

0025 1670 85 (Nov. 16, 2018) – Claimant submitted his resignation with a verbal job offer in hand that was specific as to his position, shift, location, and salary, but which was contingent upon passing a drug screen and background check. Where the new employer rescinded the offer based upon a break in past employment that the claimant had already revealed during the interview, the claimant could not reasonably have anticipated that he would not be hired. Held he left in good faith to accept new permanent, full-time employment and became separated for good cause attributable to the new employing unit pursuant to G.L. c. 151A, § 25(e).

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Issue ID: 0025 1670 85

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 March 30, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 4, 2018. 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 initial determination and denied benefits in a decision rendered on June 22, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's separation from employment was not in good faith to accept new employment on a permanent full-time basis, 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 additional evidence about the job offer from the new prospective 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 decision, which concluded that the claimant failed to show that when he quit his job with the employer, he had an offer of new employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer full-time on a temporary assignment from 1/25/18 until his separation on 3/30/18.
2. The claimant worked as a Field Service Technician, full time earning \$30 an hour.
3. The claimant left his temporary assignment position to take a permanent full-time position with a new employer.
4. On 3/26/18, the claimant was verbally notified by a recruiter that he was offered a full-time permanent position with a new employer. There is no written offer. A written offer was not presented at the remand hearing.
5. The claimant was verbally told by the Recruiter that his salary would be \$82,000 and that he would work the first shift as a Machine Shop Supervisor at [Employer B] in [Town A], Massachusetts.
6. The claimant accepted the job offer but was not provided a start date. There was no specific reason why the claimant was not provided with a firm start date with the new employer. The claimant was informed by the Recruiter that the offer of employment was contingent upon the claimant passing a drug screen and background check and that he would start in approximately 2 weeks after the background check and drug screening was complete.
7. The claimant did understand that he could only begin working for the new employer after both the background check and the drug screen were done and the new employer had the results from both. The claimant did understand that he may not begin the new position if he did not pass the background check and the drug screen.
8. The claimant was never told at any time that he could begin his new position and be kept on a probationary period pending the background check and drug screen.
9. On 3/26/18, the claimant contacted the instant employer and informed them that he was giving a one week notice of his resignation. The claimant subsequently contacted the instant employer again to change his notice period to two weeks but the instant employer told the claimant that would not be necessary.
10. The claimant last worked for the employer on 3/30/18.

11. The claimant never began work for the subsequent employer after they raised an issue with information on his resume at his interview. The claimant had failed to indicate he had been laid off and rehired for a past employer but had instead listed dates of continuous work on his resume and disclosed this to the new employer at the interview. The background check company that was used by the new employer contacted the claimant's employer on his resume to inquire into the discrepancy.
12. As of 6/18/18, the claimant became employed full time with another employer.

Credibility Assessment:

During the remand hearing, the claimant contended he was given a written offer, however, his contention is not credible since he failed to produce the written offer he was requested to provide at the hearing.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

When a claimant voluntarily leaves his employment, we consider his eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1), which provides, in relevant 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

We agree that nothing in the record indicates that the employer did or said anything to cause the claimant to leave his job. Therefore, there is no basis to conclude that the claimant left his employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1). The claimant has asserted that the reason he left his job with the employer was in order to accept a new job. For this reason, we consider the third paragraph under G.L. c. 151A, § 25(e), which states, in relevant part, as follows:

No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became

separated from such new employment for good cause attributable to the new employing unit.

By its express terms, this section of law places the burden of proof upon the claimant to show that he left his employment in good faith to accept new employment.

In interpreting the meaning of this statutory provision, we are mindful that the purpose of the unemployment statute is to encourage full-time employment and to provide temporary relief to people who lose their jobs “through no fault of their own.” Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted). Thus, the DUA does not pay benefits to claimants who quit their employment simply because they want to look for a different job. *See* DUA Service Representative Handbook, § 1218(A). However, for individuals who leave their existing employment in good faith to accept new, permanent, full-time work, but then lose the new job for good cause attributable to the new employing unit, the Legislature provided a safety net. In harmony with paying benefits only to those who did not cause their unemployment, the worker must have both acted in good faith and lost the new job through no fault of his own.

The first question is whether, at the time the claimant gave notice to the employer, he had a *bona fide* offer of new permanent, full-time employment, as opposed to the mere prospect of new employment. After remand, the review examiner found that the claimant was not given a written offer of employment from the new company.¹ Consolidated Finding # 4. However, it is not critical to the claimant’s burden of proof that he produce a written offer. *See* Board of Review Decision 0013 2341 38 (Oct. 16, 2014) (“we are aware of no authority that requires an offer of new employment to be in writing or in contractual format for it to be a legitimate, *bona fide* offer.”).² To meet the burden of proof, we have required claimants to show that the new employer conveyed enough detailed information about the new employment such as to create a *good faith* belief that it intended to hire the claimant for a specific job.

For example, in Board of Review Decision 0021 9411 85 (Dec. 19, 2017), the Board found that before she resigned, a *bona fide* job offer had been made to the claimant, as she had been told the individual partners that she would be working for, the number of hours she would work, and the salary that she would be paid. *Compare* Board of Review Decision 0017 5638 85 (July 28, 2018) (claimant quit before his job interview).³ In the present case, the findings show that before he submitted his resignation to the employer, the new company’s recruiter told the claimant that he would be working in a specific position on the day shift, at a specific location, and for a specific salary. In many ways, the claimant’s job offer was as specific as the claimant’s in Board of Review Decision 0021 9411 85. However, here, the recruiter also stated that the claimant could not begin working until completing a background check and drug screen. *See* Consolidated Finding # 6.

¹ The claimant testified unequivocally that he received a written offer via email. However, because he could not locate and produce the email at the remand hearing, the review examiner discredited that testimony.

² Board of Review Decision 0013 2341 38 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

³ Board of Review Decisions 0021 9411 85 and 0017 5638 85 are also unpublished decisions.

Thus, we must consider whether a specific job offer of employment that attaches a contingency is a *bona fide* offer of new employment under G.L. c. 151A, § 25(e). We believe that if there was something that the claimant had done, or failed to do, such that the claimant could anticipate a problem in meeting the contingency, then that individual could not have been acting under a good faith belief that he or she would be hired by the new employer. For example, if the new job required a college diploma and the claimant never actually finished college, or the job required a current professional license and the claimant had allowed such license to lapse, the claimant could not reasonably expect to be hired. Or, if the new job was contingent upon passing a drug screen and the claimant had recently used drugs, then, again, he or she could not reasonably expect to be hired.

In the present appeal, the consolidated findings do not suggest that the new employer had any issues with the claimant's drug screening. Apparently, it had concerns over the background check. If the record showed that, at the time he resigned from the employer, the claimant knew of something in his background that would cause a potential employer to consider not hiring him, then we think he could not have had a good faith belief of being hired into the new job. On the other hand, if the potential employer took issue with something in the claimant's past that he could not reasonably have anticipated would affect an employment decision, then we think that, given all of the other specific aspects of the job offer, the claimant could, in good faith, have believed that he was going to start the new job.

Consolidated Finding # 11 reveals why the new employer rescinded its job offer. The claimant's resume indicated that he had worked continuously for a prior employer, when, in fact, he had actually been laid off and rehired by the same company during that period of time. However, the claimant had already disclosed this fact to the new employer during the interview. *See* Consolidated Finding # 11. Since the new employer already knew about the break in employment before it extended its verbal offer, the claimant could not reasonably have anticipated that it would become a factor in withholding the new job.

Finally, because the claimant's unemployment was due to the new employer not following through with the job offer, the claimant has also shown that he lost that job through no fault of his own.

We, therefore, conclude as a matter of law that the claimant has satisfied his burden to show that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning April 1, 2018, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 16, 2018



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh