0016 2073 23 (Dec. 24, 2015) – A temporary employee, who had worked full-time at one assignment for approximately a year, did not refuse an offer of suitable work. The employer offered only sixteen hours of work about a month after the end of the full-time assignment. *[Note: The District Court affirmed the Board of Review.]*

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Issue ID: 0016 2073 23

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 from September 28, 2014 through November 22, 2014. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was hired by the employer to work full-time, and she did so, until her assignment ended in late September of 2014. She filed a claim for unemployment benefits, which was approved in a determination issued on June 11, 2015. 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 4, 2015.

Benefits were denied after the review examiner determined that the claimant refused an offer of suitable work during the first week of October, 2014, and, thus, was disqualified, under G.L. c. 151A, § 25(c). 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. 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 conclusion, that the claimant, who worked full-time for the employer from October of 2013 to September of 2014, refused an offer of suitable work, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings of fact indicate that the employer spoke with the claimant about working 16 hours per week and the claimant declined that offer.

Findings of Fact

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

1. The claimant worked as a Registered Nurse for the employer, a Certified Home Health Care Agency, from October 15, 2013 until September 30, 2014.

2. The claimant was hired to work as a private duty Registered Nurse working blocked nursing hours, working up to 8 to 10 hour shifts. The claimant's only restriction on her hours was that she was not able to work as a night nurse, 11:00 pm to 7:00 am.

3. The claimant was hired for the position by the Director of Client Services. The claimant chose to be notified of available work by telephone, providing the employer with a number to be reached. The claimant also provided the employer with her e-mail address, along with her home address.

4. The employer worked with pediatric and non-pediatric clients.

5. The claimant was hired to work on one particular case, a terminally ill young child. The claimant took care of that child until the child passed away.

6. The claimant was residing in [Town A], Massachusetts when she began work for the employer.

7. The claimant was performing services for the client in [Town A]. The claimant was working forty hours per week. (The claimant only worked 30 hours, the final week that she provided services for the client.)

8. The claimant was paid $25 per hour in her position. The claimant did not receive any benefits.

9. In mid-September 2014 the scheduling person left the employment of the employer. The Marketing person then took over the scheduling. The nurses would have a blank schedule/calendar where each month they would write in their available hours to provide to the employer.

10. The claimant's last day of work for the client was September 30, 2014. The claimant worked that shift from 2:00 pm to 10:00 pm. (The client was transported to the hospital after the September 30th date.)

11. The next day, the claimant was contacted by the Marketing person, who left a message inquiring as to when she could pick up the claimant's schedule for the next month, October 2014. The claimant returned the call, informing her that the client was in the hospital. There was no further discussion of the claimant's hours or schedule.

12. The claimant did not return to work for the client after the September 30th date, because the client passed away sometime thereafter.

13. The employer would not leave client information in voicemail messages to employees, due to HIPPA concerns.

14. Sometime after September 30, 2014, the claimant received some voicemail messages from the employer asking her to call, but the employer did not make any offers of work or leaving any detailed information in those messages. The claimant was still upset about the clients passing and did not return any of the employer calls.

15. The claimant's sister was not an employee with the instant employer. On November 3, 2014, the claimant's sister went to the employer's office and spoke with the President regarding being hired by the employer. The President spoke to the claimant's sister about being hired to work with a client who had a tracheotomy. The President informed the claimant's sister that the assignment was for a total of 16 hours per week, entailing two eight hour shifts. At no time was the claimant's sister hired by the employer to work.

16. On November 3, 2014 the President also informed the claimant's sister that they were waiting to hear from the claimant to provide her with work. The claimant's sister informed the President that the claimant wanted full-time work and was looking for work elsewhere.

17. On November 3, 2014, after being informed by her sister of the conversation with the employer, the claimant spoke with the President by telephone. The claimant inquired about the available work. The President informed her that they had an assignment available working two eight hours shifts a week. The claimant responded that she only wanted full-time work. (At no time did the claimant mention that she no longer wanted to work with pediatric clients or that she would need clinical orientation to work for a client who had a tracheotomy.)

18. The claimant was seeking full-time work in order to pay her living expenses. (The claimant's sister was residing with the claimant. In November 2014 the claimant's sister had recently completed her schooling and was not working.)

19. The claimant did not receive any text messages or e-mail communications from the employer regarding available work. At no time did the claimant receive a letter from the employer offering her work.

20. The claimant filed her claim for unemployment benefits on October 9, 2014. The effective date of the claim is September 28, 2014.

21. On June 11, 2015 a Notice of Approval was issued in accordance with Section 25(c) of the Law indicating that "the claimant refused an offer of work

because the work is unsuitable. The work was unsuitable because it was not full time. You did not provide details about the positions you offered the claimant as requested in additional fact finding." The employer filed a timely appeal to that determination.

22. The claimant obtained full-time work in July 15, 2015. The claimant had no work from September 30, 2014 until July 2015.

CREDIBILITY ASSESSMENT:

The employer's testimony was convoluted as to what communications they had with the claimant after September 30, 2014 regarding available work and the actual contents of those communications, asserting that they communicate with the claimant by text message, e-mail, voicemail messages and one letter. Although the President asserted that when they could not reach the claimant by other methods they sent the claimant a letter regarding available work, the employer witness was unable to testify as to the mailing method of that letter and there was no verification of receipt.

The President further testified that when contacting the claimant after the September 30th date regarding the availability of work, and when unable to reach the claimant they left voicemail messages offering her full-time assignment. However, in the remand hearing, the employer's witnesses was heard to state that they would not leave any specific information when contacting an employee about work, concerned about HIPPA violations, and would simply indicate that there was work and they should contact the employer. As such, the employer's testimony varied from the initial hearing to the remand hearing, detracting from the employer's credibility.

The claimant's sister testified that in speaking with the President on the November 3rd date, regarding her sister, the employer communicated that they had sixteen hours of work available at that time. However, the President alleged that there was no discussion of available hours with the claimant's sister and the claimant's sister notified her at that time that the claimant was attending school and did not want to work for the employer. Not only did the claimant's sister deny making that statement, there was no credible independent evidence to support that at any time after September 30th that the claimant was in attendance at school. Further, it does not make sense that had the claimant's sister informed the employer on November 3rd that the claimant was attending school and would not be working for the employer that the employer would continue to make calls to offer work, as they alleged they had done on November 10th and November 16th. The claimant's testimony was consistent with her sister's, that she was not attending school any time after September 30th and that when she communicated with the President on November 3rd she was only notified of the availability of sixteen hours per week.

Ruling of the Board

In accordance with our statutory obligation, we review 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. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is subject to disqualification.

The review examiner concluded that the claimant had refused an offer of suitable work with the employer. G.L. c. 151A, § 25(c), provides, in relevant part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . (c) Any week in which an otherwise eligible individual fails, without good cause, to apply for suitable employment whenever notified so to do by the employment office, or to accept suitable employment whenever offered to him . . . .

The review examiner's consolidated findings of fact indicate that, following the claimant's last day of work on a long-term care assignment in September of 2014, there was contact between the parties on November 3, 2014. During that conversation, a specific assignment of 16 hours of work was discussed. Therefore, we must decide whether, based on this assignment, the review examiner was correct to conclude that the claimant rejected an offer of suitable work.[1]

We conclude that the offer was not suitable. The major known detail of the work was that it was for 16 hours per week. The suitability of an offer of work is determined by analyzing various factors, including the nature of the work, the remuneration associated with it, and the distance it is located from a claimant's home. *See* G.L. c. 151A, § 25(c) (defining "suitable employment"). An important consideration is also the number of hours of work offered. In this case, the claimant had a history of working full-time for the employer. She worked full-time for approximately one year with only one client. The findings of fact do not indicate that there was any agreement between the parties, or even any understanding, that the claimant could be offered short, part-time, or as-needed work, such as is often associated with a temporary employment agency. Given this history of full-time work, the offer of only 16 hours (less than half of the hours she previously worked) was a severe reduction. Since the offer was for so few hours based on her history of work, we think that the offer of work was not suitable.

We are guided to this conclusion, in part, by the DUA's own policies. In the DUA's Service Representative Handbook (SRH), the agency itself notes that "[p]art-time work, odd jobs, and temporary work of brief duration are not considered suitable work." SRH Section 1110(B). Although an offer of part-time work could be considered suitable in some circumstances, such as

[1] We need not discuss at length the provision of G.L. c. 151A § 25(c), which mentions that disqualification can only apply to an "otherwise eligible" claimant. First, as our decision indicates, we conclude that no disqualification is warranted. Second, there does not appear to be any other disqualification in effect during the week ending November 8, 2014. So, for that week, the claimant was an "otherwise eligible individual" for purposes of the statute.

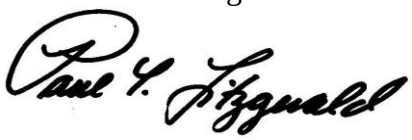
where a person has a history of working part-time and/or cannot work full-time, under the circumstances presented here, we think Section 1110(B) applies. Moreover, the agency also allows an individual a reasonable amount of time to look for work which has wages and hours which are equivalent to his or her most recent job. SRH Section 1129, which is titled "Length of Employment," provides as follows:

> In general, a claimant is entitled to a reasonable amount of time to find new work with wages and fringe benefits equivalent to his or her most recent employment. The only exception: when such work does not exist in the claimant's labor market area, i.e., the area covered by the local DUA office and/or the area(s) to which the claimant is willing to relocate.
>
> What constitutes a "reasonable" amount of time? DUA defines long-term unemployment as unemployment lasting 15 weeks or longer... [It] is reasonable to expect (but not require) a long-term claimant to accept a job offer with a slight reduction in wages after an extended period of time has passed.

Here, approximately four weeks had passed from the time the claimant's full-time assignment ended to the time she was offered only 16 hours of work. We think that, at that point, it was reasonable for her to continue to look for full-time employment. Although there is no evidence of it in the record, given the number and quality of hospitals and nursing agencies in the Boston area, we think it certainly possible that the claimant could have obtained a full-time job with her training and experience.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits pursuant to G.L. c. 151A, § 25(c), is not supported by substantial and credible evidence or free from error of law, because the employer's offer of 16 hours of work, after the claimant had worked full-time, 40 hours per week for approximately one year, was not suitable.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 2, 2014, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 2015

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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

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