

0017 2866 38 (July 14, 2016) – Board declined to disqualify a claimant, who was hired to be an activities director at the employer’s rest home, but was transferred to being an aide after the employer decided that she could not do the director position. Claimant had good cause to resign because the new position was unsuitable. Attempts to change the essential elements of the job would have been futile.

Board of Review
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Issue ID: 0017 2866 38
Claimant ID: 10361462

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 separated from her position with the employer in November of 2015, after notifying the employer that November 20, 2015, would be her last day of work. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 12, 2015. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency’s initial determination and denied benefits in a decision rendered on April 9, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 did not quit her job for good cause attributable to the employer, 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 was hired by the employer to be the Activities Director and Day Club Coordinator in July of 2015, but, by early November of 2015, the employer had changed her position to a Day Club Aide.

Findings of Fact

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

1. The claimant worked full-time for the employer, a nursing home, beginning July 20, 2015.
2. The claimant was hired to be the Activities Director/Day Club Coordinator with a \$31,000.00 annual salary (\$14.90 per hour/\$596.15 per week).
3. The claimant had 5 interviews. The owner was aware the claimant did not have experience working with the elderly.
4. The claimant had prior experience working with disabled individuals which duties included toileting and bathing.
5. The owner had reservations about the claimant's ability to do the job but liked her personality.
6. The Activities Director/Day Club Coordinator's job duties included creating and scheduling activities and exercise programs and doing associated paperwork such as resident charts and Department of Public Health (DPH) filings. The Activities Director/Day Club Coordinator on occasion attended to residents' bathroom needs.
7. The claimant received about 6 hours of training for the Activities Director/Day Club Coordinator position from the prior Activities Director.
8. Prior to September 8, 2015 the employer reduced the claimant's work load about 50% because she had not completed resident charts or kept up with DPH requirements.
9. The owner and the Director of Nursing (DON) assisted the claimant with the paperwork.
10. The claimant confided with the Kitchen Manager she was overwhelmed in the Activities Director/ Day Club Coordinator position.
11. On September 8, 2015 the employer made the claimant's Activities Director/Day Club Coordinator two separate positions.
12. The employer created the separate Day Club Coordinator position specifically for the claimant.
13. On September 8, 2015 the claimant was removed from her duties as Activities Director because she was overwhelmed by the paperwork and not meeting the employer's expectations. Two employees had threatened to leave due to the claimant's job performance.

14. The claimant was offered the Day Club Coordinator position.
15. On September 9, 2015 the claimant accepted the Day Club Coordinator position. The claimant was paid \$12.60 per hour/\$504.00 per week.
16. The Day Club was a program which offered activities at the employer's premises for residents of other area assisted living facilities and health provider referrals.
17. The employer had about 12-14 daily signed-up Day Club participants.
18. The employer also sought to sign-up new daily participants for the program.
19. The claimant, as the Day Club Coordinator, in addition to working with the regular signed-up daily participants, also gave tours to prospective participants and informed family members about the Day Club program.
20. The claimant had the opportunity to increase her hourly rate to \$17.00 per hour if she was able to sign-up enough new participants to reach at least 20 daily regular Day Club participants.
21. The claimant as the Day Club Coordinator was also responsible for bookkeeping and the administration of TB tests. The Day Club Coordinator was also responsible for attending to Day Club visitors' bathroom needs.
22. The claimant had difficulty keeping up with the paperwork for the Day Club members.
23. Prior to November 3, 2015 the employer received a complaint from an assisted living facility claiming the claimant told a client (Client A) of the assisted living facility, a Day Club member, she smelled.
24. The claimant did not tell Client A from the assisted living facility she smelled. The claimant notified the head nurse at the assisted living facility Client A had to have her oxygen hooked up in order to be a Day Club member and she had an odor which may be due to a UTI (urinary tract infection) problem.
25. The employer lost Client A as a Day Club member.
26. The owner met with the DON and instructed her to tell the claimant she would be a Day Club Aide and no longer the Day Club Coordinator.
27. On November 3, 2015 the claimant was told by the DON she would no longer be doing paperwork for the Day Club Coordinator position and she would be a Day Club Aide.

28. The duties of a Day Club Aide included doing activities and games with the Day Club members and assisting them with bathroom needs.
29. The claimant worked November 3, 2015, November 4, 2015, and November 5, 2015 as an aide and as the Day Club Coordinator.
30. On November 6, 2015 the claimant submitted her resignation with a two week notice effective November 20, 2015.
31. The claimant resigned because she was not hired for an aide position; she would not be utilizing her creative skills in the aide position; and because she would not have the opportunity to increase her pay by signing-up enough new participants to reach at least 20 daily regular daily participants.
32. The claimant considered the aide position unsuitable employment.
33. The claimant did not speak to the owner before submitting her resignation because she “knew the duties of an aide”.
34. The claimant was not made aware of a reduction in pay.
35. The claimant did not have a problem toileting residents or Day Club members.
36. The claimant’s employment was not in jeopardy.
37. Work was available for the claimant at the time of separation.

Ruling of the Board

In accordance with our statutory obligation, we review the decision 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 is free from error of law. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant did not have good cause for resigning her position. We conclude that the change of job duties and title from Activities Director/Day Club Coordinator to Day Club Aide created good cause to resign and does not subject the claimant to disqualification under G.L. c. 151A, § 25(e)(1).

The parties did not dispute the fact that on November 6, 2015, the claimant submitted her resignation, which was to be effective November 20, 2015. The claimant resigned her position because she considered the Day Club Aide position to be unsuitable, she was not hired for that job, and she did not think that she would be able to earn as much money at that job as she could have with the Day Club Coordinator position. *See Findings of Fact ## 31 and 32.* 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 . . . [T]he 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 she is eligible to receive unemployment benefits. The review examiner concluded that the claimant had not carried her burden and denied benefits, mainly on the basis that the claimant did not make adequate efforts to preserve her job. He did not consider whether or not the claimant had a reasonable workplace complaint. We conclude the claimant had both a reasonable complaint and that efforts at preserving her job would have been futile. Consequently, contrary to the review examiner, we allow benefits.

To determine if the claimant had a reasonable complaint, or good cause, to leave her job, we must examine whether the employer did something to cause the claimant's separation. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). Although the claimant underwent several changes to her position over the course of her approximately four-month employment, for our purposes, we are concerned with comparing the positions the claimant held at the start and at the end of her employment. This is because the position she held at the start was the position the claimant was hired to do and the position which she wanted, and the position she held at the end of her employment is the position which the claimant asserts was not suitable or was too different from what she was hired to do to remain employed. As we analyze the claimant's employment situation, we must keep in mind that Chapter 151A is to be construed liberally in aid of the unemployed worker. G.L. c. 151A, § 74.

We are also mindful that the DUA itself has certain policies in place regarding changes to job duties and positions. For example, Section 1215(A) of the DUA's Service Representatives' Handbook, with which we agree, is titled "Change in Duties-Permanent Transfer." It provides the following:

After an unsuccessful attempt to have the matter resolved, a claimant leaves his or her job because he or she is permanently transferred to new duties which:

- are outside the scope of his or her general work classification; or
- will not permit continued use of his or her highest skill.

Separation from employment under these circumstances is with good cause attributable to the employing unit, because the change in job duties makes the work unsuitable.

Indeed, in initially approving benefits for the claimant, the DUA cited this language from the Handbook.¹

¹ The DUA approved the claim, noting the following: "The claimant left work because of a permanent transfer to another type of work which would not permit continued use of the claimant's highest skill." Exhibit # 5.

We agree with the claimant that the aide position she ultimately held in November of 2015 was different from the Activities Director/Day Club Coordinator position she was hired to do. The review examiner found that the claimant was hired to create and schedule activities and exercise programs, as well as complete paperwork regarding resident charts and Department of Public Health filings. *See* Finding of Fact # 6. These job duties require a high level of responsibility, direction of other employees, supervision, and organization. On the other hand, as an aide, the claimant was responsible for doing activities and games with Day Club members and assisting them with bathroom needs. *See* Finding of Fact # 28. Although the Activities Director/Day Club Coordinator position occasionally included helping residents with bathroom needs, that assistance was clearly not the focus of the job the claimant was hired to do.

During the hearing, the employer was heard to argue that the aide position was suitable, because the claimant was able to do all of the aide job duties. While it may be true that the claimant was capable of helping a resident use the bathroom, or that the claimant was capable of playing a game with the resident, the focus of her job as an Activities Director/Day Club Director was clearly different. In the end, the claimant did not take the job in order to be an aide, even if she could do that kind of work. She signed up to be a director or coordinator. Under the above-cited DUA policy, this created good cause for the claimant to quit her job.

Having concluded that the claimant did have a reasonable complaint, we now move to the point raised by the review examiner in his decision. He concluded that the claimant failed to make adequate efforts to preserve her job. He reasoned as follows:

In this case, the claimant testified she did not speak with the owner about the aide position prior to resigning because she “knew the duties of an aide”. The claimant was not told her pay rate as an aide was going to be less than the Day Club Coordinator rate and though she believed she would no longer be able to sign-up Day Club members in an effort to become eligible for a higher pay rate, the claimant did not speak with the owner prior to submitting her resignation about the specific duties she would be performing, pay rate, loss of a potential rate increase for new sign-ups or if the change in duties was permanent. The owner had previously separated the Activities Director/Day Club Coordinator position to create a separate position (Day Club Coordinator) specifically for the claimant who was overwhelmed by the Activities Director/Day Club Coordinator position. The claimant did not give the employer, who had worked with her before by creating the separate Day Club Coordinator position, an opportunity to address her concerns about the aide position. Without speaking with the owner and learning the specifics of the position prior to submitting her resignation it cannot be concluded the claimant made a reasonable attempt to preserve her employment.

It is well established that, in order for a claimant who has quit her job to show that she is eligible for benefits, she must have made a reasonable attempt to correct the problem that is causing her to resign. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93 (1984). We require that a claimant attempt to preserve her job, unless it would have been futile to do so. *See* Kowalski v. Dir. of Division of Employment Security, 391 Mass. 1005, 1006 (1984).

In this case, the review examiner concluded that the claimant had not made an adequate attempt at preserving her job, essentially because, prior to submitting her resignation, she did not talk with the employer about the details of her job as an aide. For example, he noted that she did not ask the employer about her pay rate, duties, or opportunity to make money in addition to her hourly rate. As noted above, we conclude that the claimant had good cause to quit based on her job duties, not necessarily on her pay rate, so the fact that she did not ask about the pay rate does not ultimately mean that she did not make adequate efforts to preserve her job.² As to the job duties, the claimant was the activities director of the day club for a period of time, and she had worked for the employer for several months. So, she would have been familiar with the role of an aide. It was not unreasonable for the claimant to refrain from questioning the employer about her job duties, where she was aware of the nature of those duties from observing them.

Moreover, the employer's repeated expressions of dissatisfaction with the claimant's job performance suggested that the claimant was being given the most basic of job functions and that the employer did not think her qualified to do other work.³ See Exhibits ## 12–14. An attempt at negotiating a better position would have been futile given the claimant's prior work history with the employer. In addition, the fundamental job duties of a position are dictated by an employer and, absent unusual circumstances, most likely not subject to change. The Appeals Court has noted the following:

The requirements of a job are, of course, "attributable to the employer." We emphasize that although an employee who leaves a job due to its unsuitability has "good cause attributable to the employer," this phrase carries with it no implication that the employer has done anything wrongful. It may simply be that the job it seeks to fill is not suitable for the particular individual. In this case, . . . [the claimant] was not required to seek to eliminate the aspects of the job he concluded that he could not do. Any such attempt would have been futile: [the claimant]'s apparent concern was with essential elements of the job

Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009, *2 n.2 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*. Although the claimant in Baker asserted that he could not do certain aspects of the job, and the claimant in this case has argued that the aide position is not suitable because it was not what she was hired to do, the underlying rationale in that case applies to the claimant's situation in this case.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant did not resign her position with good cause attributable to the employer is not supported by substantial and credible evidence or free from error of law, because the employer's decision to change the claimant's job from Activities Director/Day Club Coordinator to Day Club Aide

² We note, however, that the employer's witnesses testified that, as an aide, the claimant would not have the opportunity to get pay increases, as had been the case as the Day Club Coordinator. In addition, there was testimony that her pay rate would not have changed.

³ The review examiner's findings of fact gloss over the specific details of the employer's evaluation of the claimant's performance. However, from the employer's point of view, the job changes were justified and needed, given the claimant's inability to keep up with the work assigned to her. The employer's testimony was reasonably clear that it wanted to keep her employed but not in the position that she was hired to do.

constituted a major change to her job title and duties, which rendered the job unsuitable for the claimant, and attempts at trying to change the duties of an aide would have been futile.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week period beginning November 22, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – July 14, 2016



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