

Assistant Director of Nursing's medical condition rendered her unsuitable for the position when she discovered that she could not work the required on-call hours.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant resigned from her position with the employer on April 5, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 26, 2019. The employer 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 awarded benefits in a decision rendered on September 19, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer, and, thus, she was not 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 employer's appeal, we remanded the case to the review examiner to obtain further evidence about the circumstances causing the claimant's separation and her efforts to preserve her employment. Both parties 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 had good cause attributable to the employer to resign due to her inability to meet the employer's expectation to work more than 10 days in a row without a day off, 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 assessment are set forth below in their entirety:

1. The claimant worked as an Assistant Director of Nursing and Staff Development Coordinator for the employer, a skilled nursing facility, from 9/10/18 until she separated from the employer on 4/5/19. She had last performed work on 4/5/19.
2. The claimant was hired to work full time, Monday through Friday from 8 a.m. to 5 p.m., earning an annual salary of \$110,000.00.
3. The claimant left work because the employer was requiring her to work on the floor as a nurse each weekend she was on call.
4. As management, the claimant was required to be on call one weekend a month. Since the start of her employment, the claimant would come in on the weekends she was on call to cover for a few hours until a replacement came in. The on-call employee would usually cover the duties of a nurse but it would depend on what position was open. Generally, the Supervisor on duty would fill the position. The employer would use temp agencies to hire nurses to cover the shifts.
5. Between September 10, 2018 and April 5, 2019, the employer did not change the duties of the on-call employee called in to work.
6. Between September 10, 2018 and April 5, 2019, the employer's use of the temporary nursing agency did change. There was no agency booked for that weekend of March 9th – 10th. It had been the policy of the employer to use the temporary nursing agencies up until that weekend. A temp agency had not been booked prior to Saturday, March 9, 2019. The claimant had been told by the employer that no agency would be called and that she would be required to go in and fill all the shifts. It was only after she could not fill all the positions that the Supervisor got permission from the Administrator to call a temp agency.
7. The claimant herself was initially told she would need to cover 4 of the shifts. After permission was given to call the temp agency, 2 of the shifts were covered and the claimant had to cover the other 2.
8. The claimant covered the 3 p.m. to 11 p.m. shift on March 9, 2019 and the 3 p.m. to 11 p.m. shift on March 10, 2019.
9. Between September 10, 2018 and April 5, 2019, the claimant was the employer's on-call employee one weekend each month. The claimant does not recall being called in to actually work during any of those weekends except March 9th to 10th. She may have worked 1 to 2 hours between September 10, 2019 and the weekend in question.
10. The claimant was scheduled to work and worked her regular shifts from Monday, 3/4/19 to Friday, 3/8/19. She was not scheduled to be on-call for the

weekend of March 2nd to 3rd. The Staff Development Coordinator was supposed to be on-call for weekend of March 2nd to 3rd. The employer did not have a Staff Development Coordinator at the time, so the claimant was supposed to be covering. The claimant notified the Director of Nursing that [sic] could not be on-call two weekends in a row and that her normal on-call weekend was March 9th to the 10th. The claimant did not cover as on-call employee during the weekend of 3/2/19 and 3/3/19. The claimant was on-call on Saturday 3/9/19 and Sunday 3/10/19. The claimant did not volunteer to take this weekend. It was her normally scheduled weekend as the Assistant Director of Nursing to be on-call.

11. The claimant called in on 3/9/19 to see if she was needed. She was told that she needed to cover both the 7 a.m. to 3 p.m. and 3 p.m. to 11 p.m. shifts and that she would need to cover the same shifts on Sunday.
12. The claimant went in to work on Saturday 3/9/19. One of the Staff members stayed to work the 7 a.m. to 3 p.m. shift so the claimant went home and returned to work the 3 p.m. to 11 p.m. shift.
13. The claimant found coverage for herself on the Sunday 7 a.m. to 3 p.m. shift. She was subsequently told by her Supervisor that she needed to work both shifts on Sunday 3/10/19 because it would put the nurse she had found to cover into overtime. The Supervisor got approval to call the temp agency to get a nurse to cover the 7 a.m. to 3 p.m. nurse on Sunday 3/10/19.
14. As of March 10, 2019, the employer provided a \$250 bonus or allowed the manager a day off for each shift they covered, if they were called in for weekend work while serving as the on-call contact.
15. The claimant came into work on Sunday 3/10/19 and worked the 3 p.m. to 11 p.m. shift. She needed to be back at work on Monday, 3/11/19, Tuesday 3/12/19 and Wednesday 3/13/19 for orientation. The claimant was responsible to hold an orientation every Monday through Wednesday.
16. On 3/11/19, the claimant sent an email to the Administrator, Director of Nursing and Human Resources recommending they get the shifts covered sooner rather than later. The claimant asked for a day off as compensation for working the weekend of March 9th to 10th and she was told by the Administrator in that response to the email that she couldn't have a day off until Thursday, 3/14/19.
17. The claimant worked 12 days straight. She was allowed to take day 13 and 14 off as compensation. The claimant wanted to take a day off sooner but was not allowed to do so. The employer could have rearranged the schedule to have someone else cover the claimant's orientation on March 11th, 12th or 13th. At 62 years old, the claimant physically could not sustain working that many days without a day off.

18. On 3/9/19, by both text message through a company app and by telephone, the claimant was told by the Administrator that the employer was no longer going to be using nurses from the temp agency and that going forward she needed to work her regular schedule and the on-call schedule during the weekend she was on-call since she makes a “shit ton of money”.
19. The claimant had saw [sic] her doctor on 3/20/19 for a sinus infection, facial paralysis, stress and shingles which lasted a couple of weeks. She was out two days from work as a result. On 4/1/19, the claimant had a relapse of her [Bell’s] palsy and facial shingles from being tired and stressed. She was required to stay in bed for 4 days as a result.
20. The claimant sought treatment from her Primary Care Doctor on both 3/20/19 and 4/1/19 for her medical condition.
21. The claimant had asked the Area Director of Clinical Services prior to resigning for a transfer to another facility but was told there [were] no fulltime positions available. She did not request a leave of absence since she would return to the same schedule.
22. The claimant sent the Administrator her resignation via email on 3/11/19 because she had never received a response from the Administrator or the Director of Nursing from her prior email she sent on trying to fix the schedule going forward, and received an email from Human Resources stated how dare the claimant bothered [sic] her on how bad the staffing was the weekend of March 9th and 10th were [sic]. She also sent it after she was denied time off after working 12 days straight with no time off.
23. The claimant did inform the Administrator, Human Resources and the Clinical Director on Monday, 3/11/19 why she was quitting. The employer responded to the claimant’s resignation by asking for a formal letter to send to Corporate.
24. The claimant never asked to reduce her duties or workload prior to resigning because her duties could not be reduced, and the position required someone full time.
25. On Monday 3/11/19, the claimant gave a 30-days notice. She worked until 4/5/19. The claimant gave a month notice as a professional courtesy to the employer. For the sake of her reputation, the claimant would not give anything less than a 4 week notice. At the time she gave notice, the claimant had not experienced the bells palsy or shingles.

Credibility Assessment:

The claimant’s testimony that she was told by the Administrator that the employer was no longer going to be using a temp agency for weekends is deemed more

credible than the employer since the employer witness, the Administrator, could not recall the conversation. In addition, the claimant provided clear and specific testimony regarding this conversation.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 3 does not accurately describe the claimant's on-call responsibilities, nor does it fully explain the claimant's reasons for resigning. We reject the portion of Consolidated Finding # 9, which, as written, suggests that the claimant had worked a total of only one to two on-call hours prior to March 9th and 10th, as it is inconsistent with Consolidated Finding # 4. Consolidated Finding # 16 omits the material fact that the claimant specifically asked for that Monday or Tuesday off as compensation for working the weekend. Finally, Consolidated Finding # 22 states that the claimant sent her March 11, 2019, resignation email after working 12 days straight. However, it was undisputed that at that point, the claimant was on her 10th straight day of work.¹ In adopting the remaining findings, we deem 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. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant resigned from her job, this case is properly analyzed under G.L. c. 151A, § 25(e), 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 . . . [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.

The express language of these statutory provisions places the burden of proof upon the claimant.

In her original decision, the review examiner concluded that the claimant resigned for good cause attributable to the employer. Ordinarily, when a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). In this case, the parties agreed that the claimant's position as Assistant Director of Nursing required that she be available to work on-call one weekend a month in addition to working her regular full-time hours during the week. *See Consolidated*

¹ 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).

Findings ## 2 and 4. In and of itself, there is nothing unreasonable about this expectation, as it enables the employer to maintain necessary staffing levels on the weekend. Moreover, the record shows that the claimant had no difficulty meeting the expectation during the first six months of her employment, as she had only had to come in for a few hours during each on-call weekend to stand in until a replacement arrived. *See Consolidated Finding # 4.*

However, during her on-call weekend of March 9 and 10, 2019, the claimant had been required to work two 3:00 p.m. to 11:00 p.m. shifts in a row. She subsequently resigned. *See Consolidated Findings ## 8, 12, 15, and 22.* We remanded the case to find out what happened over that weekend and why the claimant quit the next day.

The claimant formally resigned via email at 10:40 a.m. on March 11, 2019. *See Consolidated Finding # 22 and Exhibit 4.* After her shift ended on March 10, 2019, at around 12:30 a.m. on March 11, 2019, the claimant sent an email to the employer's Administrator, Director of Nursing, and a Human Resources representative asking for the next day off.² *See Consolidated Findings ## 16–17.* At that point, she had already worked nine days in a row, and was scheduled to work the following three conducting staff orientation. *See Consolidated Findings ## 10 and 15.* There was no dispute that the claimant was entitled to compensatory time off after working the full shifts over the weekend and that, in the normal course, it would be taken the next day. The review examiner also found that the employer could have arranged to have someone else cover one of the orientation days. *See Consolidated Finding # 17.* Nonetheless, the administrator responded that the claimant could not take a day off before Thursday, March 14, 2019. *See Consolidated Finding # 16.* This meant that the claimant would be working 12 days in a row.

As the claimant explained in her testimony, she was tired. She understood that the employer expected her to be able to work on-call weekend shifts in addition to her regular weekday hours. But, at age 62, she could not physically sustain working that many days without a day off. *Consolidated Finding # 17.* She also explained that working an excessive amount of time would cause a relapse of her Bell's palsy.³ In fact, this happened. By the following week, she was diagnosed with facial paralysis/Bell's palsy, as well as stress, fatigue, and a sinus infection. *See Consolidated Findings ## 19 and 20, and Remand Exhibit 5.*

The review examiner noted in *Consolidated Finding # 25* that the claimant submitted her resignation before experiencing any Bell's palsy or shingles symptoms. The health issues had not yet surfaced. As such, there is insufficient evidence to conclude that the claimant's medical condition constituted an urgent, compelling and necessitous reason for the claimant to resign. However, we believe that the claimant is eligible on other grounds.

The claimant met her burden to show that due to her medical condition, she was not suited for the job. "Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.'" *See Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n. 3 (1981)." *Baker v. Dir. of Division of Unemployment Assistance*, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013),

² The parties did not produce the email, but the employer did not dispute the claimant's testimony that it was sent at around 12:30 a.m. on March 11, 2019.

³ These portions of the claimant's testimony are also part of the unchallenged evidence in the record.

summary decision pursuant to rule 1:28. Among the factors to be considered under the statute's definition of "suitability" is the health of the employee. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986), *citing* G.L. c. 151A, § 25(c).

Here, the record shows that the claimant had no difficulty performing her job as long as she had to work only a few hours one weekend per month. But, once she experienced the reality of meeting the job's on-call requirement to work two full-weekend shifts on top of her regular work schedule, it is apparent that the responsibilities were too demanding. They were detrimental to her health.

In order to be eligible for benefits, a claimant must also prove that she made reasonable efforts to preserve her employment before leaving. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). The review examiner found that, prior to submitting her resignation on March 11th, the claimant reached out to the employer's Administrator, Director of Nursing, and Human Resources to address the problem of uncovered shifts on weekends and to get the next day off. Consolidated Finding # 16. When the Administrator responded that she would have to work another three days before getting a day off, the claimant asked to transfer to a different facility, but there were no full-time positions available. *See* Consolidated Findings ## 16 and 21. As the review examiner further found, she did not ask for fewer duties or a lighter workload because she understood that the duties and workload of the position could not be changed. *See* Consolidated Finding # 24. Moreover, given the employer's change in policy not to use temporary nursing agencies to fill staff shortages going forward, it was reasonable to expect that, thereafter, the claimant would have to work full shifts whenever she was on-call. *See* Consolidated Finding # 18. In light of this evidence, we are satisfied that the claimant made reasonable efforts to preserve her employment and that further attempts would have been futile.

We, therefore, conclude as a matter of law that the claimant had good cause attributable to the employer to resign within the meaning of G.L. c. 151A, § 25(e)(1), because the claimant's health condition rendered her unsuitable for the position.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning April 7, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 13, 2020



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