



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

**DECISION
OF
BOARD OF REVIEW**

In the matter of:

Appeal number:

BR-22125999

APPELLANT: (claimant)

[REDACTED]
[REDACTED]
[REDACTED]

RESPONDENT: (employer)

ZAM Corporation
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So. Weymouth, MA 02190

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On August 19, 1999, the Quincy Division of the District Court remanded this case, Civil Action No. 96 CV 1730 to the Board of Review. On January 5, 2000, in Boston, Massachusetts, the Board reviewed the written record, transcripts, and recordings of the testimony presented at the hearings held on August 4, 1997, August 18, 1997 and October 22, 1999.

The Board's decision of October 20, 1997, denied the claimant's application for review of the Deputy Director's September 4, 1997, decision denying her benefits in accordance with the provisions of G.L. c. 151A, § 41, the Massachusetts Employment and Training Law (the Law). The claimant exercised her right of appeal to the courts under section 42 of the Law.

The Quincy District Court remanded this case with the following specific directive:

For further evidence on the issue of what if any reason the claimant had for needing to leave work quickly on her last day and whether the employer knew of any such reason.

The case was received at the Board from the court on August 31, 1999. The Board remanded it to the Deputy Director on September 1, 1999, for the making of the court requested additional findings of fact. The case was returned to the Board on November 17, 1999.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

The claimant left her job without good cause attributable to the employer or its agent, or for urgent, compelling and necessitous reasons within Section 25 (e)(1) of the Law.

The claimant was not discharged from her employment. Therefore, Section 25 (e)(2) does not apply to this matter.

In accordance with Section 25 (e)(1), the burden of proof is upon the claimant to establish by substantial and credible evidence that she left for good cause attributable to the employer or its agent, or for urgent, compelling and necessitous reasons.

The claimant contended that she left the job for good cause attributable to the employer, and not for urgent, compelling and necessitous reasons. Yet, given the facts as stated above, the claimant failed to meet her burden of proof in establishing that the employer was responsible for her leaving. The claimant contended that she walked off of the job intending to resign her position as a result of alleged harassment by the president. The claimant testified that the harassment consisted of his making derogatory remarks in another language, his humiliating her by discussing her financial situation in the presence of customers, his talking down to and yelling at the claimant in the presence of customers, his use of profanity, his making gestures regarding male sexual organs, and his massaging the claimant's shoulders.

The claimant's testimony regarding such harassment was not credible for various reasons. First, the claimant testified that all of these incidents occurred throughout the entire course of her employment, however, without explanation the claimant remained working for the employer for almost eight months and then made numerous telephone calls to the employer after walking off the job in an attempt to get her job back.

Second, the claimant's testimony as to when such incidents occurred was vague and contradictory. For example, the claimant initially testified that the incident where the employer made a gesture of a sexual nature using a food object occurred in February of 1996, then at a later point in the hearing the claimant testified that it occurred during a different month. However, both the employer and the employer's witness directly testified that such incident did not occur.

Third, although the employer admittedly would use profanity around the work premises and even use a specific phrase in Italian, the employer's witness corroborated the testimony that the use of such language was common place on the work premises and the claimant herself used such language. The employer's witness was also present during a portion of the May 10th incident, whereupon, she corroborated that both the claimant and the employer were raising their voices at one another.

Fourth, although the claimant contended that two to three times during the course of her employment the president massaged her shoulders, whereupon, she informed him that she didn't want him to put his hands on her, such testimony was not credible in that once again the claimant's testimony was non-specific. In addition, although the employer admittedly would pinch the employees around the neck or shoulder area when passing, the employer's testimony that at no time did the claimant voice an objection was corroborated by a witness who testified that at no time when viewing such behavior on the part of the employer towards the claimant did the claimant appear to be visibly upset by such gesture.

Fifth, although the employer admittedly made a comment in the presence of customers referencing the claimant's receipt of welfare, the unrefuted testimony was that it was an isolated incident, in that once the claimant voiced her objection to such joking there were no incidents of a similar nature.

Finally, the claimant contended that as a result of stress from her job she sought medical attention however, the documentation submitted by the claimant supported that her physical exam and laboratory work were normal. Further, the claimant offered no explanation for her failure to follow up with a mental health professional as recommended by her physician prior to offering her resignation, nor did she request a leave of absence in order to alleviate such stress.

In view of the facts, the claimant's leaving work was not with good cause attributable to the employer or involuntarily for urgent, compelling and necessitous reasons. Therefore, the claimant is subject to disqualification and is denied benefits.

The claimant is denied benefits from the week ending May 18, 1996, until she has worked eight weeks and in each week has earned an amount that is equal to or in excess of her weekly benefits amount.

Section 25(e)(1) of chapter 151A of the General Laws is pertinent and provides as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for-

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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 Deputy Director's representative held hearings on August 4, 1997 and August 18, 1997. Both parties were present. On September 1, 1999, the Board remanded the case to the Deputy Director for the taking of the court ordered additional evidence and findings. The Deputy Director's representative held a remand hearing on October 22, 1999. Only the claimant and her representative were present. The Deputy Director's representative then consolidated her final findings of fact as follows:

1. The claimant filed for unemployment benefits on May 17, 1996.
2. The claimant worked as a counter person for employer, a restaurant and deli, from September 20, 1995, until separated from the employer on May 10, 1996
3. The claimant worked five days per week, four hours per day. The claimant was paid \$6.00 per hour.
4. The claimant had a twelve-year-old son who suffered from ADHD. When the claimant was hired for her position she informed the president of her son's [sic] condition. She also informed the president that her son was on medication and that she could only work until 2:00 p.m. because she needed to be home in time to administer his medication.
5. The claimant's son attended school Monday through Friday. He would normally arrive home between 2:30 p.m. and 2:45 p.m. The claimant's son had a key to let himself into the house.
6. The claimant's son normally received his medication at 2:45 p.m. each day.
7. During the course of the claimant's employment she had submitted paperwork to the employer to be completed regarding her housing. The paperwork was to be submitted to the Welfare Department.
8. In November 1995, while the claimant was working, the president stated in front of the customer's 'I'm going to call the welfare department on you. The next day the claimant informed the president that she did not like what he stated regarding her being on welfare. The president informed the claimant that he was joking. At no time thereafter did the employer comment as to any issues regarding the claimant's receipt of welfare.
9. While working, the president would sometimes speak in Italian. The expression that the president used translated into English as 'your sister's face looks like my ass'. The claimant did not understand Italian, but the president informed her as to what it meant.
10. The president along with the employees would use profanity while on the work premises. The claimant also used profanity on the work premises. The claimant also used profanity on the work premises [sic].

11. On Occasion when walking through the work premises, the president would pinch, or massage the employees neck or shoulders as a friendly gesture. Such behavior bothered the claimant. The claimant would tell the president to leave her alone, whereupon he would just walk away.
12. Since April of 1996, the claimant began to experience such symptoms as insomnia and continual bouts of crying.
13. Th claimant saw a doctor on May 9, 1996, due to her symptoms. The claimant's test results were normal. There was no diagnosis at that time, but the claimant was given a referral to speak with a mental health professional. The claimant did not make an appointment to be seen thereafter.
14. On May 10, 1996, the claimant was scheduled to work from 9:00 a.m. to 2:00 p.m.
15. The president would normally get the paychecks prior to 2:00 p.m., whereupon, he would sign them before distributing them to the employees.
16. The claimant was working on May 10, 1996. The employer was short staffed that day. At the conclusion of her shift on May 10th, the president asked the claimant to go upstairs to payroll and get the paychecks. The claimant had to meet her son at home upon completing her shift at work, because her son had left his house key at home that day and would be unable to get in. The claimant also had to administer her son's medication at 2:45 p.m.
17. The claimant went to get the paychecks, whereupon, when she returned she asked the president to sign her paycheck.'
18. The president informed the claimant that she would have to wait until he was done with the order, because the customer comes first. The president continued to wait on customers. The claimant responded by raising her voice and informing the employer, 'I do fucking everything.
19. The claimant informed the president that she was not coming back. The claimant walked to the door, whereupon, the president came running out after her, asking the claimant to wait and informing her that he would sign her paycheck.
20. The president then signed the claimant's paycheck. The claimant walked out the door, then immediately returned, throwing her hat on the counter. The claimant intended to resign her position at that time. The claimant left the work premises at 2:25 p.m.
21. On May 10th, a fellow coworker had heard both the claimant and the president yelling, but did not hear the contents of the discussion.
22. The next day, the president contacted the claimant by telephone. When unable to reach her, the president left the claimant a message. The president apologized for yelling at the claimant and informed her that he 'loved her like a sister'. The president instructed the claimant to contact him by Sunday, May 11th.
23. The claimant contacted the employer on May 13th, 14th, 15th, 16th, and 17th, whereupon she spoke to the counter manager. The claimant was contacting the employer regarding returning to work, whereupon the counter manager informed the claimant that the president was too busy to take the call.
24. At no time prior to May 10th did the claimant request a transfer to another position, specifically the deli cart position. The claimant did not request transfer to any other position, because she believed that there were no other positions available at that time. Also if the claimant was to obtain a transfer to another position, she would still be working with the president. In the deli cart position, not only would the claimant still be working with the president, but her pay would be decreased.
25. At no time prior to May 10th did the claimant request a leave of absence from the employer. However, a leave of absence would not have assisted the claimant, because upon her return she would still be working with the president.

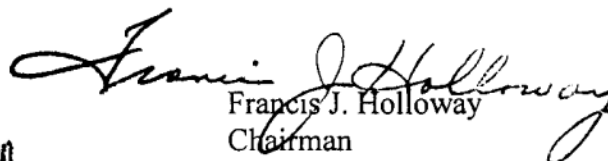
26. In support of the claimant's testimony regarding her being harassed by the president, [sic] date of the final incident the claimant needed to leave work as scheduled at 2:00 p.m. in order to let her son into the house and to administer his medication. The president was aware of the claimant's need to leave and although it was busy, he would not take a moment to sign the claimant's paycheck making the claimant wait almost a half-hour. Further supporting that such harassment had occurred the president admittedly would pinch or massage the claimant's shoulders. However, when asked the president could not recall if the claimant had ever voiced an objection to such behavior. Although a witness testified on behalf of the employer that she had not seen the claimant visibly upset by such touching, the claimant directly and consistently testified such touching was unwelcome and that she voiced her objections to the president. Finally, although the claimant remained working for eight months under such conditions and had even sought to gain her position back after the final incident on May 10th, the claimant's need for the money as a single parent of a special needs child, was a plausible explanation.

After reviewing the record, the Board adopts the consolidated findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes as follows:

The findings show that the employer created a hostile working environment by subjecting the claimant to unsolicited physical contact and threats regarding her status with the Welfare Department. The claimant finally left her job when the employer purposely delayed signing her paycheck. The employer was aware that the claimant had to leave work promptly at 2:00 p.m. to administer her son's medication. Therefore, the board concludes that given the employer's actions, the claimant has established that her voluntary leaving was with good cause attributable to the employing unit. Consequently, the claimant is not subject to the disqualifying conditions of section 25(e)(1) of the Law.

The Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending May 18, 1996, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
 DATE OF MAILING - JAN 12 2000


 Francis J. Holloway
 Chairman


 Kevin P. Foley
 Member

APPELLANT: I.D. # [REDACTED]
 RESPONDENT: I.D. # [REDACTED]

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

LAST DAY - FEB 11 2000

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