

**Claimant, who was promised full-time hours but provided 30% fewer, had good cause attributable to the employer to leave. Where he told his foreman that he would resign if not given the full-time hours, and the foreman could not tell him when that would be, the claimant satisfied the requirement that he make an effort to preserve his employment before quitting.**

**Board of Review  
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**Issue ID: 0019 0761 26**

## **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 resigned from his position with the employer on April 6, 2016, and continued collecting benefits on an existing his claim. However, in a determination, dated August 11, 2017, the DUA disqualified the claimant from receiving further benefits, beginning April 10, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's determination and denied benefits in a decision rendered on December 1, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer, and, thus, he 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 remanded the case to the review examiner to obtain further evidence to clarify the reason the claimant stopped working for the employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original conclusion that the claimant's failure to wait until work picked up rendered him ineligible for benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the findings after remand show that the employer hired the claimant to work full-time, but only provided part-time hours.

### **Findings of Fact**

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

1. On January 19, 2016, the claimant opened a claim for unemployment benefits with an effective date of January 17, 2016.
2. The claimant worked as a laborer for the employer, a construction company, from March 28, 2016 to April 6, 2016. The claimant was paid \$25.00 per hour.
3. At the time of hire, the owner (owner) hired the claimant to work full time. The owner did not inform the claimant that work was slow.
4. The employer's foreman on site (foreman) supervised the claimant.
5. During the week beginning March 27, 2016, the claimant worked 28 hours and earned \$700.
6. During the week beginning April 3, 2016, the claimant worked 14.25 hours and earned \$356.25.
7. On or about March 30, 2016, the claimant spoke to the foreman about the lack of hours. During the conversation, the claimant told the foreman that he would be leaving if work did not increase to full time. In response, the foreman told the claimant it would pick up. The foreman did not know when work would increase to full-time hours, he was waiting for the owner to inform him.
8. On April 4, 2016, the claimant's coworker who drove him to work was transferred to another job site.
9. On April 5, 2016, the claimant called the office administrator (administrator) and informed her that he had car trouble and was unable to get to work.
10. On April 6, 2016, at lunchtime, the claimant informed the foreman that he was leaving to pursue 40-hour employment.
11. On April 8, 2016, the owner called the claimant and asked him to return to work. The claimant told the owner he had already obtained full time work with another employer.
12. The claimant had not, in fact, obtained another job.
13. On April 8, 2016, the employer's payroll employee sent the claimant a letter informing him that the employer has attempted to reach the claimant many times and received many excuses as to why the claimant was not available.

The letter states that there was plenty of work for the claimant and that his unemployment benefits should be terminated.

14. The claimant did not receive the letter.

15. On May 26, 2017, the claimant provided a verbal statement to the DUA that he quit due to a lack of transportation because his co-worker who was driving him had been transferred to another job location and he had no way of getting to work. The claimant further stated that he called the employer and spoke to a woman in the office and told her he was quitting because he had no way of getting to work.

16. On August 22, 2017, the claimant provided a verbal statement to the DUA that he did not remember the name or telephone number of the person he spoke to in the employer's office, nor did he remember the date he had called.

#### CREDIBILITY ASSESSMENT:

On May 26, 2017, the claimant provided a verbal statement to the DUA reporting his last day of employment as April 8, 2016. In the initial hearing, the claimant continuously testified that he worked for the employer for 3 weeks. The claimant also testified that he thought it was in 2015 and he could not recall the dates of his employment. In the continued hearing, the claimant testified he could not give exact dates because he could not recall. In April 2016, the employer reported to the DUA in an agency questionnaire that the claimant worked 14.25 hours during the week ending April 9, 2016 and his last day was April 8, 2016. The employer submitted a letter dated April 8, 2016, indicating the claimant had separated a few days earlier. In 2018, the employer provided a report with the claimant's hours worked and wages earned which accurately reflected the hours reported in the employer's April 2016 questionnaire. The employer's consistency with the hours worked for the week ending April 9, 2016 is more credible than the claimant's vague testimony. The employer's letter stating the claimant had not worked past April 8, 2016 is consistent and credible when considering both the questionnaire and the report of the claimant's 14.25 hours worked during the week ending April 9, 2016. Therefore, I conclude that the claimant's last physical day was April 6, 2016.

In the initial and the continued hearing, the claimant testified that he left due to a lack of hours and that he had obtained full-time work with another employer. On May 26, 2017, the claimant provided a verbal statement to the DUA that his reason for quitting was his co-worker who was driving him to work had been transferred to another job location and he had no way of getting to work. In the original and the continued hearing, the claimant admitted to taking work off for transportation issues but testified that transportation was not his reason for separation. On August 22, 2017, the claimant provided a verbal statement to the DUA confirming that he spoke to a woman in the employer's office telling her that he had no way of getting to work. At various times, the claimant had three

different reasons for leaving: lack of work, lack of transportation and new employment. Because the claimant gave three inconsistent reasons for leaving, the employer's statement regarding "many excuses" in the April 8, 2016 letter is deemed accurate.

In the original hearing, the claimant testified he received a phone call from the owner about a week prior to his separation asking if he would be returning to work. The claimant told the owner he would not return to work because he had already obtained full time employment somewhere else. In the continued hearing, the claimant denied receiving a phone call from the owner. Because the claimant testified that he received new employment prior to his separation, and the employer reported the claimant told him he had a new job, I conclude the claimant received the call from the owner and told him that he was leaving for new employment.

In the original hearing, the claimant testified that he left his job for new employment. The claimant testified that he worked full time for the new employer for a few months after he separated. The claimant did not report any earnings during that period. When asked if the claimant was claiming benefits while working full time the claimant had no explanation. In the continued hearing, the claimant testified that he left his job for full time employment and only worked one day for the new employer. The claimant could not recall when he began working for the employer or for how long. The claimant does not have any wages from any other employer in the 2<sup>nd</sup> quarter of 2016. Therefore, it is concluded that the claimant did not quit this job to accept new employment.

### 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 original 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is disqualified from receiving benefits based upon his separation from this employer.

Because the claimant quit his job with the employer, we analyze his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1), which 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 . . . .

The express provisions of this section of law place the burden upon the claimant to prove that his reasons for leaving amounted to good cause attributable to the employer.

In her credibility assessment, the review examiner suggests that, at various times, the claimant gave various reasons for quitting this job. Considering the fact that this employment lasted only two weeks and more than a year had passed before the DUA interviewed him or he testified at a hearing, it is not surprising that he had difficulty remembering. For our purposes, it makes no difference whether the claimant reported to the employer that he had found another job or that he was also having transportation issues. The findings show that the employer hired the claimant to work full-time hours but gave him only part-time work. *See Consolidated Findings ## 3, 5, and 6.* At the claimant's pay rate of \$25.00 per hour, he would have grossed \$1,000.00 per week had he worked 40 hours per week. *See Consolidated Finding # 2.* When the employer gave him only 28 hours during his first week, he was paid \$700.00 instead of \$1,000.00. *See Consolidated Finding # 5 and Remand Exhibit # 5.* This is 30% less than he was promised.

Leaving employment due to an employer detrimentally changing the conditions of employment such that the job becomes unsuitable is, under the case law, incorporated in the determination of good cause under G.L. c. 151A, § 25(e)(1). 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, citing Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n. 3 (1981). "A substantial decline in wages may render a job unsuitable." McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470, *quoting Graves*, 384 Mass. at 768. The Supreme Judicial Court has found that an offer of part-time work to full-time workers, which involved a reduction of 30% in hours and weekly wages and increased transportation time, was not suitable. President and Fellows of Harvard College v. Dir. of Division of Employment Security, 376 Mass. 551, 556 (1978); *see also North Shore AIDS v. Rushton*, No. 04-P-503, 2005 WL 3303901 (Mass. App. Ct. Dec. 6, 2005), *summary decision pursuant to rule 1:28*, ("[R]elative to the modest \$35,000 salary...an indeterminate reduction of 16 percent was a substantial change in the terms and conditions of employment...."). Here, the employer provided the claimant with 30% fewer hours and wages than was originally promised. This was good cause attributable to the employer to resign.

Nonetheless, the review examiner disqualified the claimant because she felt that he did not give the job a chance, and that he left without giving it a reasonable amount of time for the hours to pick up. We disagree. As a general rule, a claimant must make an effort to preserve his employment before quitting, even if he otherwise has a good reason to leave. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). In the present case, the claimant raised his concern about not getting full-time hours to his foreman, but the foreman could not tell him when he could expect to get those hours. *See Consolidated Finding # 7.* Under these circumstances, where the claimant accepted a full-time job that turned out to be substantially fewer hours than promised, he raised the issue with the employer but received nothing more than an indefinite assurance that he would soon be earning full-time wages, the claimant has made adequate efforts to preserve his employment.

We, therefore, conclude as a matter of law that the claimant quit his job for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 10, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 24, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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](http://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.

AB/rh