COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

TRIAL COURT DEPARTMENT
QUINCY DISTRICT COURT
DOCKET NO. 0556 CV 2136

YENNY LEE

vs.

JAMES P. O'LEARY, in his capacity
as Director of the Division of
Unemployment Assistance

MEMORANDUM

This is an action, brought by Yenny Lee, the claimant, seeking judicial review, pursuant to G.L. c. 151A, § 42, of a denial of his appeal by the Board of Review (Board) of the Massachusetts Division of Unemployment Assistance (DUA)) from a decision of a review examiner which denied unemployment compensation benefits to claimant. The Board's denial of the appeal rendered final the decision made by a review examiner, who found the claimant ineligible for unemployment benefits under G.L. c. 151A, § 25(e).

"General Laws c. 151A, § 25(e) [], provides, in relevant part, that no unemployment benefits shall be paid to an individual '[f]or the period of unemployment next ensuing and until the individual has had at least four weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount after he has left his work (1) voluntarily without good cause attributable to the employing unit or its agent.... An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.' Although 'the statute expressly provides that the law should be liberally construed to establish its purpose, which is "to lighten the burden which now falls on the unemployed worker and his family,"' *Reep v. Commissioner of the Dep't of Employment & Training*, 412 Mass. 845, 847 (1992). [The claimant] bears the burden of proving either that he left his employment for good cause attributable to the employing unit, or that his reason for leaving was of an urgent, compelling, and necessitous nature that would render his departure involuntary. *Sohler v. Director of the Div. of Employment Sec.*, 377 Mass. 785 (1979). The nature of the circumstances of each individual case, and the degree of compulsion that such circumstances exert on a claimant, must be objectively evaluated. See *Reep v. Commissioner of the Dep't of Employment & Training*, supra at 848." *Crane v. Commissioner of Dept. of Employment and Training*, 414 Mass. 658 (1993).

The record reveals that the claimant began employment with Diamond Windows & Doors

Mfg. Inc., on February 7, 2005, as a "Service Tech - Installer." The conditions of employment required the claimant to work from 8:00 a.m. until 4:00 p.m., Monday through Friday, and for this he would be paid $450.00 per week which would net the claimant $355.08. The claimant worked for Diamond until March 4, 2005, at which time the claimant informed his supervisor that he was resigning.

The claimant was informed by his supervisor that he would be paid bi-weekly. Diamond maintained a written payroll policy, not provided to the claimant, which stated "[e]mployees are paid every other Friday. Each paycheck will include earnings for all authorized work performed through the end of the previous payroll period (2 weeks from the last pay period ending date)." The effect of this policy on the claimant was that the claimant was paid for his first week of employment on February 25, 2005. For the following two weeks, the policy required that the claimant be paid on March 11, 2005. The review examiner found that the claimant "accepted" these terms of employment.

The hearing record indicates that during the third and fourth week of employment, the claimant, over that period, spoke with the accountant for Diamond regarding his concern as to why he had not been paid for all the hours that he had worked. According to the claimant, the accountant informed him that "they are not sure how to pay [him]" and that "they [would] let [him] know later." On March 4, 2005, still without an answer, the claimant resigned.

Pursuant to G.L. c. 151A, § 42, judicial review of 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." Accordingly, the court "is to determine whether the review examiner applied the correct legal principles in denying unemployment compensation benefits to the plaintiff. *Lycurgus v. Director of the Div. of Employment Sec.*, 391 Mass. 623, 626-627, 462 N.E.2d 326 (1984). In addition, [the court] must consider whether the review examiner's findings are supported by substantial evidence. *Id.* at 627." *Quintal v. Commissioner of Dept. of Employment and Training*, 418 Mass. 855 (1994).

It is not for the court to substitute its judgment, either as to the weight or credibility of the evidence, for that of the review examiner. *Fergione v. Director of the Division of Employment Security*, 396 Mass. 281, 283 (1985). Rather, "[a] decision by the board will be reversed only if it is based upon an error of law or is unsupported by substantial evidence." *Potris v. Commissioner of the Dept. of Employment & Training*, 42 Mass.App.Ct. 735, 737-738 (1997).

In determining "substantial evidence" the Appeals Court has stated:

> " In order to be supported by substantial evidence, an agency conclusion need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon 'reasonable evidence,' *Medical Malpractice Joint Underwriting Assn. of*

Mass. v. Commissioner of Ins., 395 Mass. 43, 54 (1985), i.e., 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' after taking into consideration opposing evidence in the record. G.L. c. 30A, §§ 1(6), 14(8); *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981)

Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App.Ct. 246, 257-58 (1996).

In this case, the review examiner made a determination, based upon the evidence, that the claimant's position that he voluntarily left employment because he had not been paid is supported by substantial evidence. However, it is also true, as found in the review examiners conclusions, that while the claimant did not leave because he had not been paid, the claimant did leave because the claimant objected to the employer's payroll schedule.

The legal issue, then, is whether the evidence of the employer's payroll schedule sustained the claimant's burden of proving that good cause existed such that his departure is not disqualifying or was such that the claimant's departure was of an urgent, compelling, and necessitous nature that would render his departure involuntary. The court, to answer this question, turns to G.L. c. 149, § 148, commonly referred to as the Massachusetts Wage Act.

General Laws c. 149, § 148 states that any "person having employees in his service shall pay ... bi-weekly each such employee the wages earned by his to within six days of the termination of the pay period during which the wages were earned if employed for five...days in a calendar week....No person shall by a special contract with an employee...exempt himself from this section...."

Diamond's payroll policy violates G.L. c. 149, § 148. For the first week of claimant's employment, which would have been the second week of a pay period, the claimant should have been paid on February 18, 2005. On March 4, 2005, the claimant should have been paid for the pay period of February 14th through the February 27th.

Had the claimant been paid as required, the claimant would have received, by the date of his resignation - March 4th - gross wages of $1,350.00 which would have netted the claimant $1,065.24. Instead, under Diamond's plan, the claimant would need to budget $355.08 net earnings over a period of thirty-three days: $10.76 per day on average[1].

The review examiner's focus upon the claimant's ability to maintain employment and receive

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[1] The review examiner found that the claimant "accepted' the terms of his employment including the payroll plan. Under G.L. c. 149, § 148, the employee could not accept an arrangement that violates this section. Further, in light of the payment plan, the evidence does not warrant a finding that the claimant, or any person in the claimants's position, would accept a wage schedule that would force the employee to live on $10.76 per day for thirty-three days.

bi-weekly benefits misses the mark. The issue is whether the claimant was without good cause in resigning from employment where a payroll policy short-changed the claimant net wages of $710.16 otherwise due under the law. Viewed objectively under these circumstances, the degree of compulsion exerted on a claimant, an unskilled laborer, who would be required to sustain his existence on $10.76 per day, is overwhelming. The payroll plan of Diamond's and its affect upon the claimant, as exhibited by claimant's inquiry of the accountant, evidences the good cause attributable to the employer that entitles the claimant to unemployment benefits.

Accordingly, the Court finds the review examiner committed an error of law and that the conclusion that the claimant is not entitled to unemployment benefits is reversed.

November 1, 2006

Mark S. Coven, Justice