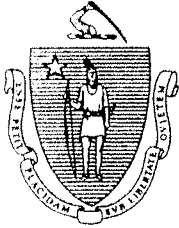

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BOARD OF REVIEW DECISION

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MEMBER

STEPHEN M. LINSKY, ESQ.
MEMBER

In the matter of: Appeal number:

CLAIMANT APPELLANT: **EMPLOYING UNIT:**

S.S. # XXX-XX- EMP. #
Hearings Docket #

Introduction and Procedural History of this Appeal

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

The claimant was separated from his position with the employer on December 16, 2008. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on April 7, 2009. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, a review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 17, 2009.

Benefits were denied after the review examiner determined that the claimant left work voluntarily without good cause attributable to the employer and, thus, was subject to disqualification, pursuant to 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 remanded the case back to the review examiner to take additional evidence and make additional findings. Both the claimant and the employer 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, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant left work voluntarily for good cause attributable to the employer when he refused to sign a warning relating to his refusal to perform an unsafe duty for the employer.

Findings of Fact

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

1. The claimant worked as a maintenance mechanic for the employer from 6/25/07 until he left his job on 12/16/08.

2. The claimant left his job when he was told to sign a warning for insubordination.

3. A new Facility Engineer became the claimant's immediate supervisor three weeks prior to his separation from work.

4. As a maintenance technician, the claimant's job varied from changing a light bulb to skimming grease from the sewage pits. The claimant was assigned to work in Building 1400. He performed HVAC rounds daily. Although he did not have to deal with the sewerage pits daily, he did this type of work when he was asked to do so.

5. There were times when the claimant would be required to skim grease from the top of raw sewerage pits. When performing this work, he used safety gear which was provided to him by the employer that included rubber boots, gloves, masks and full body suits. The safety gear is kept in the maintenance room. Although the employer had two respirators that were supposed to be stored with the other safety gear in the maintenance room, the claimant never saw the respirators.

6. The claimant found the Facility Engineer to be rude. He regularly told the claimant that he had a bad attitude and during the three weeks he was there, the claimant was assigned to do more garbage work than he had done in his entire time in service. The Engineer would call the claimant to ask if he received his work orders. It is common knowledge that it takes five to ten minutes from the time an order is entered until it transmits to the Blackberry Nextel. When the claimant would inform him that he had not yet received the job order, he repeatedly would ask the claimant if there was something wrong with his phone.

7. Both parties agreed that when sewage overflowed, an outside company had to be called in to pump out the sewage and dispose of it. The claimant does not know why the outside company was not called on 12/15/09. The Facility Engineer's testimony, saying that there was no overflow, is not credible. This is supported by the Facility Manager and the claimant testimony that there was an overflow.

8. On December 15, 2008, a sewage injector pit overflowed. The Facility Engineer told the claimant and one other employee to vacuum out the pit of raw sewage and to fill a 55 gallon drum. The claimant put on the safety equipment, mask, gloves and boots before doing the job. It took the claimant and the other employee six hours to do this job. Once the 55 gallon drum was full the claimant took his fifteen minute break.

9. After the break, the claimant was heading back to the shop when the Facility Engineer approached him and handed him a five gallon bucket. The Facility Engineer told him to take the 55 gallon drum that was full with raw sewerage from Building 500 to the Building 700 injector pit and using the five gallon bucket, empty the 55 gallons of raw sewage into that pit. The claimant refused to the do the job because his face would be in close proximity to raw sewage and without a respirator that fit tightly around his mouth, he could not perform this work without placing his health and well being in jeopardy. The claimant did not have time to request a respirator; the Engineer handed the claimant the pale and told him to go do the job. When the claimant refused to do the job the Facility Engineer sent the claimant home.

10. The claimant organized most for the storage facility. While performing this job he saw spare parts, safety suits, white masks that cover mouth and nose but he never saw respirators.

11. The claimant went home and later received a message from the Facility Engineer telling him to report to work the following morning at 8am to meet with him and the Facility Manager.

12. The next day, the claimant returned to work and met with the Facility Engineer and Facility Manager. He was issued a warning for insubordination. He was told to sign the warning if he wanted to stay. The claimant told them that he would not sign the warning. The Facility Engineer then left the room. The Facility Manager never told him that he could not add his disagreement to the warning. The claimant was issued the warning and refused to sign it. This matter of adding the claimant's disagreement to the warning was not discussed. It is not known why this option was not offered to the claimant. However, the claimant did tell the Facility Manager that he did not do the work assigned because it was detrimental to his health. The Facility Manager told the claimant that he had to do what he was told to do.

13. The claimant did provide the employer with written notice of resignation that said as of 12/16/08 he was giving his resignation to the company. The claimant signed the resignation.

14. The claimant believed that if he signed the warning, the employer would have continued to make him perform work that was hazardous to his health. Since he was being asked to perform work that placed his health at risk the claimant did not consider his refusal to do the job to be an act of insubordination.

15. The Facility Engineer's testimony that the claimant told him that he only want to HVAC work is not credible. This is supported by the fact that the claimant was hired to be a maintenance mechanic and throughout his time in service, including his last day of work, he performed both HVAC work as well as all of the maintenance work that had been assigned to him without question until the final incident.

16. On April 30, 2009, the claimant sent an email to the Facility Manager asking if he could return to work and he made a mistake in leaving the job.

Ruling of the Board

The Board adopts the DUA 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....

The review examiner concluded at the initial hearing that the claimant left his job voluntarily without good cause for leaving attributable to the employer.

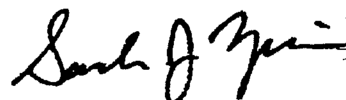
In light of the consolidated findings of fact, we conclude that the claimant quit his employment voluntarily without good cause attributable to the employer. The claimant resigned after being told to sign a warning that he believed was manifestly unfair, given that it arose because he refused to do work he had good grounds for believing was unsafe. If the employer had allowed the claimant the opportunity to lodge a disagreement or addressed the claimant's concerns, we might view the outcome differently. The employer's unwillingness to do so, however, provided good cause to the claimant for his resignation.

We, therefore, conclude as a matter of law that the claimant sustained his burden to prove that he had good cause attributable to the employer for his resignation.

The review examiner's decision is reversed. The claimant is entitled to benefits, under G.L. 151A, § 25(e)(1), for the week ending January 24, 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

Member Stephen M. Linsky, Esq. 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 – October 28, 2010

MS/rh

COMMONWEALTH OF MASSACHUSETTS

GENERAL LAWS CHAPTER 151A, SECTION 42

APPEALS TO THE COURTS

"The commissioner or any interested person aggrieved by any decision in any proceeding before the board of review may obtain judicial review of such decision by commencing within thirty days of the date of mailing of such decision, a civil action in the district court within the judicial district in which he lives, or is or was last employed, or has his usual place of business, and in such proceeding, every other party to the proceeding before the board shall be made a defendant. If an appeal to the board of review is deemed denied pursuant to subsection (a) of section forty-one because the board failed to act upon such appeal, judicial review may be obtained by commencing a civil action as prescribed in the preceeding sentence, except that the time for commencing such action shall run from the date such appeal is deemed denied. The commissioner shall be deemed to have been a party to any such proceeding before the board. The complaint shall state the grounds upon which such review is sought. The plaintiff shall serve a copy of the complaint upon each defendant by registered or certified mail, return receipt requested, within seven days after commencing the action for judicial review.

The commissioner shall make every reasonable effort to file with the court a certified copy of the decision of the board of review, including all documents and a transcript of all testimony taken at the hearing before said board or the commissioner as the case may be, within twenty-eight days after service of the complaint upon the commissioner or within twenty-eight days after the commencement of the action for judicial review by the commissioner. Each defendant shall file an answer within twenty-eight days after receipt of the complaint, except that the commissioner may, by way of answer, file in court within such time period a certified copy of the record of the proceeding under review.

Except as otherwise provided in this section, or if inconsistent with the provisions of this section, such proceeding shall be governed by the Rules of Civil Procedure for the district courts and the municipal court of the city of Boston. The findings and decisions of the board shall be reviewed in accordance with the standards for review provided in paragraph (7) of section fourteen of chapter thirty A. Any proceeding under this section shall be given precedence over all other civil cases.

An appeal may be taken from the decision of the justice of the district court directly to the appeals court. Notice of appeal shall be filed in the office of the clerk of the district court within thirty days after entry of the judgment by the clerk. The completion of such appeal shall be made in accordance with the Massachusetts Rules of Appellate Procedure. Benefits shall be paid or denied in accordance with the decision of the trial court justice during the pendency of such appeal."

IMPORTANT
This notice contains information about your rights or obligations, and should be translated immediately. If you need a translator, ask for a listing of translation services at your DUA office.

ВАЖНОЕ СООБЩЕНИЕ
В этом сообщении содержится информация о Ваших правах и обязанностях, и оно должно быть срочно переведено Вам. Если Вам нужен переводчик, попросите список переводческих компаний в своем DUA офисе.

IMPORTANTE
Este aviso incluye información sobre sus derechos y obligaciones, y debe traducirse de inmediato. Si necesita un traductor, solicite el listado de servicios de traducción en la oficina de la DUA correspondiente.

IMPORTANTE
Questo avviso contiene informazioni sui Suoi diritti ed obblighi e deve essere tradotto immediatamente. Se ha bisogno di un traduttore, chieda l'elenco dei servizi di traduzione presso la DUA.

IMPORTANTE
Este comunicado contém informações sobre os seus direitos ou obrigações. Ele deve ser traduzido prontamente. Se precisar de um tradutor, solicite no escritório DUA mais próximo uma lista dos serviços de tradução.

ສຳຄັນ
ໃບແຈ້ງການນີ້ ມີຂໍ້ມູນກ່ຽວກັບສິດທິ ແລະ ພັນທະ, ເຊິ່ງການແປໂດຍທັນ
ທີ ປະກອບດ້ວຍ ໆ ກ່ຽວກັບສິດ ແລະ ພັນທະຂອງທ່ານ ໆ
ຂອງທ່ານຄວນໄດ້ຮັບທີ່ໄລກ. ຖ້າ ທ່ານຕ້ອງການໃຊ້ຜູ້ແປພາສາ, ໃຫ້ຂໍ
ລາຍການບໍລິການແປພາສາທີ່ ມີໄວ້ໃຫ້ໃຊ້ໃນບ້ານ. ການຕ້ອງການ
DUA ຂອງທ່ານ

សំខាន់
សេចក្តីជូនដំណឹងនេះ មានពត៌មានស្តីអំពីសិទ្ធិ ឬ ភារកិច្ចរបស់អ្នក ។ សូមអោយគេបកប្រែសេចក្តីនេះជាបន្ទាន់ ។ ប្រសិនបើអ្នកត្រូវការអ្នកបកប្រែ សូមសួររកបញ្ជីឈ្មោះកន្លែងផ្តល់សេវាកម្មបកប្រែ ដែលមាននៅការិយាល័យ DUA របស់អ្នក ។

ENPÒTAN
Nòt sa a genyen enfòmasyon sou dwa w oubyen obligasyon ke ou genyen, epi ou fèt pou ou fè tradwi l kounyè a. Si ou bezwen on moun ki pou tradwi pou ou, mande on lis ki genyen sèvis ke yo ofri pou tradiksyon nan biwo DUA ke ou konn ale a.

QUAN TRỌNG
Thông báo này bao gồm thông tin về quyền hạn hoặc trách nhiệm của quý vị và phải được thông dịch ngay. Nếu cần một thông dịch viên, hãy yêu cầu một danh sách dịch vụ thông dịch tại văn phòng DUA của quý vị.

重要
本通知包含有關閣下權利或義務的資訊, 應即刻翻譯。如果閣下需要翻譯人員, 請到閣下的DUA辦事處要求一份翻譯社的名單。