

Claimant submitted her resignation with a written job offer from a new company in hand that was specific as to her position, to whom she would report, her salary, and her start date, but which was contingent upon passing a drug screen and background check. The new employer rescinded the offer with only a vague reference to not passing the background check. Because the claimant could not reasonably have anticipated that she would not be hired, Board held that she 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).

Board of Review
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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 her position with the employer on May 16, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 13, 2018. 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 September 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 had not been in good faith to accept new employment on a permanent full-time basis, and, thus, she was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant failed to show that she had an offer of new employment because her offer was contingent upon passing a drug screen and various background checks, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On June 20, 2012, the claimant started working for the employer, a health care provider, as a fulltime Licensed Practical Nurse.
2. The claimant was scheduled to work Monday through Friday from 8:30 a.m. until 4:30 p.m.
3. The claimant was paid \$31.88 per hour.
4. On April 20, 2018, the claimant was offered a [sic] with another company by e-mail for a nursing position. The job [offer] listed that it was a contingent offer. The claimant was provided with a start date of May 22, 2018.
5. On May 9, 2017, the claimant resigned from her job with the instant employer. The claimant offered to work until May 16, 2018.
6. The claimant's last date of work with the employer was on May 16, 2018.
7. On May 17, 2018, the other company updated the offer letter issued to the claimant (Exhibit 4). In this letter, the company wrote in part:

“We are pleased to offer you the position of Licensed Practical Nurse with [company's name omitted]. In this position you will report to [name omitted]. She will review your job responsibilities and answer any questions you may have regarding your new position. This offer is contingent upon the results of the drug screen, a criminal background check, professional references check, copy of high school diploma or highest level of education and when necessary, driver's license check (Exhibit 4).”
8. In the May 17, 2018 letter, the other company also listed the claimant's annual salary to be \$70, 000 (Exhibit 4).
9. On May 21, 2018, the company wrote the claimant the following letter:

“As you know, we made a conditional offer of employment to you in a letter dated May 1, 2018 (the “Conditional Offer”). The Conditional Offer provided in paragraph 1 stated that your employment was “contingent” upon satisfactory completion of a drug screen, criminal background check, professional references check...” The Company has conducted an independent investigation into your background, including reference checks and other inquiries. We are writing to inform you that as a result of our investigation, we are not going to make you a final offer of employment and are revoking the Conditional Offer (Exhibit 5).”
10. The claimant left her job with the employer because she was presented with a conditional offer of employment from another company.

11. The claimant subsequently did not start working for the other company as the other company revoked the conditional offer.

12. On May 24, 2018, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 1).

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. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 4 is misleading to the extent that it suggests that the claimant received her new employment offer on April 20, 2018. This date conflicts with Findings of Fact ## 7 and 9, which provide that the claimant had originally received a letter, dated May 1, 2018, offering her a new position. In adopting the remaining findings, we deem 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 ineligible for benefits.

When a claimant voluntarily leaves her employment, we consider her 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 her job. Therefore, there is no basis to conclude that the claimant left her employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1). Rather, the claimant has asserted that the reason she left 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 she left her 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 her own.

The first question is whether, at the time the claimant gave notice to the employer, she had a *bona fide* offer of new permanent, full-time employment, as opposed to the mere prospect of new employment. 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.

Here, the findings are somewhat confusing as to what the claimant had received in terms of a job offer before submitting her resignation on May 9, 2017. Read as a whole, however, the findings indicate that the claimant had been given an offer letter on May 1, 2018. *See* Findings of Fact ## 7 and 9.¹ The findings further show that the offer was for a specific position, it identified the name of the person the claimant would report to, it provided a specific salary, and it gave her a specific start date. *See* Findings of Fact ## 4, 7, and 8. This type of detailed information is consistent with job offers made to claimants in other appeals before the Board, where we concluded that such particulars about the new position could reasonably create a good faith belief that the new employer intended to hire them. *See* Board of Review Decision 0021 9411 85 (Dec. 19, 2017) (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).² However, unlike these other cases, the claimant's job offer stated it was "contingent upon the results of the drug screen, a criminal background check, professional references check, copy of high school diploma or highest level of education and when necessary, driver's license check." *See* Finding of Fact # 4.

We recently had another opportunity to 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). *See* Board of Review Decision 0025 1670 85 (November 16, 2018).³ There, we stated that, if there was something that a 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 had not finished college, or the job required a

¹ During the hearing, although the claimant could not locate the first letter, she was adamant that the May 17th letter was identical in all respects to the May 1st letter, except that it corrected her position to licensed practical nurse in place of registered nurse. She further insisted that she did not resign until after receiving it. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

² Board of Review Decisions 0021 9411 85 and 0017 5638 85 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

³ Board of Review Decision 0025 1670 85 is also an unpublished decision.

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 case, the record indicates that the employer may have revoked the job offer due to an issue with the claimant's references. *See* Exhibit 3.⁴ The claimant attempted to contact the employer to learn more about why she was not hired, but had little success. There is nothing in the record to suggest that the claimant was aware of any reason that she would not satisfy the company's contingencies. Under these circumstances, it would be wholly unfair to deny unemployment benefits to the claimant, who otherwise acted in good faith.

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 she lost that job through no fault of her own.

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

⁴ On the claimant's DUA fact-finding questionnaire, Exhibit 3, completed shortly after her separation, she stated that she called the company for an explanation about the revoked offer and "they stated it was a reference issue and they did not have any further information to give me. I made 3 calls after that email and received no calls back." This statement in Exhibit 3 is also part of the unchallenged evidence in the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 13, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2018



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Chairman



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Member



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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

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