

When the claimant's job changed from working as a software engineer to field service work performing precision machine calibrations, he could not perform to expectations. Held the new position was objectively unsuitable, giving the claimant good cause attributable to the employer to resign.

**Board of Review
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Issue ID: 0027 1874 68

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 September 6, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 1, 2019. 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 March 23, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. 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 resigned due to general job dissatisfaction, is supported by substantial and credible evidence and is free from error of law, where the findings show that the claimant quit because the employer changed his job and it was no longer suitable.

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 material testing company, from January 2017 through September 6, 2018.
2. At the time of hire, the claimant was brought on as a software engineer.
3. In or about March 2018, the claimant's role changed and he was spending half of his time doing software engineering work, and half of his time doing field service performing technical support involving validation and calibration work at client sites.
4. In May 2018, the claimant's role shifted to be wholly field service work and he was moved under a different manager ("[A]").
5. The employer is a small company of roughly 20 people and roles change frequently.
6. The claimant struggled under [A] because [A] had higher expectations than the claimant's previous manager. For example, he expected the claimant to be able to complete a validation in less than 3 hours, where his previous manager allowed him 2 days to complete a validation.
7. [A] demonstrated to the claimant how he could complete the validations in less [sic] 3 hours, as [A] was able to do. The claimant was argumentative with [A] and did not want to do the validations the way [A] demonstrated. The claimant was insistent that he needed to do things in a certain order and believed that [A] was "skipping steps". Consequently, he did not do validations the way [A] instructed him and his performance suffered.
8. The claimant did not like the field service job because it was more precise and detail-oriented than his software engineering position, and involved travel. He also preferred the more "creative" nature of the software position.
9. The claimant further felt that his responsibilities had grown and he should be paid more. He requested more pay and was told his request would be considered.
10. On August 17, 2018, the claimant was placed on an Employee Improvement Plan ("EIP"). The EIP addressed the claimant's attitude stating that he is "argumentative and negative" when assigned tasks. The EIP also addressed the claimant's efficiency and productivity, stating that the claimant did not complete tasks in the allotted time, often taking more than 2 or 3 times the amount of time allotted for a task. The claimant would also argue with his manager about the allotted time for tasks. The company's expectation of the amount of time a task should take to perform was based on the actual past and current experience of other employees. The EIP also addressed the quality of the claimant's work, stating that the claimant makes mistakes that then require

the company to send a different employee out to fix them “at great expense to the company”.

11. [A] and the claimant met on August 22, 2018 to review the EIP and the company’s expectations of the claimant going forward and scheduled a follow-up meeting for August 30, 2018 to review the claimant’s progress.
12. The EIP stated that failure to meet and sustain improved performance could amount in [sic] disciplinary action including termination. The EIP did not have a deadline by which the claimant would have to show that improvement.
13. The claimant told his supervisor during the August 22, 2018 meeting that he would work on improving his attitude and performance.
14. The employer had invested over a year and a half of training and guidance into the claimant and was dedicated to helping him improve.
15. On August 23, 2018, the claimant emailed his supervisor and gave his two week notice of intent to resign as of September 7, 2018, stating that “(A)fter reflecting on the company’s last warning, I feel I am not suitable for this role.”
16. The claimant’s last day of work for the employer was September 6, 2018.
17. The claimant filed a claim for unemployment benefits effective September 23, 2018.

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 original 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 is ineligible for benefits.

Because the claimant resigned from his job, his eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e), 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

These sections of law expressly place the burden of proof upon the claimant.

We agree that nothing in the record indicates that the claimant's reason for leaving was due to urgent, compelling, and necessitous circumstances. The reason he gave the employer for resigning was that he felt he was not suitable for the job. *See* Finding of Fact # 15. However, the review examiner decided that the timing of his resignation, following receipt of the Employee Improvement Plan (EIP), indicated that he actually quit due to general dissatisfaction with his employment. *See Sohler v. Dir. of Division of Employment Security*, 377 Mass. 785, 789 (1979) (general and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1)). We disagree.

On appeal, it is the Board's responsibility to consider the facts and apply the appropriate law. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463-464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). The findings show that the claimant was indeed dissatisfied with his job. He was hired to perform software engineering, but the following year, the employer changed the nature of his job to performing only field service work. *See* Findings of Fact ## 1-2 and 4. "Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.'" *Baker v. Dir. of Division of Unemployment Assistance*, No. 12-P-1141, 2013 WL 33290009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28* (mechanic with no managerial experience realized he was not suited to perform the managerial aspects of his new job), *citing Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n. 3 (1981).

We must decide whether the claimant's new job duties were objectively unsuitable. The record shows that the claimant's job changed from sitting every day at a computer coding software to traveling to customer sites with a 50 lb. toolbox and performing precision machine calibrations. *See* Findings of Fact ## 3, 8 and Exhibits 6 and 12.¹ On appeal, the claimant asserts that his background and training were in software engineering, not field service work. But, whether or not the new field work required different qualifications than the claimant had, both parties were in agreement that the claimant did not perform this field work satisfactorily. He did not understand the customers' problems and asked them irrelevant questions, he was taking two to three times longer to perform the assigned tasks than the employer expected, and he made a lot of mistakes. *See* Finding of Fact # 10 and Exhibit 12. From these facts, we can reasonably infer that the claimant was not suited to the field work assigned to him. Since the requirements of the job are "attributable to the employer," his decision to resign is for good cause attributable to the employer. *Baker*, 2013 WL 3329009 n. 2. As the Appeals Court noted, this does not mean that the employer did anything wrong; "[i]t may simply be that the job it seeks to fill is not suitable for [this] particular individual." *Id.*

The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action also has the burden to show that he made a reasonable attempt to correct

¹Exhibit 6 is a DUA fact-finding questionnaire wherein the claimant describes the two jobs and Exhibit 12 is the employer's EIP, which also describes some of the field service work that was expected of the claimant. While not explicitly incorporated into the review examiner's findings, these descriptions are part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984). In the present case, the findings show that the claimant tried doing this field service work for five months before resigning. Since his problems were with the essential elements of the job, we believe any further attempts would have been futile. See Baker, 2013 WL 3329009 n. 2.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he left his employment 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 September 2, 2018, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2019



Paul T. Fitzgerald, Esq.
Chairman



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/jv