

Board of Review
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Issue ID: 0010 9404 96

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by JoAnn Amico, 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 reverse.

The claimant resigned from her position with the employer on June 28, 2013. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 28, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 16, 2013.

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 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 on appeal is whether the review examiner's decision that the claimant quit her job voluntarily without good cause attributable to the employer is supported by substantial and credible evidence and free from error of law, where the review examiner found that the employer had promised the claimant a raise on two different occasions, the claimant did not receive the raise, and the claimant quit due to not receiving it.

Findings of Fact

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

1. The claimant worked 38 to 40 hours per week as head baker for the employer, a coffee shop, from May 2011 to 6/28/13. At the time she separated from employment, her rate of pay was \$10 per hour. The coffee shop is part of a brand that franchisees may purchase.

2. In January 2013, the claimant was evicted from her apartment and moved to Framingham. She paid \$100 per week in rent in Framingham. She paid the same amount per week when she rented the apartment from which she was evicted.
3. The claimant believed she incurred additional gas costs of approximately \$50 per week when she had to drive from Framingham to work in Franklin, and when she was asked to drive to the employer's distribution center and back to Franklin.
4. In January 2013, the claimant asked her supervisor if she could get a raise. The supervisor said he could not give her a raise and the owner did not want to give raises until the store made more money.
5. In the beginning of May, the claimant asked the owner if she could get a raise. He said she could. She asked for \$1 more per hour, or \$11 per hour. He agreed. Neither the claimant nor owner agreed on a specific date the raise would go into effect.
6. The claimant asked the supervisor again in May if she could get a raise. The supervisor said he needed to talk to the owner.
7. The claimant spoke with the owner again in May about a possible raise. He indicated she would get a raise. They did not discuss the date the raise would be effective. She believed the supervisor and owner pushed the subject of the raise aside and did not want to speak with her about it.
8. The claimant explained to the supervisor and owner that she had to move to Framingham in January and she cannot afford to drive from Framingham to Franklin each day and to drive to the distribution center without additional compensation.
9. The claimant did not ask whether she could transfer to an employer location closer to Framingham or in Framingham before she quit her employment; nor did she apply for any positions with employers who own separate franchises in Framingham or near Framingham, before she separated.
10. The claimant did not receive a raise before she quit her employment. She worked on 6/28/13. She did not return to work after that date and did not inform the employer that she was resigning from her employment.

Ruling of the Board

In accordance with our statutory obligation, we review the findings of fact 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 that the claimant is not entitled to benefits is free from error of law. Upon such review the Board adopts the review

examiner's consolidated findings of fact. In adopting the findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's ultimate conclusion that the claimant should be disqualified from receiving benefits.

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 she is entitled to benefits. The review examiner concluded that the claimant had not carried her burden. We disagree.

The review examiner found that the claimant was working as a head baker for the employer's coffee shop at a rate of \$10.00 per hour. After being evicted from her apartment and having increased fuel expenses for her car, the claimant asked the employer for a raise in January 2013. Her supervisor told the claimant that she would not receive a raise until the store made more money. The claimant waited until May, 2013 to ask again for a raise. This time, she asked the owner for the raise of \$1.00 per hour, which was ten per cent of her total hourly rate. The owner agreed to it. Despite the owner's blanket approval of the raise, it was never implemented. The owner confirmed to the claimant again in May that she would receive a raise. The claimant waited until June 28, 2013 for the raise and resigned when it was not forthcoming.

The review examiner asserted in her discussion that the claimant "could not show that she reasonably believed that the employer promised her a raise, as the employer did not discuss with her when the raise would take effect and she believed the employer did not want to talk to her about this and pushed the subject aside." We do not agree that the findings of fact support the examiner's conclusion that the claimant was not promised a raise. Findings of Fact #5 and #7 both indicate that the owner agreed that the claimant would get a raise. The review examiner herself, in the sentence prior to the one just quoted, wrote that the claimant "was told she could have a raise." The review examiner seemed to assume that the raise was not promised because the parties did not discuss the date on which it would be put into effect. This assumption is incorrect. The promise of the raise, including its amount, is contained within the owner's statements to the claimant in May 2013. Since the claimant was promised a raise which never materialized, she had a reasonable workplace complaint with the employer.

The review examiner also concluded that the claimant did not take reasonable steps to preserve her employment. In order to be eligible for benefits following her resignation, the claimant must prove she made a reasonable attempt to correct the problem in the workplace, or that such an attempt would have been futile. See Kowalski v. Dir. of Division of Employment Security, 391 Mass. 1005, 1006 (1984) (rescript opinion). The problem that the claimant sought to address was the employer's failure to give her a promised raise after multiple assurances. She quit due to this, and Finding of Fact #10 clearly links the raise with the claimant's separation from her job.

We believe that the findings of fact indicate that the claimant did make reasonable attempts to persuade the employer to keep its promise and waited a reasonable period of time. On at least three different occasions, the claimant spoke with her supervisor or the owner about the raise. She waited a reasonable amount of time before concluding that the raise would not materialize. A transfer to a location closer to Framingham, where she now lived, may have helped with her transportation expenses but would not have addressed the reasonable complaint that the claimant had with regard to the unpaid raise and the failed promises. Based on the claimant's continued efforts to speak with the employer about her raise, we conclude that she did take reasonable steps to preserve her job and reasonably concluded that further requests and/or further promises would have had the same futile outcome as the earlier ones.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant is not entitled to benefits is based on an error of law, because the claimant voluntarily quit her position for good cause attributable to the employer, where the employer promised the claimant a raise on multiple occasions, the raise was never given to her, and the claimant repeatedly made efforts to get the raise before she quit.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 23, 2013, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 8, 2014



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh