The claimant, who had worked full-time hours for the employer for several years, had good cause for resigning his position, when the employer offered him a part-time job after he returned from a medical leave of absence. The new job was no longer suitable given the drastic reduction in hours and pay.

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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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer on or about October 23, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on November 11, 2017. 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 February 13, 2018.

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 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 decision, which concluded 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 employer did not have a full-time job for the claimant after he returned from a medical leave of absence and the claimant ultimately resigned his position due, in part, to the reduction in his work schedule from full-time to part-time hours.

Findings of Fact

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

1. On March 8, 2011, the claimant began working, as a per diem staff nurse, for the employer a healthcare center. The employer would call him whenever there were shifts available that he could work. Most weeks he worked 40-60 hours.

2. On January 10, 2017, the claimant was transferred into the position of full time, licensed practical nurse.

3. On February 18, 2017, the claimant was in an accident. He was seriously injured and unable to work. He informed the employer of his situation and sent in medical notes, approximately once a month, from March 3, 2017 through April 24, 2017, stating that he was unable to work. The claimant was not asked to complete any FMLA or other paperwork before taking this leave of absence from work.

4. On May 22, 2017, the claimant provided the employer with a medical note stating that he was able to return to work without restrictions as of June 5, 2017.

5. The claimant returned to work on June 5, 2017.

6. Part of the claimant's job was to give medications to patients. He normally would push the med cart around the unit to deliver the medications. Due to his injury, he started leaving the med cart at the nursing station and taking the meds to the patients individually.

7. On June 9, 2017, the claimant sent the Director of Nurses (DON) a medical note stating that he could work with restriction; specifically he was not to push, pull, or lift more than 20 pounds.

8. As a nurse, the claimant needed to be able to grab a patient who might be falling. This would cause him to be lifting more than 20 pounds if it happened.

9. After receiving and reviewing the June 9, 2017 medical note, the DON informed the claimant that that the employer could not accommodate his restrictions and that he could not return to work until his doctor released him to work without restrictions. She told him to take time to recover and that his job would be waiting for him when he was ready.

10. The claimant tried to see his doctor the day after the DON told him that he could not work with restrictions. He learned at that time that his doctor was on vacation for a month. The claimant informed the DON that he would be unable to see his doctor for approximately one month and that he would see her as soon as she returned.

11. When the claimant saw his doctor, on July 14, 2017, she told him that she could not, in good conscience, release him to work without restrictions given what she knew of his health condition.

12. The claimant sent the DON a medical note, on or about July 14, 2017, which stated that he was unable to work from July 14, 2017 through August 14, 2017.

13. On September 11, 2017, the claimant saw his doctor who released him to work without restrictions. He provided the medical note to the DON within a day and told her he was ready to return to work on Monday September 18, 2017.

14. On Friday September 15, 2017, the claimant contacted the scheduler and stated that he should be put back on the schedule starting Monday September 18, 2017. The scheduler told him to report to the DON and Human Resources on Monday September 18, 2017.

15. When the clamant came into work on Monday September 18, 2017, he looked at the schedule and saw that he was not on the schedule. He also saw that his normal 7-3 shifts were assigned to 2 or more nurses. He asked the scheduler why he was not on the schedule. The scheduler told him that the DON was now doing the scheduling and that the clamant would need to talk to her if he wanted an answer to that question.

16. When the claimant met with the DON, she told him that she could not put him on the schedule and that he needed to speak to someone in Human Resources, as she did not know if he still had a job. The Human Resources person was not in that day so the claimant met with her the next day.

17. When the claimant met with the Human Resources person, on September 19, 2017, she told him that his shifts had been given to other people. The clamant told her that he was now able and available to take those shifts back. The Human Resources person told him that under FMLA the employer only had to preserve the claimant's job for 12 weeks, and as he was out of work for longer than that, they did not have to give him back his job. She then asked him to fill out the FMLA forms. He refused to do so. The Human Resources person then told the claimant to go back to the DON and that she would find him some hours.

18. The claimant went back to the DON and she offered him four part time work options, one was for 24 hours and three were for 16 hours. The claimant asked to combine the 24-hour position with one of the 16-hour positions and was told that he could only have one of the positions. The claimant took the 24-hour position, as he wanted as many hours as possible. The DON told the claimant that he would be the first person offered any pick-up hours when

other nurses called out so that he could make up the 16 hours needed to bring him back up to 40 hours. The claimant told the DON that while he was accepting the part-time schedule he did not agree with her decision to give his prior shifts to employees who had much less seniority with the employer than himself.

19. After working for a week or two, the claimant noticed that the pick-up hours he had been promised where actually being given to other employees, who all appeared to him to be from the DON's native country. He complained to the Human Resources person about this and she said that she would speak to the DON. When the claimant did not hear back from her after a few days he scheduled a meeting with the administrator and voiced his complaint to him. The Administrator agreed to look into the matter.

20. The Administrator met with the DON, the scheduler and the Human Resources person. He then informed the claimant that as policy had been followed regarding holding a positon open while an employee was on leave he could not get the clamant back his full time schedule. He told the claimant that his choices were to take the 24-hour positon or resign.

21. At some point, prior to October 16, 2017, the DON told the clamant that he was becoming a thorn in her side. She advised him that if he needed full-time hours he should look for a job somewhere else before he did something that would cause her to take drastic action.

22. The last day the claimant performed services for the employer was October 16, 2017. He was scheduled to work until 3:00pm and left around 3:15pm, as he had completed his shift duties and the employer was strict regarding not staying past scheduled end times without authorization.

23. During the evening of October 16, 2017, another employee, who worked the 3-11 shift, phoned the claimant and told him that the DON had come in looking for him near the start of the shift and had appeared to be very upset that he had already left. She told the claimant that the DON had stated that she had sufficient reason to discharge the claimant.

24. The claimant went into work for his next scheduled shift, Wednesday October 18, 2017. When he arrived, he saw that his name was circled on the schedule. This usually meant that the employee had called out. The claimant asked the scheduler why he was off the schedule and was told that the DON had taken him off. The scheduler was unable to tell the claimant why the DON had removed him.

25. The claimant attempted to meet with the DON on October 18, 2017 but she was not available, so he left.

26. The claimant expected to receive a call or letter from the DON or Human Resources explaining why he was off the schedule. He did not receive one. He therefore called the scheduler before his next scheduled shift, Saturday October 21, 2017, to see if he was on the schedule. He was told that he was not. He did the same thing on Monday, October 23, 2017, and was told the same thing.

27. The claimant was aware that management had been taking action to terminate a number of employees and he expected, based on what had been happening in the past month, that he was about to be fired for an unknown reason. He was also aware that another employee, who had been told that he was going to be fired, was allowed to instead resign his full time position and continue working on a per diem basis.

28. The claimant decided to resign from his part-time position and request per diem status as a way of avoiding the humiliation of being discharged. He wrote a letter to the employer, which he delivered, on or about October 23, 2017. This letter reviewed his recent history with the employer and his belief that the DON was giving scheduling preference to nurses who came from her native country, which the claimant did not. The letter stated that he wanted to downgrade his employment from part-time to per diem position instead. He indicated that this was because the reduction of his hours from full time to part time had caused him: frustration, economic hardship, emotional torture, and a continuous feeling of inferiority and worthlessness since he did not come from the Director of Nursing's native country.

29. After downgrading to per diem status, the claimant expected the employer to call him with hours as they became available, in the manner they had done when they originally hired him in 2011. He received no calls or letters offering hours.

30. On October 26, 2017, the claimant filed his 2017-01 claim for unemployment benefits, effective October 16, 2017.

31. The claimant's mother passed way at the end of October 2017. The claimant, as the oldest child, had many responsibilities in relation to this event and was grieving.

32. On November 11, 2017, DUA issued a Notice of Approval stating that the claimant was entitled to benefits under Section 25(e)(2) of the law effective September 11, 2017, as his position was no longer available to him when he returned from a leave of absence.

33. Sometime in November 2017, the claimant traveled to New York to take care of matters relating to his mother's death. He then traveled to Nigeria in December 2017. He returned to the United States in February 2018. He was unavailable to accept per diem hours with the employer during this period.

34. The employer appealed the November 11, 2017 determination. On January 2, 2018, a hearing was held. The claimant was unaware of this due to his absence from the country. On or about February 12, 2018 a hearings decision was issued, which reversed the November 11, 2017 determination.

35. On March 19, 2018, the claimant appealed the February 12, 2018 hearings decision.

36. On April 3, 2018, he Board of Review granted the claimant appeal and ordered that a hearing be scheduled to take additional evidence. This hearing was held on June 5, 2018. One employer witness, the Human Resources Manager, attended this hearing along with the claimant.

CREDIBILITY ASSESSMENT:

The claimant testimony was given more weight than that of the employer's witnesses' as he was the only witness to give direct testimony subject to cross-examination. The Human Resources Manager did not have any direct testimony to present relating to the claimant separation and the Executive Assistant did not return to the remand hearing to make herself available for cross-examination. The claimant's testimony was, in general, found to be credible on its face.

The claimant provided testimony indicating that he [returned] to work with restrictions for one week and that the DON then removed him from the schedule for no reason until he was released without restrictions. The record, however, includes a doctor's note dated May 22, 2017 that states that the claimant was able to return to work without restriction on June 5, 2017 and another doctor's note dated June 9, 2017 stating that he could work with specific light duty restrictions. Based on these two documents it was found that the claimant returned to work on June 5, 2017 without restrictions and that he was removed from the schedule on or about June 9, 2017, after his doctor placed him on a light duty restriction that the employer could not safely accommodate.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, although we agree with the review examiner that the claimant did resign his position with the employer, we conclude that he did so for good cause.

During the remand hearing, the claimant emphasized that he did not resign his position, he merely downgraded it, from part-time to per diem. The review examiner's supported

consolidated findings of fact indicate that after the claimant changed his status, he never worked for the employer again. *See* Consolidated Findings of Fact ## 28 and 29. He then filed his claim for unemployment benefits. Consolidated Finding of Fact # 30. Although the claimant may have maintained a per diem status with the employer for some period of time after October 23, 2017, we think that his decision to give up the permanent, ongoing part-time job was equivalent to him resigning his position. He was no longer working a consistent schedule due to his decision to stop working the part-time job. In this way, he caused his complete unemployment prior to when he filed his claim for benefits. Consequently, G.L. c. 151A, § 25(e)(1) applies in this matter. That section of law 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 this section of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. The review examiner initially concluded that the claimant had not carried his burden. We disagree.

In this case, the claimant, who had been working consistent full-time hours during the course of his employment, was on a medical leave of absence from, more or less, mid-February of 2017 through September 11, 2017. Although this length of time was clearly longer than a 12-week Family Medical Leave Act (FMLA) leave of absence, the claimant had been told by the Director of Nursing that he should "take time to recover and that his job would be waiting for him when he was ready" to return to work. Consolidated Finding of Fact # 9. A reasonable reading of the findings and interpretation of the claimant's testimony is that the employer approved the claimant to be out of work, even if his job was no longer covered by FMLA.

After he was cleared to return to work without restrictions, the employer did not have a full-time job for him. Eventually, the claimant accepted a part-time position, working 24 hours per week. It appears from the findings that he worked this part-time job for about one month. *See* Consolidated Findings of Fact ## 13 through 22. Ultimately, the claimant separated from his part-time position "as a way of avoiding the humiliation of being discharged." Although the claimant thought that he might be discharged, it appears that the underlying reasons for his concerns about his job initially stem from the employer's failure to offer him his full-time position after he was cleared to return from his medical leave of absence. *See* Consolidated Finding of Fact # 28.

Where an employer makes a substantial change to a claimant's hours, pay, or benefits, the employer creates good cause to resign, because the change renders the job no longer suitable to work. *See* Graves v. Dir. of Division of Employment Security, 384 Mass. 766 (1981) (substantial decline in wages may render job unsuitable). Applying Graves, we have held that an employer's drastic reduction in a claimant's hours rendered her position *per se* unsuitable. *See* Board of Review Decision BR-110763 (March 28, 2010) (claimant's hours cut in half). Under such circumstances, the employer unilaterally changes the fundamental conditions of a person's employment relationship. In this case, the claimant worked for many years as a full-time

employee, with 40 to 60 hours of work per week. Consolidated Finding of Fact # 1. The employer allowed him to be out of work for an extended period of time following the car accident in February of 2017. When he was able to return to work, he expected to return to a full-time position. However, his hours were reduced from 40–60 per week to 24. This drastic reduction in hours (and, thus, pay) rendered the job unsuitable for the claimant.

We recognize that prior to quitting a job, a worker must make reasonable efforts at preserving his employment. Such a requirement has been held to be a prerequisite to showing that a person was reasonable in quitting his job, unless it would have been futile to continue preservation efforts. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). In this case, the claimant had various discussions with the Director of Nursing and Human Resources regarding his concerns about his hours. He even took the reduced schedule of twenty-four hours with some assurances that he would be given additional hours to make up for the lost work. *See* Consolidated Finding of Fact # 18. However, he was not given any more hours than the 24 promised to him. *See* Consolidated Finding of Fact # 19. By working the new part-time schedule for about one month, we think that the claimant gave the job a reasonable trial period before quitting. *See* Jacobsen v. Dir. of Division of Employment Security, 383 Mass. 879, 880 (1981) (rescript opinion) (a voluntary separation, after a reasonable trial period, from a job which is not suitable may not disqualify claimant from receiving benefits under G.L. c. 151A, § 25(e)(1)). In so doing, the claimant took reasonable steps, after the employer did not offer him full-time hours, to keep his job.

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(e)(1), is not supported by substantial and credible evidence or free from error of law, because the claimant, who had worked full-time for the employer for several years, carried his burden to show that the employer was responsible for his resignation when it offered him a part-time schedule after he returned from a medical leave of absence.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 22, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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