0014 5343 84 (June 29, 2015) – A unilateral reduction in claimant's weekly draw against commission by more than half or the fact that the employer may have violated a state wage and hour law does not relieve the claimant of the obligation to make adequate and reasonable attempts to preserve his job or to show that such efforts would have been futile.

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Issue ID: 0014 5343 84
Claimant ID: 10307640

BOARD OF REVIEW DECISION

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 October 6, 2014. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 7, 2014. 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 27, 2015. 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 accepted the claimant's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is disqualified, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the employer changed the claimant's pay structure but the claimant did not make efforts to preserve his job.

Findings of Fact

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

1. The claimant worked as a Salesperson with the employer's car dealership from September 2, 2013 until resigning his job without notice on October 6, 2014. He performed both inside and outside sales work for the employer.

2. At hire, the claimant worked as a commissioned salesperson. Three months before his separation from employment, the parties agreed that the claimant would be paid a weekly draw against commission of $1000 because the claimant was selling 8-9 cars per week. The draw would be subtracted from his sales proceeds at the end of each month. The claimant was never paid a salary.

3. As of October 6, 2014, the claimant owed the employer $9700 in weekly draws. The employer-owner and employer's Operations and Marketing Director tried to discuss a resolution of the problem on three different occasions. Each time, the claimant was dismissive and would not discuss the problem with them.

4. The employer-owner decided that he could not continue to pay the claimant $1000 per week while the claimant was not selling cars. Frustrated with the claimant's refusal to discuss the issue, he and the Operations and Marketing Director issued the claimant a draw check for $243 to "get (the claimant's) attention."

5. The claimant told the employer that he could not continue to work for so little money, and immediately quit the workplace.

6. The employer was willing to discuss a less drastic cut in the claimant's weekly draw, but the claimant did not stay long enough to resolve any issue causing his departure from the workplace with the employer prior to quitting the workplace.

7. The claimant was not in jeopardy of losing his job at the time of his resignation from employment.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence, with the exception of that portion of Finding of Fact # 2, which states that three months prior to the claimant's separation, the parties agreed that the claimant would be paid $1,000.00 weekly as a draw against commission. During the second day of the hearing, both parties confirmed that, after working for the employer for eight months, the parties decided on the $1,000.00 per week draw against commission. Thus, the commission against draw arrangement began in May of 2014. As discussed more fully below,

we conclude, as the review examiner did, that the claimant has not shown that he quit his job for good cause attributable to the employer.

Both parties agreed during the hearing that the claimant quit his job. 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 . . . [T]he 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 unemployment benefits. The review examiner concluded that the claimant had not carried his burden. We agree.

The review examiner found that the claimant quit after the employer decided to reduce his weekly $1,000.00 draw to about $243.00 in early October of 2014. The claimant argued during the hearing that a draw of $243.00 per week would not have even been sufficient to meet state minimum wage requirements. He also testified that the reduction to his weekly draw would put him in a financially difficult position. Accordingly, he quit.

We need not discuss at length whether the employer's reduction to the claimant's weekly draw was a violation of the state's minimum wage laws. The reduction represented an approximately 75% decrease in the claimant's base compensation per week. Such a unilateral and substantial decrease to the amount of income paid to the claimant could constitute a reasonable workplace complaint supporting a quit for good cause. *See* Graves v. Dir. of Division of Employment Security, 384 Mass. 766 (1981).

However, in order for the claimant to carry his burden under G.L. c. 151A, § 25(e)(1), he must also show that he made reasonable attempts to correct the workplace complaint or that such attempts would have been futile. *See* Kowalski v. Dir. of Division of Employment Security, 391 Mass. 1005, 1006 (1984). In his appeal to the Board, the claimant cited prior Board cases which could be read to imply that preservation efforts are not needed if a claimant establishes that the employer has violated Massachusetts wage and hour laws. *See* BR-124223-A (January 30, 2013) (holding that employer's withholding of earned pay gave claimant good cause to quit since this was a violation of wage and hour laws and since it is a strict liability law, the claimant had no obligation to tell the employer about the violation prior to resignation); BR-108176 (February 5, 2009) (holding that violation of wage and hour laws provided claimant with good cause to quit without any discussion of preservation or citation to authority relieving claimant of preservation efforts in such a situation).[1] To the extent that these cases explicitly or implicitly suggest that preservation efforts are not needed in cases such as this, we decline to follow them. Our conclusion that preservation efforts are generally required even if the claimant reasonably believes the employer is violating a statute is based on the Supreme Judicial Court's long history

[1] Board of Review Decision BR-108176 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

of holding that reasonable preservation efforts are required for a claimant to carry his burden, under G.L. c. 151A, § 25(e)(1). *See* id.; Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 336 (1979); Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). Even though ignorance may not be a defense against a claim brought under the wage and hour laws, and an employer will be liable for any such violation regardless of ignorance, the unemployment compensation statute is not a means for enforcing statutes such as the wage and hour law, but rather is intended to lighten the burden on workers who find themselves without a job through no fault of their own. Even if an employee is not required to seek redress from the employer before filing a wage and hour claim, it does not follow that the employee is entitled to unemployment compensation if he quits his job without reasonable efforts to resolve the problem.

As to preservation, the review examiner found that the claimant told the employer he could not work with a draw of $243.00 per week and "immediately quit the workplace." Finding of Fact # 5. To determine if the conclusion that the claimant did not make adequate preservation efforts is supported by the record, we shall review some of the testimony which the review examiner did not explicitly note in the decision. The claimant testified that, on October 3, 2014, he spoke with a supervisor who informed him that the reduction to the draw was needed to catch the claimant up on his draws. The claimant then told the supervisor that the $243.00 would not even be minimum wage, at which point the employer admonished the claimant to not tell him the law. They finally agreed that the claimant would come in on Monday to talk about it.[2] The supervisor's testimony was more or less consistent with the claimant's testimony. He testified that he spoke with the claimant on October 3, 2014, and the claimant "went off about workplace bullying" and how the employer had broken the law. They agreed to talk on Monday about it.[3]

The claimant then testified that on Monday, October 6, the employer told him that until he was caught up with the draws, the draw would be $250.00 per week. The supervisor testified that on October 6, the employer spoke with the claimant about some work issues. The claimant then stated that the employer broke the law and that the employer needed to pay him minimum wage. He also yelled about health insurance and threatened the employer with lawsuits. On the second day of hearing, the employer's operations and marketing director testified that on October 6, he and the supervisor wanted to follow up regarding the October 3, 2014 conversation that the claimant had with the supervisor. The claimant indicated that there was not much to do, he was leaving, and he "wouldn't do it anymore" (work for the reduced draw). The supervisor asked the claimant for suggestions (apparently regarding the draws), but the claimant had no answer. Then the employer asked him to hand in his keys, gas card, and plates.

From this testimony, it is clear that the claimant made the employer aware that he was upset and concerned about the decrease to his weekly draw and the employer was not immediately willing to resolve the issue. However, we think that the review examiner's conclusion that the claimant

[2] While giving his testimony about the October 3, 2014 conversation, the claimant testified that, if the reduction had only been to $500.00, the parties would not be "sitting at this table right now." The suggestion by the claimant appears to be that he would not have complained if the draw was reduced to $500.00. However, the claimant never testified that he gave a counter-offer to the employer asking that the reduction not be so steep. Such an offer would have indicated that the claimant was trying to preserve his employment.

[3] The review examiner made no findings of fact about what happened on October 3, 2014. However, the testimony was basically consistent on the salient points mentioned in our discussion.

did not take reasonable steps to preserve his job is still supported by the record, especially the testimony given by the employer's witnesses, which the review examiner clearly credited when making his findings of fact. At the October 6, 2014 meeting, it would have been reasonable for the claimant to talk with the employer about possible alternatives to the large reduction to his draw. He could have asked the employer for a reduction to what would have been minimum wage (the claimant testified that this would have been about $360.00 or $370.00 per week. assuming the minimum wage law is applicable), or to $500.00, which he testified could have prevented the entire separation. *See* Finding of Fact #6. He could also have worked with the employer to deal with the large amount of draw debt that he had accumulated, rather than continuously ignore the employer's efforts to talk to him about it. *See* Finding of Fact # 3. Instead, at the first sign that he was possibly aggrieved by an employer action, the claimant told the employer about it and quit soon after, without allowing the employer the opportunity to work with him to resolve his complaint. Taking such action does not show that the claimant was making reasonable and adequate steps to try to keep his job. Moreover, since the claimant did not try to have a constructive conversation with the employer on October 6, 2014, we cannot say that the claimant has shown that his efforts at preservation would have been futile. Although the employer certainly was interested in reducing the claimant's draw on commissions to recoup some of its previously paid out draws, it is not clear that the amount of the reduction was non-negotiable. The findings of fact do not indicate that the claimant had tried to remedy the situation but could not do so or that any discussion or negotiation with the employer would have been futile.

We, therefore, conclude as a matter of law that the review examiner's conclusion to deny benefits, pursuant to G.L. c. 151A, § 25(e)(1), is free from error of law and supported by the record, because, even if the claimant had a reasonable workplace complaint, he did not take reasonable or adequate steps to preserve his employment or show that making such efforts would have been futile.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning October 5, 2014, 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 the his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 29, 2015

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR A BOSTON MUNICIPAL 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.

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