COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EMPLOYMENT AND TRAINING
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

BR-260578

In the matter of: Appeal number:

APPELLANT: (claimant)

[redacted]

Office #27

RESPONDENT: (employer)

Nature's Heartland

On November 2, 1999, in Boston, Massachusetts, the Board reviewed the written record, and recordings of the testimony presented at the hearings held by the Deputy Director's representative on May 26, 1999, and June 11, 1999.

On August 2, 1999, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The Board remanded the case to the Deputy Director for further review and to make subsidiary findings of fact from the record. The Deputy Director returned the case to the Board on August 25, 1999.

The Board has now 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 was not discharged from employment. Therefore, Section 25(e)(2) of the Law is not applicable in this matter.
>
> In accordance with Section 25(e)(1) of the Law, the burden of proof is upon the claimant to establish by substantial and credible evidence that he left work voluntarily with good cause attributable to the employer or its agent, or left work involuntarily for urgent, compelling and necessitous reasons.
>
> The claimant failed to meet his burden of proof in establishing that he left work with good cause attributable to the employer or its agent. The claimant testified that he resigned his position as a result of a change to his work schedule, which resulted in a decrease in his earnings.
>
> Although the claimant also referred to his being required to perform additional work, he was unclear as to whether he would have resigned his position at that time due to such, had his scheduled [sic] not changed. Furthermore, the credible evidence and testimony supported that the workload was not the reason for the claimant's resignation in that the increase in work began in December of 1998, whereupon the claimant did not resign until three months later. In addition, in February of 1999, when the claimant was again asked by the employer to prepare additional dishes, the claimant refused to do so, whereby the claimant admitted that no action was taken by the employer and he was not required to perform the additional work.

As for the claimant's actual reason for resigning, the reduction in hours, which effected his pay, such, was effective beginning March 7th and was for an indefinite period of time. The employer's unrefuted testimony was that such occurred as an attempt to reduce cost [sic] in decreasing the number of overtime hours. Furthermore, there was no indication that the claimant was in any way singled out, in that the employer also changed the schedule of other employees for the same purpose. More importantly, the reduction to the claimant's gross pay per week was not significant in that it was only $48.00 and his other benefits were not effected.

Therefore, even though the claimant attempted to preserve his employment, by speaking with the employer by way of messages through the use of a coworker, regarding his dissatisfaction with his schedule change and the corresponding decrease in pay, his reason for resigning does not constitute good cause attributable to the employer or it's [sic] agent.

In view of the facts, the claimant is subject to disqualification and is not entitled to receive benefits.

The claimant is disqualified from receiving benefits from the week ending April 10, 1999 and until he has had eight weeks of work and in each week has earned an amount equal to or in excess of his weekly benefit rate.

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 May 26, 1999 and June 11, 1999. Both parties appeared. The Board remanded the case to the Deputy Director for further review and to make additional findings of fact. Whereupon, the Deputy Director's representative consolidated her final findings of fact as follows:

1. The claimant worked full time as a cook for the employer, a food business, from May 21, 1998 until becoming separated from employment on March 20, 1999.

2. The claimant normally worked Tuesday, Thursday, Friday, Saturday and Sunday, from 8:00 A.M. to 4:30 P.M. The claimant was paid $12 per hour and received time and a half on Sundays. The claimant's gross pay was $528 a week. The claimant received paid sick, personal and vacation days.

3. In the claimant's position, he was responsible for preparing the dishes for the day and preparing the food items for the next day. The claimant did not receive a written job description. When the claimant was hired, he was not informed as to a specific number of dishes that he would be required to prepare per shift.

4. Up until around December of 1998, the claimant was preparing approximately ten dishes per shift. In December of 1998, the claimant was asked by the chef to prepare fifteen dishes per shift. The claimant did not voice any objection at that time. The claimant did not receive an increase in pay.

5. In February of 1999, the chef asked the claimant if he could prepare twenty dishes per shift on the days when he was scheduled to have the next day off from work. The claimant informed the chef that he was unable to prepare that many dishes, because he was too tired. The chef did not respond. Thereafter, up until the time of the claimant's separation from work, the claimant was preparing approximately fifteen dishes per shift.

6. At no time was the claimant disciplined by the employer due to his failure to prepare a certain number of dishes per shift.

7. Around March of 1999, the employer attempted to reduce the amount of overtime hours. The employer decided to take some of the employees off of work on Sundays, to avoid paying them time and a half. The employer decided to reduce the overtime hours of the claimant and three other employees.

8. The change to the claimant's schedule, in an attempt to reduce overtime hours, was to be permanent. The claimant's benefits would not be effected [sic] by the change in schedule.

9. The claimant spoke Mandarin. The claimant had a limited understanding of English and a limited ability to speak English. The sushi chef would often translate for the claimant and the employer.

10. On March 4, 1999, the sushi chef informed the claimant that the employer was going to change his schedule. The claimant was informed that he would no longer be working on Sundays, but would be working on Mondays instead. The claimant informed the sushi chef that he was dissatisfied with the change.

11. Thereafter, the sushi chef informed the prepared foods manager that the claimant was unhappy with his change in schedule. The prepared foods manager believed that the claimant was dissatisfied with the change in schedule due to his no longer receiving time and a half for Sundays. The prepared foods manager informed the sushi chef that there was nothing that she could do about it because it was a directive from the store manager and his superiors to cut the overtime hours on Sundays.

12. The sushi chef informed the claimant that nothing could be done.

13. On or about Saturday March 6th,the claimant was informed by the chef that his schedule change was to begin at that time. The claimant informed the chef of his dissatisfaction with the change in schedule and that as a result his earnings would decrease. The chef indicated that there was nothing that could be done.

14. The week beginning March 7th up until the time of his separation from work, the claimant was working the new schedule.

15. The claimant were to work the new schedule without any overtime hours, his gross pay would be $480 per week.

16. The week ending March 13, 1999, the claimant had a quarter hour of overtime, whereupon the claimant gross earnings were $484.50.

17. The week ending March 20, 1999, the claimant was absent from work one day, whereupon his gross earnings were $390.

18. On March 20, 1999, as the claimant was exiting the work premises, he informed the prepared foods manager that he would not be returning to work thereafter. The prepared foods manager inquired as to the reason, but he [sic] claimant did not explain. There was no further discussion with the employer regarding his resignation.

19. The claimant resigned his position due to his dissatisfaction with the reduction in his weekly earnings as a result of the change in his schedule. The claimant's contention that he also resigned his position as a result of an increase in work load was not credible, in that the claimant was not required to perform the additional work which was requested of him by the employer and the claimant was not disciplined for refusing to do so.

20. The claimant's last day of work for the instant employer was March 20, 1999.

21. The claimant filed his claim for unemployment benefits on April 5, 1999.

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:

Under Massachusetts General Laws, Chapter 151A, § 25(e)(1), the burden of proof is upon the claimant to establish by substantial and credible evidence that his leaving of work was for good cause attributable to the employing unit or its agent or for an urgent, compelling and necessitous reason as to make his leaving involuntary.

The claimant left his job because he was dissatisfied that the employer unilaterally changed his schedule of hours that precluded him from working on Sundays and earning time and a half. This change in the claimant's hours was to be permanent. The claimant normally worked a five-day week that included Sunday. The claimant's customary rate of pay was $12.00 an hour but on Sunday he was paid time and a half, which was $18.00 an hour. On March 6, 1999, the employer informed the claimant of this schedule change, which prevented him from earning his customary overtime pay on Sunday. The claimant's gross weekly pay with work on Sunday had been $528.00 a week but with this change in hours, the claimant's weekly pay was reduced to $480.00. The claimant complained to his supervisor, who in turn went to the prepared foods manager in an attempt to resolve the claimant's dissatisfaction. The claimant, however, was told that nothing could be done about the matter because it was a directive from the store manager to reduce the overtime hours.

Inasmuch as this change in the claimant's hours was going to be permanent and since the employer's unilateral change in the claimant's schedule of hours represented a $48.00 reduction in the claimant's gross weekly pay, the Board concludes that the claimant's leaving of work, although voluntary, was for good cause attributable to the employing unit within the meaning of section 25(e)(1) of the Law.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending April 10, 1999, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - NOV 15 1999

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)

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LAST DAY - DEC 15 1999