**A temporary employee who, prior to continuing to request benefits on an existing claim, communicates to the employer that he could not continue working his current unsuitable assignment, and who does not assert that he is unavailable for work, has met the requirements of G.L. c. 151A, § 25(e), where the employer does not offer another assignment.**

**Board of Review**
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**Issue ID: 0059 3581 70**

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 separated from his position with the employer on July 16, 2020. On March 23, 2021, the DUA issued a Notice of Approval. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 29, 2021. 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, 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 make subsidiary findings from the record. 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 voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant stopped working for the employer's client because the position was unsuitable, and the employer did not offer the claimant any other suitable work at that time.

Findings of Fact

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

1. On September 4, 2015, the claimant initially began working with the employer, a temporary staffing agency. The claimant's contact with the employer was the office manager.

2. On July 13, 2020, the claimant was assigned by the employer to work on-site for [a] windshield wiper manufacturing company (the 'company') as a machine operator and fork truck driver by the employer.

3. The position was a full-time position. His shifts were scheduled from 6:00 a.m. until 5:00 p.m. He was to be paid $17.00 per hour.

4. On July 13, 2020, the claimant appeared for work.

5. On July 13, 2020, the claimant was scheduled for training.

6. When the claimant appeared for work, he was told that he would be working 14-16 hour shifts because the employer was understaffed as a result of the COVID-19 pandemic.

7. The claimant was uncomfortable working 14-16 hour shifts.

8. During training, the claimant learned that his position required him to work with the chemical solutions in the windshield wiper fluid.

9. The chemical solutions would often spill onto the floor of the warehouse, particularly in the area of the warehouse where he would be working.

10. The claimant did not know he would have to work with chemicals or be exposed to chemicals when he learned about the job. He believed he would be a fork truck driver.

11. The claimant had never worked with chemicals before.

12. On July 13, 2020, the claimant was trained in operating the machines that mixed the chemical solutions into the windshield wiper fluid.

13. The claimant was not asked to directly touch the chemical solutions.

14. The claimant was not comfortable working with the chemical solutions. He also did not want to breathe in chemicals.

15. The claimant had had an accident in high school dealing with chemistry, which made him uncomfortable working with chemicals.

16. The claimant told the person training him that he did not know if he could do the job.

17. On July 14, 2020, the claimant did not appear for work.

18. The claimant left his job with [the] company, the employer's client, because he did not want to work with chemicals.

19. On July 16, 2020, the employer spoke with the claimant about why he did not appear for work. The claimant told the employer that he could not do the job. The employer told the claimant that it was a good job and asked him to try to continue. The claimant told the employer that he could not.

20. The employer told the claimant that they would let him know when they found more work.

21. A week later, the claimant came to the employer's office to pick up his pay card.

22. The claimant did not reach out to the employer again.

23. At the time the claimant left work, the employer would have been able to find him another placement.

24. The claimant believed that the employer would not be able to find another placement because he had walked off the job with the company.

25. The claimant did not ask the company for a leave of absence.

26. The claimant did not know if he was eligible for a leave of absence.

27. The claimant did not ask the company for a different schedule or position.

28. At the time that the claimant left work, he was not at risk of being fired.

29. At the time the claimant left, he was speaking to another temporary employment agency.

30. At the time the claimant left, he did not have another job lined up.

31. On March 23, 2021, the DUA issued a Notice of Approval granting the claimant benefits under Section 25(e)(1) of the Law commencing the week beginning September 20, 2020, and subsequently thereafter if otherwise eligible. The employer appealed the Notice of Approval.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's separation from the employer was disqualifying.

Because the claimant left his assignment with the employer's client, in determining his entitlement to benefits, we must analyze 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 . . . .

Under G.L. c. 151A, § 25(e)(1), the claimant has the burden to establish good cause. To determine if the claimant has carried his burden, we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985) (noting that a reasonableness standard applies to resignation situations). If there is such a workplace complaint, the claimant must also show that he made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984).

After remand, the review examiner found that the claimant did not wish to continue working for the employer's client because it had changed the terms of his assignment after he began the position on July 13, 2020, and the claimant was not comfortable with the changes. *See* Consolidated Findings ## 3, 6–10, 14–15 and 18. Specifically, the claimant was hired to work full-time from 6:00 a.m. until 5:00 p.m., but on his first day of work, he was informed that he would be working 14–16 hour shifts due to understaffing related to the COVID-19 pandemic. Additionally, the claimant learned during his first day of work that he would be required to work with the chemical solutions in windshield wiper fluid, and he observed that these solutions often spilled onto the floors of the warehouse where he worked. Due to a prior chemistry class accident in high school, the claimant did not feel comfortable working with chemical solutions or breathing in their fumes. The claimant testified that, when he was placed with the client, he was originally told that he would be moving pallets with a fork-truck.[1] Based on the above, we can reasonably infer that upon learning of the changes to his schedule and job duties on his first day of work, the claimant believed that his assignment with the client was no longer suitable work for him.

When the suitability of a job is at issue, it is the "claimant [who] bears the burden of proving that the employment he was offered was unsuitable." McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted). A claimant can carry his burden to show that he quit his job for good cause attributable to the employer, if he 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

[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).

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).

Based on our review of the review examiner's consolidated findings of fact and the record as a whole, we conclude that the claimant's assignment with the employer's client was not suitable. The claimant was originally hired to work an 11-hour shift, which in itself is an objectively long shift, and the addition of three to five hours, would increase claimant's working hours by 27% to 45%. Although the claimant did not specifically state why he felt uncomfortable working an increased schedule of hours, we can reasonably infer that it was at least partly due to the toll such unreasonably long hours would take on his health, given the physical nature of his work with the client. Also adding to the unsuitability of the assignment was the claimant's apparent distress at the thought of working with chemicals due to a prior accident with chemical solutions. Due to his past negative experience with chemicals, it appears that the claimant was simply incapable of handling the mental stress of performing the work. Based on the unsuitability of the above working conditions, we conclude that the claimant had good cause to leave the assignment with the client.

However, in order to be eligible for benefits under G.L. c. 151A, § 25(e)(1), in addition to establishing that he had good cause to leave his assignment with the client, the claimant must also establish that he took reasonable steps to preserve his employment. *See* Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009). Here, prior to leaving the assignment, the claimant informed the client that he did not think he could perform the job. *See* Consolidated Finding # 16. Three days later, when speaking to the employer about his reason for leaving the assignment with the client, the employer suggested that the claimant try and continue the assignment because it was a good job. *See* Consolidated Finding # 19. Although it is unknown on this record what the client's exact response to the claimant was when he expressed a concern about the assignment, we can reasonably infer that the claimant's concerns were not addressed, particularly where the employer encouraged the claimant to return to the assignment without any indication that his concerns would be addressed. By speaking to both the client and the employer about his concerns, we believe that the claimant made reasonable attempts to preserve his job.

Finally, we do not think that the claimant is disqualified pursuant to the temporary employment provisions contained within G.L. c. 151A, § 25(e). A portion of that statute provides, in pertinent part, as follows:

> A temporary employee of a temporary help firm shall be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment before filing for benefits and the unemployment benefits may be denied for failure to do so. Failure to contact the temporary help firm shall not be deemed a voluntary quitting unless the claimant has been advised of the obligation in writing to contact the firm upon completion of an assignment.
>
> For the purposes of this paragraph, "temporary help firm" shall mean a firm that hires its own employees and assigns them to clients to support or supplement the client's workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects. "Temporary

> employee" shall mean an employee assigned to work for the clients of a temporary help firm.

The review examiner originally concluded that the claimant's separation from the employer, a temporary help firm, was disqualifying because he failed to request a new assignment after he quit his employment with the client. We disagree with the review examiner's conclusion.

After remand, the review examiner found that, although the claimant had refused to continue working for the client, he was still eligible for reassignment through the employer, as the employer told him on July 16, 2020, that it would look for other work for the claimant and let him know when it was available. *See* Consolidated Findings ## 19–20. It is unknown on this record whether the employer advised the claimant in writing of his obligation to contact the employer upon completion of an assignment, but assuming, *arguendo*, that such a communication was made, the consolidated findings establish that the claimant has fulfilled his obligations.

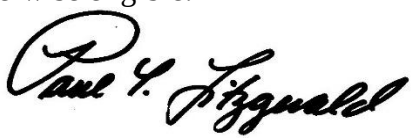
Again, the review examiner originally concluded that the claimant had failed to request reassignment from the employer. However, while it appears that the claimant did not explicitly ask for reassignment, there is no indication in the record before us that the claimant made any assertions that he was not available for work. In fact, given that the employer said it would look for other work for the claimant, we can reasonably infer that the parties understood that the claimant was available for other work. We note that we have previously held that a communication between the parties that was less explicit than in the instant case has satisfied the requirements for employees of temporary placement services set forth in G.L. c. 151A, § 25(e). *See, e.g.*, Board of Review Decision BR-113873 (April 25, 2011) (claimant's return call to employer to confirm that her assignment had ended satisfied the statutory requirement to contact the employer before filing a claim).[2]

In our view, the statutory purpose underlying the requirement that a temporary employee contact his temporary employer for reassignment prior to filing for benefits is to provide the temporary employer with actual notice of an employee's availability for reassignment and the opportunity to offer a suitable reassignment. Here, as stated above, the employer became aware of the claimant's availability on July 16, 2020, when the claimant communicated that he could not continue his assignment with the employer's client. The employer had the opportunity at that time to offer the claimant a new assignment, if one was available, but no such offer was made. It is immaterial that the claimant did not reach out to the employer on a subsequent date to request another assignment, as the communication between the parties on July 16th effectuated the relevant statutory purpose. *See* Consolidated Finding # 22.

We, therefore, conclude as a matter law that, pursuant to G.L. c. 151A, § 25(e)(1), the claimant had good cause attributable to the employer to leave his assignment with the client, and he took reasonable steps to preserve his employment prior to leaving. We further conclude that because the claimant promptly communicated his availability to the employer, but no suitable assignment was offered to him at that time, his separation from the employer is not disqualifying under G.L. c. 151A, § 25(e).

[2] Board of Review Decision BR-113873 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 18, 2020, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - February 24, 2022**

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT 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.

SVL/rh