's decision. Only the claimant responded. Our decision is based on our review of the entire record, including the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's response.

The issues on appeal are whether the claimant made adequate efforts to preserve his employment before leaving his job, and whether his reason for leaving constitutes good cause attributable to the employer.

Findings of Fact

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

1. The claimant worked as a full time IMAX Theatre technician, for a museum located in [City], from 4/24/07 until he left his job on 5/16/09 after having given his manager about 3 ½ weeks advance notice of his intentions.

2. When the claimant accepted his job he was to be part of a hierarchy that included the manager of the theatre, a chief projectionist, next the claimant and under the claimant a projectionist. After about 3 months the chief projectionist left and the manager informed the claimant that he had no intention to replace the chief projectionist. He began to assign the duties/responsibilities that had been the chief projectionist's to the claimant without changing either his title or his compensation. He increased the claimant's hours of work and had the claimant on call nights and weekends.

3. The claimant told the manager on several occasions that he considered the situation unfair and that he was considering leaving his job. The manager appeared to be unconcerned about how the claimant felt about the situation. When the claimant told the manager that he would take the matter up with the vice president who was the manager's superior, the manager simply responded, "you can do that, but it won't get you anywhere." At one point when the manager added additional responsibilities on the claimant's shoulders he made a point of telling the claimant that there would be no increase in his compensation in consequence of the new duties and that he could see why the claimant might view the additional duties as akin to "indentured servitude".

4. The claimant felt that his avenues for redress of his grievances against the manager had been cut off by the manager.

5. The employer has an open door policy. The claimant was aware of that policy. The policy provides that complaints about managers can be brought to and will be addressed by the vice president; it further provides that if an employee does not receive satisfaction from the relevant vice president that the employee can take the matter directly to the human resources department. The claimant did not follow this procedure because he felt the manager's response quoted above in finding #3 meant that this procedure would prove useless even if he followed it. He feared retaliation by the manager if he complained over the manager's head.

6. The claimant also left his job in part because he felt he could no longer afford to live in [City]. He was earning a net annual salary of $29,000 from his job with the employer but found that he was borrowing from friends and relying on friends to get by financially.

Ruling of the Board

The Board adopts the review examiner's 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 … after the individual has left work … 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 … An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

When an employee contends that he left employment because of conditions that justified his leaving, he must also prove a reasonable attempt to correct those conditions of employment which he now claims justified his leaving his employment or that such an attempt would have been futile. Kowalski v. Director of the Div. of Employment Security, 391 Mass. 1005, 1006 (1984).

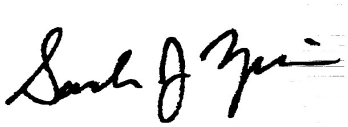
The DUA review examiner concluded in his decision that the manager's changes to the terms and conditions of the claimant's employment constituted good cause for leaving, but he found that the claimant had not done enough to preserve his job because he could have gone over his manager's head. We agree with the former but disagree on the latter. The examiner's findings on the manager's statements to the claimant demonstrate the futility of further efforts. In our view, when an employee makes his concerns known to his immediate supervisor who then responds repeatedly that nothing will be done to address them, he has done enough to preserve his employment. *See*, e.g., New York and Massachusetts Motor Service, Inc. v. Massachusetts Comm'n Against Discrimination, 401 Mass. 566 (1988) (claimant had notified his supervisor of the need for an altered work schedule and this was adequate effort to preserve employment).

We, therefore, conclude as a matter of law that the claimant is entitled to benefits because his separation from employment was not voluntarily, within the meaning of G.L. c. 151A § 25(e)(1).

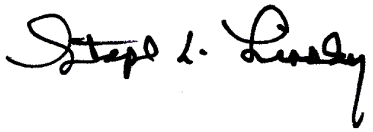
The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending July 18, 2009 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - September 28, 2010

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

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 – October 28, 2010

LH/rh