The claimant did not have good cause attributable to the employer to resign over not being given full-time hours of work because the review examiner found that he was hired with the promise of only 25-30 hours per week. Since this is new part-time benefit year work, the claimant is subject to a constructive deduction from his weekly benefit amount.

Board of Review
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Issue ID: 0021 1211 86

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Matthew Shortelle, 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 we affirm in part and reverse in part.

The claimant resigned from his position with the employer on February 23, 2017. He re-opened a claim for unemployment benefits with the DUA but was denied further benefits in a determination issued on March 21, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant and a representative for the employer, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 2, 2017. 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, and, thus, he 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 obtain further evidence about the claimant's wages and hours while working for this employer and any DUA determinations rendered in connection with previous employers on his original claim for benefits. 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 issues before the Board are: (1) whether the review examiner's conclusion that the claimant failed to show that he had good cause attributable to the employer to resign is supported by substantial and credible evidence and is free from error of law; and (2) if so, whether the claimant is subject to a complete disqualification or merely a constructive deduction.

Findings of Fact

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

1. On August 25, 2016, the claimant filed a claim for unemployment benefits with an effective date of August 21, 2016.

2. The claimant worked as a line cook for the employer, a restaurant, from January 11, 2017 until February 23, 2017.

3. The employer's Kitchen Manager (the Manager) supervised the claimant.

4. When hiring the claimant, no employer personnel guaranteed the claimant full time hours.

5. When hiring the claimant, the GM and a second General Manager (GM 2) told the claimant he would be hired for twenty-five (25) to thirty (30) hours each week and would cover the shifts of cooks who called out.

6. The employer considers thirty-five (35) hours or more per week full time employment.

7. The employer does not schedule cooks for more than approximately thirty-two (32) to thirty-five (35) hours each week so as to avoid paying overtime in the event a cook has to cover a shift.

8. In February 2017, the claimant had car trouble but did not miss work as a result of his car issues.

9. On February 14, 2017, the claimant GM 2 sent the claimant home one hour early.

10. On February 22, 2017, the claimant left work early because his grandfather (the Grandfather) passed away.

11. On February 23, 2017, the claimant quit his employment because of personal reasons and him not receiving enough hours of work.

12. The claimant worked for the employer for parts of seven weeks.

13. The claimant completed a Department of Unemployment Assistance (the Department) Questionnaire alleging he quit his employment as a result of "not reliable transportation and not enough hours," "lack of hours promised, incompetent management, short staff, not reliable hours," and he "tried to find alternate transportation" (the Questionnaire).

14. The employer completed Department questionnaires alleging the claimant quit because of personal issues and a lack of hours and that the employer

scheduled the claimant for more than thirty (30) hours but the claimant left work early (the Fact Finding).

15. As of the date of the remand hearing, the Department has not issued any determination which would indicate the claimant's [separations] from his base period employers are disqualifying.

16. The total amount of wages paid to the claimant by the employer is unknown.

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, while we agree that the claimant did not establish good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1), he is not subject to a complete disqualification from benefits, because this was benefit year part-time employment.

Because the claimant voluntarily left his job with the employer, his eligibility for benefits is subject to 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 . . . [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 explicit language in this statutory provision places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

Consolidated Finding # 11 states that the claimant quit his job with the employer for personal reasons and because he was not given enough hours. As for his personal reasons, there is not enough information in the consolidated findings or in the record from which we could conclude that the claimant was dealing with any urgent, compelling, and necessitous circumstances that caused him to resign. *See* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992) (we must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment.").

We also consider whether the claimant had good cause attributable to the employer to leave his job due to not receiving enough hours. In our remand order, we asked about the average number of weekly hours that the claimant had worked for the employer. *See* Remand Exhibit # 5. The

review examiner failed to make such a finding. Nonetheless, there was no dispute that the claimant worked less than full-time hours. The question is whether working less than full-time constituted good cause attributable to the employer under G.L. c. 151A, § 25(e)(1). 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. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

In his appeal, the claimant contended that he was promised full-time hours at hire. However, the review examiner accepted the employer's testimony that he was not guaranteed full-time hours when hired; he was told he would work 25–30 hours per week. Consolidated Findings ## 4 and 5. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless such assessments are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). His findings are reasonable in light of the evidence presented.

During the remand hearing, the claimant presented copies of a work schedule. Although most of the pages in Remand Exhibit # 13 are difficult to read, page 4 does indicate that other cooks were scheduled for full-time hours during at least one week.[1] However, even if the claimant had established that other employees had more work hours than he did on a regular basis, this does not mean that the employer acted unreasonably toward the claimant. The review examiner found that the claimant was hired to work 25–30 hours a week, and page 4 shows that the claimant worked 30 hours in that week. Thus, the employer scheduled him for the number of hours that he was hired to work. While the claimant may not have been satisfied with working only that many hours, general dissatisfaction with the terms and conditions of employment does not constitute good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). *See* Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979).

Having concluded that the claimant's separation from this employer was disqualifying under G.L. c. 151A, § 25(e)(1), we consider whether he is subject to a complete disqualification from receiving benefits or a constructive deduction. The claimant worked part-time for the employer for seven weeks during the benefit year of an existing claim. *See* Remand Exhibit # 10.[2] DUA regulations provide that individuals who leave new part-time benefit year work under disqualifying circumstances are subject to a constructive deduction. 430 CMR 4.72. Roughly stated, this is the amount of money that would have been deducted from the claimant's weekly benefit amount if the claimant had continued to be employed on a part-time basis. 430 CMR 4.73. The amount of the constructive deduction each week is determined based upon the claimant's earnings from the part-time employer. 430 CMR 4.78(1) provides as follows, in relevant part:

[1] The employer's schedule worksheet, entered as Remand Exhibit # 13, was not explicitly incorporated into the review examiner's findings. However, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

[2] Remand Exhibit # 10 is a printout from the DUA's electronic record-keeping system, UI Online.

> (c) On any separation from part-time work which is obtained after the establishment of a benefit year claim, the average part-time earnings will be computed by dividing the gross wages paid by the number of weeks worked.

Although the review examiner did not know the total amount of wages which the employer paid to the claimant at the time of the hearing, his wages have since been reported to the DUA. We take administrative notice of these reported wages on UI Online, which shows that he was paid $1,943.90 during the first quarter of 2017. Over seven weeks of employment, this amounts to an average of $277.70 per week.

Next, 430 CMR 4.78(2) directs us to calculate the constructive deduction by applying the earnings disregard standards provided for in G.L. c. 151A, § 29(b), to the average partial earnings as calculated in 430 CMR 4.78(1)(a) through (c). As instructed by 430 CMR 4.78(2), we deduct the claimant's earnings disregard of $66.00[3] from his average weekly wage of $277.70. The difference of $211.70 is to be subtracted from the claimant's weekly benefit amount under this claim.[4]

We, therefore, conclude as a matter of law that the claimant did not show that his separation was for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1). Because this was new part-time benefit year employment, he is subject to a constructive deduction rather than a total disqualification from benefits.

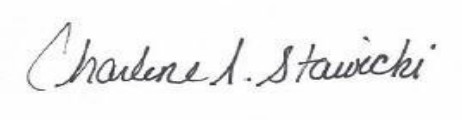
[3] *See* the DUA UI Online printout for the 2016-01 claim in effect at the time the claimant separated from the employer, Remand Exhibit # 10.

[4] Because the claimant's 2016-01 weekly benefit amount is $198, this results in a zero net weekly benefit. However, pursuant to 430 CMR 4.76(3), if the claimant obtains new part-time work or returns to the former part-time work, he is subject only to the earnings offset while so employed.

The portion of the review examiner's decision that disqualified the claimant under G.L. c. 151A, § 25(e)(1), is affirmed. However, we reverse the total disqualification from benefits. He is subject to a constructive deduction in the amount of $211.70 per week, until he meets the re-qualifying provisions of the law.[5]

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 16, 2017

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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

[5] See 430 CMR 4.76(2) and 430 CMR 4.76(3).