

Following the filing of a valid unemployment claim, the claimant was not disqualified from receiving unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1), after quitting a benefit year job, because the new job was unsuitable based on the pay, job duties, and effects on the claimant's health and wellness.

**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**

Issue ID: 0031 2290 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 her position with the employer on May 4, 2019. She then re-opened a previously filed unemployment claim. On July 17, 2019, the DUA issued a Notice of Approval to the employer, stating that the claimant was eligible to receive benefits pursuant to G.L. c. 151A, § 25(e)(1). The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 23, 2019.

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, 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence regarding her separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 to deny 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 claimant quit her benefit year job with the employer after she determined that the job was too physically demanding for her.

Findings of Fact

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

1. The claimant filed a new claim for unemployment benefits in Massachusetts on 02/18/19 effective 02/17/19.
2. On 04/10/19, the claimant was hired and on 04/14/19, she began part-time employment with this employer's package delivery company in Texas, working a variable schedule of 24–30 hours per week as a \$15.00 per hour non-union Delivery Associate.
3. The claimant was paid bi-weekly and only received two paychecks from this employer.
4. On 05/03/19, the claimant was paid for the period beginning 04/14/19 through period ending 04/27/19. The claimant worked 54 hours and earned gross wages of \$810.00.
5. From the 05/03/19 payment in addition to statutory tax deductions, the employer also deducted \$400.00 from the claimant's check for damage to the company van. The claimant had understood that the employer's insurance would cover such damage. The claimant believed this deduction was not fair and was possibly not legal but this was not the main reason in her decision to resign. After the vehicle-damage deduction, the claimant's net pay was \$312.41.
6. On 05/17/19, the claimant was paid for the period beginning 04/28/19 through period ending 05/11/19. The claimant worked 61.58 hours and earned gross wages of \$973.00. After statutory tax deductions and \$17.19 for vehicle-damage deduction, the claimant was paid net pay of \$829.51.
7. The claimant's total gross wages for her total period of employment with this employer was \$1,783.00 and her total net wages were \$1,141.92.
8. While working for this employer the claimant only worked in one position and never was transferred into any other job. Each work day the claimant would load her work van with packages and then deliver the packages where directed by the employer Dispatcher.
9. The claimant's immediate supervisor (the Dispatcher) would yell at the claimant because she took a long time loading her van with packages and the claimant frequently needed help from other Delivery Associates to load the heavier packages into her employer owned delivery van. The claimant was always the last one done in loading the delivery van.
10. The claimant made daily complaints to employer management (the Dispatcher) about the packages assigned to her being too heavy for her to

deliver. The claimant is five feet tall and she weighs less than 120 pounds so lifting heavy packages was difficult for the claimant and caused her back pain.

11. On 05/04/19 the claimant verbally resigned to the employer President stating she was really tired, in constant pain from lifting the heavy packages and she was not physically able to do the physical heavy lifting required to do this package delivery job.
12. The claimant could not give a notice period at the time of her resignation on 05/04/19 because her sore back prevented her from doing the heavy lifting job any longer.
13. On 05/04/19, the claimant completed her final shift.
14. The claimant filed to reopen her existing claim in Massachusetts effective 05/05/19.
15. When the claimant resigned, she did not have another job with a firm start date but she hoped to return to work performing the office work she had done throughout her work history that paid more money and did not involve heavy lifting.
16. In the past, the claimant has worked as an office supervisor for a state agency and most recently, before working for this instant employer, she worked 77 hours per week, at a rate of \$37.56 per hour as a Claims Adjuster/Insurance Adjuster for a catastrophe services company employer.

Credibility Assessment:

The claimant's testimony that she left this employment because, after a good faith trial period, it proved to be unsuitable work because she could not meet the physical demands of the job and the pay was far less than her usual work history earnings, was supported by the evidence and accepted by this review examiner as credible.

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. 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. As discussed more fully below, we conclude that the claimant is eligible to receive unemployment benefits.

There is no dispute that the claimant resigned her employment, effective May 4, 2019. Because she resigned her job, the claimant's separation is governed by 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

By its terms, this section of law places the burden upon the claimant to show that she is eligible to receive unemployment benefits. The review examiner concluded that the claimant did not carry her burden. Following our review of the entire record, including the updated consolidated findings of fact, we disagree.

The review examiner found that the claimant quit, because she was tired, in constant pain, and not physically capable of performing the job duties required of her. Consolidated Finding of Fact # 11. It is implied that the claimant decided not to continue her employment, because she felt that the job was not suitable for her, given the job duties and physical strain the duties caused her. When the suitability of a job is at issue, it is the "claimant [who] bears the burden of proving that the employment [s]he was offered was unsuitable." McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted). A claimant can carry her burden to show that she quit her job for good cause attributable to the employer, if she shows that the job was unsuitable or became unsuitable after a period of time. See Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n.3 (1981); Jacobsen v. Dir. of Division of Employment Security, 383 Mass. 879, 880 (1981). The suitability of a particular job is dependent on many factors. See G.L. c. 151A, § 25(c) (noting factors to be considered include health, safety, morals of claimant; prior education and training; travel distance and costs; and remuneration); Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 349–350 (1948). Even if a claimant initially thought that a job would be suitable, "the job may have been objectively unsuitable from the start." 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*. We think this is especially true when a worker has already established a claim for unemployment benefits and is seeking out new work which may be somewhat different from her prior work. Thus, our focus is not so much on the claimant's personal feelings or subjective belief as to whether she could do the job, but whether, objectively speaking, the job's requirements were suitable for a person in the claimant's position.

Based on our review of the review examiner's consolidated findings of fact and the record as a whole, we now conclude that the Delivery Associate job with this employer was not objectively suitable for the claimant. The most significant aspect here is the fact that the claimant was not physically able to perform the required work. Prior to starting work for this employer in the spring of 2019, the claimant did office work, as a supervisor and an adjuster. Consolidated Finding of Fact # 16. None of this prior work history shows that the claimant was familiar with, or capable of doing, heaving lifting and intense physical labor. The review examiner found that the claimant, a petite individual of 120 pounds, needed to load heavy packages onto a van and then deliver those same packages to customers. Consolidated Findings of Fact ## 9–11. This

work resulted in physical injury and pain to the claimant. Consolidated Finding of Fact ## 11–12. The negative effect of the work on the claimant’s health and wellness is a strong factor weighing against the suitability of the work. Moreover, we note that the pay the claimant received was significantly less than what she made in her base period work. As an adjuster, the claimant made over \$30.00 per hour. Consolidated Finding of Fact # 16. With this employer, the claimant was paid a total of \$1,783 for 115.58 hours of work, or a little more than \$15.00 per hour. *See* Consolidated Findings of Fact ## 4–7. Given the issues with the unfamiliar job duties, the physical inability to perform the work, and the substantial decrease in pay at this job, we conclude that the job was not objectively suitable for the claimant, and she had good cause to leave the job.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence or free from error of law, because the claimant carried her burden to show that the job with the employer, obtained in the benefit year of a claim, was not suitable.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week beginning May 5, 2019, and for subsequent weeks if otherwise eligible.¹

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 25, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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

¹ Although the Board does not normally address employer charging issues, we do note here that it does not appear that the employer in this case will be subject to any charges based on the outcome of this decision. This is because the employer is not a base period employer. Questions about charges may be directed to the DUA, and the employer may appeal charges to its account, if any arise.

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.

SF/rh