

**Board of Review
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Issue ID: 0019 1783 68

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Elizabeth Cloutier, 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.

After separating from a full-time employer, the claimant filed a claim for benefits, effective May 29, 2016. He then began work for this employer. The claimant resigned from his position with this employer on June 22, 2016, and continued to certify for benefits on his unemployment claim. On August 26, 2016, the DUA issued a Notice of Disqualification, which provided that the claimant was not eligible for benefits beginning June 19, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 27, 2016.

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 accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the suitability of the claimant's job with the employer. Both parties attended the remand hearing, which was conducted on January 24 and February 28, 2017. Thereafter, the review examiner issued her consolidated findings of fact and returned the case to the Board on March 3, 2017. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant separated from his job for disqualifying reasons, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant quit his job after working for three days when he found that the commute from his home to the job made him consistently late, the work hours conflicted with his obligation to drop off his children at school, the pay was significantly less than his base period job, and the job duties were not consistent with the job duties of his base period work.

Findings of Fact

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

1. The claimant was employed full time in an IT systems support position for the employer, a financial institution, from 6-20-16 until he became separated from the employer on 6-22-16.
2. The effective date of the claimant's unemployment claim was 5-29-16. He had base period wages of \$149,593.64.
3. The claimant's base period employment was as a Senior Consultant, acting as a team lead for an offshore team. The claimant reviewed multiple client site infrastructures and put up cloud offerings for multi-tenanted clouds. The claimant's physical office was 35-40 miles away. His team was located remotely in India. The claimant was able to perform work from home, utilizing conference calls and online white board. His scheduled hours were 8:30 -5:00.
4. The claimant accepted the position of IT Systems Support Engineer/Officer with the instant employer at a negotiated salary of \$77,000.00.
5. "Team Lead" and "IT Systems Support" are different positions. "Team Lead" implies management of others. The instant employer had a small department, for which in its present configuration, had no need of a team lead.
6. The claimant had previous work experience as a "team lead". He accepted the instant position understanding that he would work as a team lead/management position within 6 months, based upon verbal representations made to him by the Manager of IT and a Vice President. The claimant assumed the Manager had the authority to make this offer, which was not specific and included no promises regarding future salary.
7. The employer made no written promise or offer of a "team lead" position to the claimant.
8. The claimant travelled to the employer's place of business on 2 occasions for pre-hire interviews. The employer was located approximately 49 miles from the claimant's home at 9:00 a.m. [sic] When the claimant attended the interviews for the position, the drive took him "a little over one hour".
9. The claimant and employer discussed the claimant's commute distance as part of the interview process for the position. The employer noted that other employees had a similar commute. The claimant did not express any reason that the commute would be problematic.
10. The claimant was hired for an 8:30 to 5:00 shift.
11. The commute time according to the employer's check on traffic websites is between 1 hour and 1 hour and 15 minutes.

12. On 6-20-16, the claimant underwent “onboarding” for the position. The drive in on this first day took 2 hours.
13. On 6-21-16, the claimant’s commute to work took 2.5 hours. He arrived late.
14. The claimant asked his supervisor if he could have a later start time, due to the traffic. The supervisor offered the claimant an earlier start time of 7:00 a.m. to avoid the traffic.
15. The claimant did not accept the earlier schedule accommodation due to personal considerations. The claimant’s wife wanted to be at her mother’s home to assist her in the early morning.
16. The claimant did not want to start work at 7:00 a.m. as he wanted to drive his children to school. The children are both 13 years old. The claimant’s children could have been left at home and taken the bus, which would pick them up at about 7 a.m. The cost for the bus was \$600.00 per child for the year. The claimant felt this option was cost prohibitive.
17. The claimant did not need to be home for the children’s return home from school. They could be alone until the wife returned home.
18. On 6-22-16, the claimant was assigned for training on the help desk, shadowing the help desk employee, removing software from a user’s computer, and cleaning up a shelf area where PCs are imaged. The claimant did not want to engage in training on the help desk. He wanted to be trained by the management personnel he expected to replace.
19. On 6-22-16, the claimant travelled to work and was late. The commute took approximately 2 hours. The claimant resigned his position effective immediately, due to the commute time and the job duties not matching his expectations.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s consolidated findings of fact and deems them to be supported by substantial and credible evidence, except for the following. The date noted in Consolidated Finding of Fact # 18 appears to be a typographical error. Based on the record and the context of the other findings, the date stated there should be June 21, 2016, rather than June 22. We also note that Consolidated Finding of Fact # 2 is based on Remand Exhibit # 8, a Monetary Redetermination which was issued by the DUA on June 29, 2016. However, Remand Exhibit # 7, which shows significantly fewer base period wages, is dated June

30, 2016. From this, we are not able to conclude that Consolidated Finding of Fact # 2 is supported by substantial and credible evidence.¹ However, read together, both exhibits indicate that the claimant was paid in excess of \$100,000.00 in his base period. That factual conclusion is sufficient for purposes of deciding this case. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification, under G.L. c. 151A, § 25(e)(1). Because we conclude that the job with this employer was not suitable for the claimant, who had already established an unemployment claim, his separation from the employer is not disqualifying.

There is no dispute that the claimant resigned his employment on June 22, 2016, his third day of employment. 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] . . . (e) 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 law, the claimant has the burden to show that he is eligible to receive unemployment benefits. The review examiner concluded that the claimant did not carry his burden. Following our review of the entire record, we disagree.

The review examiner found that the claimant quit on June 22 “due to the commute time and the job duties not matching his expectations.” Consolidated Finding of Fact # 19. It is implied that the claimant decided not to continue his employment, because he felt that the job was not suitable for him, given the commute, the job duties, and other issues noted during his testimony. Indeed, the claimant argued this specifically in his appeal to the Board. *See* Remand Exhibit # 3. When suitability of a job is at issue, it is the “claimant [who] bears the burden of proving that the employment he was offered was unsuitable.” McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted). A claimant can carry his burden to show that he quit his job for good cause attributable to the employer, if he shows that the job was unsuitable or became unsuitable after a period of time. *See* Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n.3 (1981); Jacobsen v. Dir. of Division of Employment Security, 383 Mass. 879, 880 (1981).

In Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*, the Appeals Court noted that, even if a claimant had initially thought that the job would be suitable for him, “the job may have been objectively unsuitable from the start.” We think this is especially true when a worker has already established a claim for unemployment benefits and is seeking out new work, which may be somewhat different from his prior work. Thus, our focus is not so much on the claimant's personal feelings or subjective belief as to whether he could do the job, but whether, objectively speaking, the job's pay and requirements were suitable for a person in the claimant's

¹Although specifically asked by the Board in the remand order to provide one, the review examiner failed to include a credibility assessment to explain why she made her findings of fact and how she weighed the evidence before her.

position. The suitability of a particular job is dependent on many factors. *See* G.L. c. 151A, § 25(c) (noting factors to be considered include health, safety, morals of claimant; prior education and training; travel distance and costs; and remuneration); Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 349-350 (1948).

Based on our review of the review examiner's findings and the record as a whole, we now conclude that the job was not objectively suitable for the claimant. This is true, even if he subjectively felt that he should try out the job, knowing the location, duties, and salary associated with it. First, we note that the remuneration which the claimant would receive from this employer would be significantly less than what he was paid from his base period employer. The decrease in pay is something around 30 to 35%. Second, the job duties and title with this employer were not on par with his most recent prior job. With his base period employer, the claimant was a Senior Consultant, who acted as a team lead. As a team lead, it is implied that he managed other persons. However, as an IT Systems Support person, he would not be supervising others. This suggests, as noted by the claimant and his attorney during the remand hearing, that he would not be using his highest and most marketable skills at the employer's job. Third, the commute time for the claimant appears to have been significant and burdensome to his personal life. Although, based on his drives to the employer's place of business for two interviews, it appeared that the commute time would be between an hour and an hour and a half, the actual commute time on his work days was always over two hours in the morning. *See* Consolidated Findings of Fact ## 8, 12, 13, and 19. This commute time interfered with his ability to get to work on time, and he could not alter the commute time in June of 2016, due to his need to drive his children to school.² Given these issues with the pay, commute, and job duties, we conclude that the job was not objectively suitable for the claimant, and he had good cause to leave the job when he did.

We recognize that the claimant quit his job after only three days. We also note that there is a line of cases decided under Chapter 151A which says that a person who is trying a new job after filing a claim for unemployment benefits must give the new job a reasonable trial period prior to leaving it. *See Jacobsen*, 383 Mass. at 880. However, we do not require claimants who establish that there is good cause to quit their employment to stay in a job and continue to try to work things out if doing so would be futile. Claimants in such a situation can quit without making any or further efforts to keep the job. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93-94 (1984). In this case, the pay rate and job location were set by the employer, and nothing in the record indicates that those things would have changed significantly if the claimant stayed on at his job. Although the claimant may not have worked at the help desk for a long time after his initial training, the totality of the record suggests that, at least for the foreseeable future, he would not be using the same "Senior Consultant"/team lead skills he used for his base period work. Consequently, we believe that the claimant acted reasonably in leaving his position after working there for only a few days.

We, therefore, conclude as a matter of law that the review examiner's decision to deny unemployment benefits, pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and

² The commute was also significantly different from the type of commute he had with his base period employer. With that employer, he often worked at home. *See* Consolidated Finding of Fact # 3.

credible evidence or free from error of law, because the claimant carried his burden to show that the job with the employer, obtained in his benefit year after establishing a claim following his separation from another employer, was not suitable for him.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 19, 2016, and for subsequent weeks if otherwise eligible.³

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 20, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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

³ Although the Board does not normally address employer charging issues, we do note here that it does not appear that the employer in this case will be subject to any charges based on the outcome of this decision. This is because the employer is not a base period employer. If the employer has questions about charges on this claim, it may contact the DUA's Employer Charge Section at (617) 626-6350.