Evidence is sufficient to establish that the claimant quit her job in good faith to accept a new full-time, permanent position. After the offer was rescinded by the new employer, thus putting her in unemployment, the claimant was eligible for benefits under G.L. c. 151A, § 25(e).

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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, 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 her position with the employer on May 5, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 16, 2017.[1] The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 15, 2017.

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 take additional evidence regarding the claimant's work schedule, her son's health issues, and whether she separated from her job with the employer to take a new job. Only the claimant 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 is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant was offered a position, considered to be full-time by a new employer, the claimant informed the employer that she would be taking that position, and the offer of the new positions was rescinded.

Findings of Fact

[1] The agency's determination was issued pursuant to G.L. c. 151A, §§ 29(a) and 1(r).

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

1. The claimant worked full-time as an operations specialist for the employer's investment business from 10/26/15, until 1/18/17. The claimant was paid an annual salary of $75,000; she worked 40 hours per week. The claimant's immediate supervisor was the President of the business.

2. During the term of her employment, the employer allowed the claimant to work a flexible schedule around the hours of 8:00 a.m. until 4:00 p.m. in order for her to travel on an express train from her residence in [Town A] to the employer's business location in [Town B]. The claimant found that taking the express train greatly reduced the amount of time spent commuting to the workplace. The claimant was aware that she was the only employee working such hours; other employees worked from 8:30 a.m. until 5:00 p.m. The claimant was subsequently informed that she would need to be in the office each day until 5:00 p.m. One month prior to being issued this notice, the claimant informed the employer that she was pregnant.

3. When working a flexible scheduled of 8:00 a.m. to 4:00 p.m., the claimant's afternoon commute from [Town B] to [Town A] was just under one hour. The claimant took the express train from [Town B] to [Town C]. When working until 5:00 p.m., the claimant's commute from [Town B] to [Town A] took 1 ½ hours. The claimant took a train from [Town B] to [Town C]; the train departed [Town B] at 5:40 p.m.

4. The claimant commenced a maternity leave on 1/18/17, and was expected to return to work on or about 5/15/17. Prior to 4/18/17, the claimant sent an email to the President of the business requesting that she be allowed to work a schedule of 8:00 a.m. until 4:00 p.m. The claimant made the request in order to accommodate her need to take her son to medical appointments. Prior to commencing the leave of absence, the claimant had been told by the President that whenever she needed time off for medical appointments that she needed to take a full day off without pay because it was stressful to have her arrive late or leave early. The claimant did not discuss her son's needs with the President but assumed, based upon this previous directive, that she would be required to take full days off whenever she needed time off for her son's medical appointments. The President denied the claimant's request for a schedule of 8:00 a.m. to 4:00 p.m.

5. The claimant was able to return to work on 5/15/17, despite her son's medical condition. If the claimant had her preferred schedule, she would have had child care arrangements in place. The claimant hired a nanny and planned to have her father-in-law provide child care for several days each week. The son's pediatrician has office hours until 5:00 p.m., and 5:30 p.m. on several days. The claimant thought she could make it to the office before it closed, if

she left work at 4:00 p.m. The child's father could sometimes take the child to medical appointments; however, his job as a state trooper does not allow him a lot of flexibility.

6. After her request for a schedule of 8:00 a.m. – 4:00 p.m. was denied, the claimant spoke with a junior partner of a second business about a new position. The second business is an agency of the instant employer and focuses on finding clients, and providing them life insurance and educational planning services; the two businesses share clients. The second business contracts with the instant employer in order to provide investment services for its clients. Employees of the instant employer's business use email addresses associated with the second business to avoid confusion with clients.

7. On 4/18/17, the claimant sent the President an email message in which she mentioned having contact with the financial advisor one week earlier and discussing the potential of working for him. The claimant wrote in part: "My plan was to come back May 15. Please let me know your thoughts on this. Since oasis payroll and (Employer) is separate I would think it wouldn't be an issue if I were to stay on for admin work." The President responded by email that day, writing in part: "As for here, the transition is going about as well as can be expected. The usual speed bumps and everyone is a bit overwhelmed. But things should stabilize in a few months – we hope. As you know, your job is waiting for you should you decide to return to (Employer). However, it will remain an operations role and given what we are going through, I am quite sure it will be a very full time operations role. As we proceed through this difficult transition, we just cannot afford any flexibility in hours, work location, etc. Quite frankly, we are drowning in operations right now, and we need someone physically here, in our offices, eight hours a day, five days a week, helping with operations and transition. Scheduling for (junior partner) will be a much lower priority given the needs we have with this transition and the increase in the number of advisors who can now access our platform. I talked with (junior partner) about you working with him. I am fine with your working with (junior partner) if that is what you want to do. I think it is more the kind of role you were/are looking for. However, I do not think you can be on two payrolls, and thus if you go to work with (junior partner) you will have to be on his payroll and benefits…" The claimant did not return to work with the employer; however, she would have returned to work if the employer allowed her to work a schedule of 8:00 a.m. until 4:00 p.m., or a flexible schedule.

8. On 4/26/17, the junior partner extended a verbal offer to the claimant, proposing that she work a flexible schedule of 32 hours per week, with the junior partner and the second advisor each paying the claimant for 16 hours of work. The claimant was told that she would be paid $25 per hour. The claimant would be required to work 32 hours per week in order to qualify for benefits with the second business. The second business considered 32 hours per week full-time for the position the claimant was going to be working in.

The second business considered 32 hours per week full-time for an operations specialist. On 5/9/17, the practice manager for the second business forwarded the claimant paperwork required to conduct a necessary background check.

9. On 5/5/17, the claimant emailed the President, notifying him that she accepted an offer of work with the junior partner.

10. On 5/16/17, the junior partner notified the claimant that the job offer was rescinded because the second advisor backed out of the agreement. The junior partner told the claimant that he spoke with the President of the instant employer, to see if the President could help by offering some work. The President declined. The claimant asked if she could work part-time for the junior partner, until something else came along. The junior partner stated that it didn't make sense, since the claimant would not earn enough. The junior partner advised the claimant to wait until September, when the company typically becomes busy.

11. After learning that she would not have work available with the junior partner, the claimant contacted the President by email on 5/17/17 to inform him that the arrangement with the junior partner was not going to work out. The claimant did not speak with the President about returning to work. The President responded to the claimant's email by sending a settlement and release agreement. The President suggested the claimant sign the agreement to bridge the gap until she could find something else or apply for unemployment benefits.

12. On 5/20/17, the claimant made a last minute decision to move to [Town D] and moved over the following weekend (5/27-5/28/17).

13. The claimant filed an initial claim for unemployment insurance benefits, effective 5/28/17.

14. On 5/31/17, the claimant completed a DUA fact-finding questionnaire in which she wrote that she was on a leave of absence, which commenced on 1/18/17. The claimant wrote that she expected her leave to end on 5/15/17, but was unable to return to work because the employer revamped the company and her job description and hours changed while she was on the leave. The claimant wrote: "He said (Name, President) If you want to come back and work in the office 9-5 and do operations, you can. If you don't want to take the opportunity, oh well…And that's how they left it. This was around May 15. He said you have a couple of weeks to think about it. But by 5/31 we'll terminate you. It was kind of a mutual thing, because I said that's not really fair. They changed my hours and job description. Originally I was able to work from home and have flexible hours. My childcare wasn't set up for longer hours. I felt like I was being forced out…"

Credibility Assessment:

The claimant's overall credibility was diminished due to contradictions in the information provided in her initial fact finding questionnaire and her testimony during the two hearing sessions. Specifically, the claimant wrote in her responses on the fact finding questionnaire that she was unable to return to work with the employer because, during her maternity leave, the employer changed her job description and work schedule (Ex. # 1, pages 6, 8). The email from the President (Ex. # 5) confirmed that the operations role remained available for the claimant after her maternity leave. The claimant also wrote in her responses: "Originally I was able to work from home and have flexible hours. My childcare wasn't set up for longer hours." It was the claimant's direct testimony that she requested a change of schedule, to 8:00 a.m. – 4:00 p.m., prior to the end of her maternity leave, and that the change was denied. The claimant testified that although she had been allowed to work from 8:00 a.m. – 4:00 p.m. at some point during her employment, she was eventually required to work each day until 5:00 p.m. and had been working that schedule at the time of commencing her leave. Likewise, the contents of the letter written by the President on 9/12/17 support the claimant's testimony that she requested a change in schedule prior to returning from her maternity leave. The evidence does not support a conclusion that the employer initiated any changes to the claimant's position or schedule during her leave, or that the claimant had ever been granted the flexibility to work-from-home. Further detracting from her credibility was the claimant's statements that the President threatened to terminate her employment by 5/31 and that: "I felt like I was being forced out. I feel like they never had any intention of letting me back." The claimant's statements are contradicted by the email message she submitted, in which the President assures the claimant that there was a position for her to return to, if she chose to. The President's statement belie any contention that the employer did not intend to allow the claimant to return, or that she was being forced out of her job.

After the determination denying the claimant unemployment benefits was affirmed by the initial hearing, the claimant hired an attorney who recommended that the claimant request the employer and the junior partner provide her written confirmation of the events that led up to her separation. On 8/23/17, the junior partner wrote that the claimant was extended a verbal offer on 5/1/17, for an administrative position. The junior partner confirmed that the job offer was rescinded on 5/15/17, due to unforeseen business and financial circumstances. The President wrote a letter on 9/12/17, confirming that due to its operational needs, the claimant would not have been allowed a flexible schedule following her maternity leave, and would have been required to work 8 hours per day, five days per week, at the employer's location. The President also confirmed his awareness that the junior partner planned to offer the claimant work, and that the junior partner was subsequently unable to extend any such offer. There is nothing in the record to suggest or establish that the information contained in the letters provided by the claimant is not credible. Thus, full weight was given to this information.

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 ultimate 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 conclude that the claimant is eligible to receive unemployment benefits, because she separated from her job with this employer to take a new, permanent, full-time job with another employer.

As an initial matter, we note that there were several factors which contributed to the claimant's separation. During a portion of her employment, the claimant was allowed to work a flexible schedule of 8:00 a.m. to 4:00 p.m. At some point, the claimant was informed that she would need to work until 5:00 p.m. While on maternity leave, the claimant requested that she be allowed to again work from 8:00 a.m.to 4:00 p.m. This request was denied. In addition, the claimant's son had medical conditions which required frequent doctor's appointments. Leaving work later would make attendance at the appointments difficult. Finally, the claimant was in contact with a different employer regarding a new job offer.

Each of these circumstances (the change in schedule, the need to care for her son, the new job offer) potentially implicate different provisions of G.L. c. 151A, 25(e): the good cause standard, the urgent, compelling, and necessitous standard, and the leaving work to obtain new full-time employment standard. All three standards are exceptions to the general presumption that a person who quits her job is ineligible to receive benefits. To be eligible for benefits, the claimant needs to only meet one exception. Because we conclude that the claimant has met the leaving work to obtain new full-time employment provision, we shall focus on that section of law.

G.L. c. 151A, § 25(e), provides, in pertinent part, as follows:

> No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit.

As indicated above, the claimant has the burden to show that this provision applies to her circumstances such that she is not subject to disqualification.

Following the remand hearing, the review examiner made consolidated findings of fact which show that the claimant did leave her job with the employer for a new job. After she was informed by the employer that she could no longer work 8:00 a.m. to 4:00 p.m. each day, the claimant sought out other employment options. In mid-April, the claimant contacted a different company (the other employer) about a new position.[2] On April 26, 2017, a junior partner at the other employer verbally offered the claimant a job with that company. The job would be a

[2] Although the two companies at issue are related, they are distinct entities. *See* Remand Exhibit #9.

thirty-two hour per week position, at $25.00 per hour, in the same kind of work she had done for the employer at issue in this case. The claimant accepted the position, and notified the employer on May 5, 2017, that she would be taking the job with the other employer. Subsequently, on May 16, 2017, the other employer rescinded the job offer, leaving the claimant without a job with this employer or with the other employer.

We recognize that the thirty-two hours per week proposed by the other employer does not, generally, signify a full-time job (which, normally, covers around forty hours per week). However, in this case, the review examiner specifically found that the other company considered thirty-two hours per week to be a full-time schedule of hours. *See* Consolidated Finding of Fact # 8. Therefore, the offer from the other employer was full-time, permanent, and bona fide, as the specifics of the job were made clear to the claimant in the offer.[3] The claimant's decision to the leave the employer on or about May 5, 2017, was due to her acceptance of the offer of new, full-time permanent work with the other employer.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because the claimant's separation in this case can be reasonably attributed to her decision to take a new full-time, permanent job with a new employer, and her subsequent unemployment was due to the new employer's failure to follow through with the job offer. She is eligible under G.L. c. 151A, § 25(e).

[3] We do not hold that all jobs of thirty-two hours of work per week are "full-time" for purposes of the statute. Nor do we hold that, in every case, the threshold amount of hours needed to obtain fringe benefits from an employer is to be considered "full-time" for purposes of the statute. In this case, we hold only that, under these facts, which were offered credibly by the claimant, without any testimony or objection by the employer, and which are generally supported by the documentary evidence in the record, the work offered by the other employer can be considered "full-time" for purposes of G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 28, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 19, 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.

SF/rh