Where the claimant was in an approved § 30 training program, she was not required to accept an offer of suitable work with her previous employer, pursuant to § 25(c).

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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.

After being discharged from her position with the employer, the claimant filed an unemployment claim effective August 6, 2017. At that time, the employer indicated that the claimant was laid off due to lack of work, and the claimant was approved for benefits. In a determination issued on August 24, 2017, the DUA approved the claimant for training benefits pursuant to G.L. c. 151A, § 30(c). Later, after the employer informed the DUA that the claimant had declined an offer of re-employment, the parties were issued a Notice of Approval on February 28, 2018, finding the claimant eligible for benefits pursuant to G.L. c. 151A, § 25(c). 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 in a decision rendered on May 3, 2018, and denied benefits for a period of eight weeks. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to accept an offer of suitable employment and, thus, was disqualified G.L. c. 151A, § 25(c), for a period of eight weeks. 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 allow the claimant an opportunity to participate and to make findings about the claimant's training approval. 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 issue before the Board is whether the review examiner's decision, which concluded that the claimant failed to accept an offer of suitable employment pursuant to G.L. c. 151A, § 25(c), is supported by substantial and credible evidence and is free from error of law, where the claimant was attending an approved training program pursuant to G.L. c. 151A, § 30(c), during the time period in question.

Findings of Fact

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

1. The employer provides support for disabled people. The claimant worked as a direct support professional for the employer. The claimant worked for the employer from 5/05/14 to 6/21/17.

2. The claimant worked on a per diem basis. The employer required the claimant to work at least seventy-five hours in a three-month period. The employer paid the claimant $12.77 per hour.

3. The claimant did not work a set schedule and her hours varied each week. On average, the claimant worked 29.15 hours per week.

4. The claimant belonged to a labor union. The employer and the union executed a collective bargaining agreement. Article 31 of the agreement read, "Effective January 1, 2015, per diem staff must work a minimum of 75 hours in a 3-month period in order to maintain employment with [the employer]."

5. The employer had a computer system called Shiftboard. The employer posted available shifts in the system. The claimant used the system to sign up for shifts. She could sign up for up to forty hours per week. The employer allowed the claimant to work an additional ten hours per week if she gained its approval.

6. The employer sent e-mails to the claimant. The employer offered shifts in these e-mails. The claimant could also call the employer to ask for shifts.

7. The employer had an attendance policy. The policy indicated that a worker voluntarily resigns if she commits two consecutive no call/no shows.

8. The claimant signed up to work shifts on 7/28/17 and 7/29/17.

9. The claimant has two daughters. They are three years old and eight years old. Both daughters have sickle cell anemia.

10. The claimant travelled to Africa with her two daughters in May 2017. She planned to return to the United States on or around Monday 7/24/17.

11. The claimant's eight year old daughter ("Daughter 1") fell ill while in Africa. Daughter 1 had a fever. A medical care provider in Africa recommended that Daughter 1 should not travel until the fever improved.

12. The claimant called the employer on or around Wednesday 7/26/17. The claimant was still in Africa. The claimant spoke with a certain supervisor (Worker X). The claimant reported that she was still in Africa and that she must

remain there due to Daughter 1's illness. She reported that she must miss the shifts on 7/28/17 and 7/29/17.

13. The claimant did not work the shifts on 7/28/17 or 7/29/17. She returned to the United States in the week after 7/29/17. She took Daughter 1 to a hospital when she returned from Africa.

14. The employer concluded that the claimant committed no call/no shows on 7/28/17 and 7/29/17. The employer determined that the clamant quit her employment.

15. In the period 8/01/17 to 10/09/17, the employer did not allow the claimant to access Shiftboard or gain shifts because it determined that she had left her employment. The claimant grieved her separation from employment via her union.

16. The claimant filed a claim for unemployment insurance benefits. The effective date of the claim is 8/06/17.

17. The DUA sent a Lack of Work Notification to the employer's agent. The agent sent an e-mail to the employer's employee relations manager. The e-mail was dated 8/22/17. The e-mail read, "[The agent] has received a claim on the above claimant [employer's name]. Please provide me with the information below as it pertains to the claimant's employment/separation." The employee relations manager replied via e-mail. In her reply, the employee relations manager reported that the employer wanted to protest the claim. She reported that the claimant worked per diem and that the claimant was still employed. She reported that the claimant was still employed because the claimant and the employer were in the grievance process. The employee relations manager never told the agent that the employer laid off the claimant.

18. The employer's agent filled out and returned the Lack or Work Notification. In the document, the employer reported that the claimant was separated from employment due to a lack of work, effective 6/29/17. The agent electronically signed the document and dated it 8/24/17. The agent did not relay the information that the employee relations manager provided.

19. The claimant prevailed in her grievance. The employer agreed to restore the claimant to her direct support professional position effective 10/10/17. The employer agreed that it would not use the period 7/30/17 to 10/10/17 in any future calculus to determine whether the claimant worked the required seventy-five hours.

20. The employer restored the claimant's access to Shiftboard when it restored her employment on 10/10/17. The employer sent an e-mail to the claimant's union. The e-mail was dated 10/12/18. The e-mail indicated that the employer reopened the claimant's Shiftboard account.

21. The employer did not decrease the claimant's pay rate when it restored the claimant's employment. From 10/10/17 onward, the employer allowed the claimant to work up to forty hours per week and an additional ten hours with approval. The employer allowed the claimant to use Shiftboard to request shifts. The employer also resumed the e-mails to the claimant that offered shifts. The employer allowed the claimant to call and ask for shifts.

22. In October, 2017, Daughter 1 was ill for an extended period due to her sickle cell anemia. Daughter 1 needed surgery. The surgery was scheduled for November 2017.

23. On or around 10/24/17, the claimant's union representative told the claimant that the employer had reinstated her. The claimant told the union representative that she could not come back at that point because Daughter 1 was ill. She explained that Daughter 1 needed surgery and it was scheduled for November 2017. The claimant told the union representative that she could come back to work in November or December 2017 after the surgery.

24. The union representative sent an e-mail to the employer. The e-mail was dated 10/24/17. The e-mail read, "I have just got hold of [the claimant] since our last discussion on her issue. She said her daughter is very sick and she has been in and out of the hospital. She said cannot start picking ours [sic] now and she would not want the 75 hours in 90 days Count against her, so she requesting that she want to ask for leave of absence now to sought her family problems."

25. The claimant attended a full-time school program in October and November, 2017. The claimant did not want to work for the employer in this period because she was in full-time school and because she was providing care for Daughter 1. She determined that she could not handle work for the employer in addition to these obligations.

26. In December 2017, the claimant contacted the employer and asked if she could resume work. The employer told the claimant that she was no longer employed. From 10/10/17 to the time of this conversation, the claimant had not worked any shifts for the employer.

27. The DUA determined that the claimant was entitled to benefits from 10/01/17 onward under Section 25(c) of the law. The employer appealed this determination. In November 2017, the employer's agent protested the benefit charges made to the employer. In the protest form, the agent reported, "Claimant was laid off but has been rehired 10/01/17. There is much work available on all shifts." This submission was inaccurate.

28. The DUA approved the claimant to receive benefits under its Training Opportunities Program (TOP). The DUA sent an approval notice to the claimant for Issue Identification Number 0022 7581 44-01. The approval notice was

dated 8/24/17. The approval notice read, "Reasoning and Findings: You are in attendance at a full-time program and your application for school or training approval was approved pursuant to the above cited sections of the Law. You are eligible to receive up to 26 weeks times your weekly benefit rate in additional benefits while attending the full-time program. In addition, you have been granted a waiver of the work search requirements." The approval notice continued, "Applicable Section of Law: Massachusetts general Law Chapter 151A, § 30. Section 30 Benefits Approved. Salem State University. Bachelor's of Science Nursing. Start Date: 9/06/2017, Expected Degree Completion Dare [sic]: 05/14/2018. Fall Semester, 09/06/2017 to 12/21/2017. Spring Semester, 01/16/2018 to 5/142013 [sic]." The approval notice continued, "Effect of this Determination; You are eligible for additional benefits equivalent to 26 times your benefit amount while in attendance at approved school or training if otherwise eligible."

Credibility Assessment:

In the hearing, the claimant testified that she called the employer on or around 7/26/17 and that she reported her anticipated absences for 7/28/17 and 7/29/17. She testified that she spoke to Worker X. In the hearing, the employer contended that the claimant committed no call/no shows for 7/28/17 and 7/29/17. The employer contended that the claimant did not report her absences for those two days. The employer submitted an e-mail to support its contention. The employer asserted that Worker X wrote the e-mail. The e-mail indicates that the claimant never spoke to Worker X to report absences for 7/28/17 and 7/29/17. Given the totality of the testimony and evidence presented, the claimant's testimony is accepted as credible. The claimant's testimony under oath is more credible than the hearsay document and the document's alleged author did not testify in the hearing. Also, the claimant prevailed in her grievance. This supports the claimant's testimony that she indeed called and reported the anticipated absences.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant should be disqualified pursuant to G.L. c. 151A, § 25(c), because she was attending an approved training program pursuant to G.L. c. 151A, § 30(c), at the time the offer of employment was declined.

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 . . . .
>
> An individual who is certified as attending an industrial retraining course or other vocational training course as provided under section thirty shall not be denied benefits by reason of the application of the first paragraph of this subsection relating to failure to apply for, or refusal to accept, suitable work.

Here, it was undisputed that the instant employer offered to reinstate the claimant to her previous position, effective October 10, 2017, and that the claimant refused this offer for various reasons in the subsequent months. However, prior to this offer of employment, the claimant was approved to attend a retraining program, pursuant to G.L. c. 151A, § 30(c), for the period of September 6, 2017 through May 14, 2018.

While the employment offered by the employer appears to be otherwise suitable, the claimant was under no obligation to accept it because of her ongoing training. This exception is not only clearly stated in the text of G.L. c. 151A, § 25(c), itself, but can also be found within the regulations governing the Training Opportunities Program, at 430 CMR 9.07(2).

We, therefore, conclude as a matter of law that, due to her attendance in an approved training program pursuant to G.L. c. 151A, § 30(c), the claimant was not subject to the requirements of G.L. c. 151A, § 25(c), to accept suitable employment.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending October 14, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 28, 2018

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
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.

JRK/rh