COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

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Office Hours:
8:45 a.m. to 5:00 p.m.

# DECISION OF BOARD OF REVIEW

in the matter of:

Appeal number: BR-25680299

**CLAIMANT APPELLANT:**

**EMPLOYING UNIT:**

S.S. [redacted]

EMP. [redacted]

Office [redacted]

On August 31, 1999, the [redacted] Division of the District Court remanded this case (Docket Number: [redacted]) to the Board of Review to take additional evidence, make further findings, and issue a new decision.

The Board held a hearing by telephone on April 12, 2000, in order to comply with the Court Order. The claimant was present and represented by counsel. Although duly notified of the date and time of the hearing, the employer failed to appear.

The Board reviewed the written record and a transcript of the testimony presented at hearings held by the Deputy Director's representative on April 6, 1999, and November 13, 1999.

The Board's previous decision of May 19, 1999, affirmed the decision of the Deputy Director, issued on April 8, 1999, which concluded that:

> The claimant was not discharged from her employment, Therefore, Section 25(e)(2) does not apply to this matter.
>
> In accordance with Section 25(e)(1), the burden of proof is upon the claimant to establish by substantial and credible evidence that he [sic] left for good cause attributable to the employer or its agent, or for urgent, compelling and necessitous reasons.
>
> The claimant contended that she left because she had a medical condition, which limited her to being able to work only eight hours per day, and she was being asked to work more. However the supervisor testified he was willing to work with the claimant, and his testimony on this issue is credible in that according to both the claimant and the employer witness he had worked through issues she had in the past. The claimant testified she had been asked in the past to walk with a money drawer across campus, and when the supervisor did nothing to change this situation she went to his supervisor and the issue was addressed. Although the claimant testified it was her belief that a personality conflict existed the evidence failed to establish her belief as reasonable. The supervisor was relatively new, and the claimant described a better relationship with her previous supervisor.

The evidence established that this supervisor may not have operated the same as the previous supervisor, but it has not been established that his treatment was unfair. It was established the supervisor raised issues about a shortage of money, and he cut her staff, however these are areas in which a supervisor generally must take action. The evidence and testimony established the supervisor continued to work with the claimant and continued to consider her a value to the operation. In the final instance if the claimant felt her job was being drastically changed, or that the supervisor would not work with her on the hours or even if she believed there was an on-going conflict she made no attempt to address these issues with her supervisor's supervisor as she had in the past. Under the circumstances the claimant failed to establish that her leaving was for good cause attributable to the employing unit, or that her leaving was for urgent, compelling and necessitous reasons.

In view of the facts, the claimant is subject to disqualification and is denied benefits.

Benefits are denied for the week ending 1/24/99 and until she has had eight weeks of work and in each week earned an amount equal to or in excess of her weekly benefit rate.

The claimant appealed to the [redacted] Division of the District Court under G.L. c. 151A, § 42, and the court subsequently remanded the matter to the Board for further findings.

**Section 25(e)(1) Chapter 151A of the General Laws** is relevant and provides, as follows:

**Section 25.** No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for-

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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 . . .

After holding its own hearing, the Board makes the following findings of fact:

The employer owns and operates fast food restaurants Taco Bell and Subway, as well as a dining hall, all on the campus of [redacted] State College.

The claimant was employed as a shift supervisor at Taco Bell from September 4, 1995, until she became separated on January 21, 1999. She worked thirty-five hours a week, Monday thru Friday, from 2:00 p.m. until 10:00 p.m. When the college was closed for semester breaks and the summer recess, the employer would lay off the claimant and she would collect unemployment benefits, except for one summer when she worked.

On December 15, 1998, at the start of a semester break, the claimant's supervisor told her that when the new semester began in mid-January, he was transferring her to the Subway restaurant located across campus. He also told her that she would now be working a thirty-three hour week, consisting of approximately four to five hours each day on Thursday and Friday, and over ten hours each day on Saturday and Sunday.

The claimant suffers from fibromyalgia, a muscular disease wherein the muscles of the body can not contract naturally and any overuse or abuse of the body causes severe pain. Her doctor advised her in writing that because of the disease, she could not work longer than an eight-hour day.

On January 13, 1999, the claimant's supervisor called to tell her that Subway would re-open on Sunday, January 17. She then told him of her disease and of her doctor's orders, and said that because of her physical limitation, she could not work for over ten hours each day on Saturday and Sunday. He told her he would get back to her on the issue of the hours.

On January 14, when the supervisor did not get back to her, she called him and left a message. He called back and told her to work Thursday and Friday for now. She understood by that conversation, that she should not report to work on Sunday, January 17, and she did not. On January 19, the supervisor called and left a message for the claimant that he assumed that she had resigned since she failed to report for work on January 17. She called the supervisor back that day and left a message that she had understood from their last conversation that she should not bother to report for her Sunday hours and that her next scheduled work day was Thursday, January 21.

On January 21, the claimant called her supervisor at 9:14 a.m. but was not able to speak with him. She did not leave a message. She called again at 3:36 p.m., spoke with her supervisor and resigned her job. She resigned because she could not physically work the hours her supervisor assigned her for Saturday and Sunday, ten hours each day, and because working the remaining scheduled hours on Thursday and Friday for a total of eight to ten hours, would leave her ineligible for coverage under the employer's health and dental insurance plan. The employer's plans required a minimum of 30 hours work each week in order for an employee to be eligible for health and dental coverage.

When she worked at Taco Bell, the claimant was a shift supervisor overseeing the work of all employees on the shift. When the employer transferred her to Subway, the claimant believed that she would be working as a cashier or supervising the cashiers, a job requiring her to perform tasks which would not allow her adequate range of motion to alleviate the symptoms of her disease.

The Board concludes as follows:

The claimant left her work because she had been working for over three years on a schedule of five days a week, seven hours a day, and the employer unilaterally changed her schedule to a thirty-three hour week, including ten hours each day on Saturday and Sunday. The claimant informed her supervisor that she could not work beyond eight hours in a day because of her physical condition. Either intentionally or due to miscommunication, the supervisor failed to adjust the schedule, leaving her with only eight to ten hours of work each week. This new schedule and assignment contained a significant, non-temporary reduction in hours of work but was not new work. The claimant's unrefuted testimony before the Board was credible and we believe that she reasonably believed that her supervisor was requiring her to work ten-hour shifts on Saturday and Sunday. The claimant's leaving under these circumstances, although voluntary, was with good cause attributable to the employing unit. By informing her supervisor of her medical condition and requesting a different work schedule, the claimant took reasonable steps to preserve her employment prior to resigning. Therefore, the claimant is not subject to disqualification under Section 25(e) of the Law cited above.

The decision of this Board issued on May 19, 1999, is modified. The claimant is entitled to benefits for the week ending January 24, 1999, and subsequent weeks, if otherwise eligible.

Francis J. Holloway
Chairman

**BOSTON, MASSACHUSETTS**
**DATE OF MAILING –** MAY 10 2000

Thomas E. Gorman
Member

Kevin P. Foley
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**
**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY –** JUN 09 2000

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