When the claimant's employer lost its contract with its client, the claimant accepted the client's offer to perform the same part-time security job for a higher wage. Technically, his separation from the employer was disqualifying under G.L. c. 151A, § 25(e)(1). However, because this was benefit-year part-time work and the claimant immediately picked up another part-time job, 430 CMR 4.76 limits the disqualification penalty only to a reduction of his weekly benefit amount by the usual earnings disregard.

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Issue ID: 0027 2059 15

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 we affirm in part and reverse in part.

The claimant resigned from his part-time position with the employer on September 29, 2018. On October 19, 2018, the DUA determined that he remained eligible for benefits on an existing claim. 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 December 12, 2018. 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 or urgent, compelling, and necessitous reasons 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 evidence from the claimant concerning the circumstances of his separation. 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 original decision, which concluded that the claimant was disqualified from receiving further benefits pursuant to G.L. c. 151A, § 25(e)(1), because of his separation from the employer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. Sometime in January, 2017, the claimant was laid off from a full-time finance position.

2. Since then, the claimant has desired to seek a full-time employment position in the finance field.

3. From April 6, 2017, until September 29, 2018, the claimant worked as an on-call security guard for the employer, a security company.

4. Throughout his employment, the claimant generally worked between 8 and 16 hours per week.

5. The employer paid the claimant $14 per hour.

6. The claimant worked for the employer providing security at a hospital (the Client).

7. The Client is part of a large, [City A]-based non-profit hospital and physicians' network.

8. The claimant only pursued weekend shifts with the employer as he wanted to be available during the week to search and interview for finance employment positions.

9. On February 1, 2018, the claimant filed a claim for unemployment benefits with an effective date of January 28, 2018.

10. The employer's contract providing security for the Client was scheduled to end on October 1, 2018.

11. Sometime around early September 2018, the Client's director of security (the DOS) met with and told him that, given the Client's contract with the employer was ending on October 1, 2018, the Client had a need for on-call security guards. The DOS offered the claimant an on-call security guard position, to begin upon the expiration of the employer's contract with the Client, at a rate of $18 per hour. After the claimant expressed a desire to work in the finance field, the DOS told the claimant that he would support the claimant's decision to pursue a finance career within the Client, if he chose to do so.

12. The claimant accepted the position with the Client as he desired the higher hourly salary rate plus the opportunity to network for positions within the Client and its larger hospital and physicians' network.

13. The claimant, concluding that he only wanted to perform security work during the weekends in order to dedicate his time during the week to search and interview for prospective finance positions, decided to quit his employment with the employer.

14. The claimant worked for the employer until September 29, 2018.

15. On October 1, 2018, the employer's contract providing security for the Client ended.

16. On October 1, 2018, the claimant quit his employment, effective immediately, by sending an email to the employer's human resources manager (the manager). The email read, in relevant part, "Going to accept with [the Client] at this point in time. This will serve as a resignation with [the employer]."

17. At the time he quit his employment with the employer, the claimant had not had any other employment since July 2018, at which time he had a short-term, contract position with another employer.

18. Had the Client not offered him an on-call position at a rate of $18 per hour, the claimant would have continued working for the employer.

19. At no time did the employer lay off or discharge the claimant as a result of a lack of work.

20. The employer had work available for the claimant had he chosen not to quit.

21. The claimant's job was not in jeopardy when he chose to quit his employment.

22. Approximately 20 out of 22 of the employer's employees that worked at the Client's site ended up accepting positions with the Client.

23. Since he started working for the Client, the claimant has generally worked between 8 and 16 hours per week, typically during the weekends, in order to look for work in the finance field during the week.

24. The Client has not offered the claimant any health insurance benefits or any form of paid time off.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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 evidenced. However, as discussed

more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for further benefits under his claim.

Because the claimant voluntarily left his job with the employer, the review examiner properly analyzed his separation under the following provisions of G.L. c. 151A, § 25(e), which state, 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 express language under these provisions of law places the burden of proof upon the claimant. Here, the claimant left an on-call, part-time security guard job with the employer for two reasons. He was offered a higher hourly rate to perform the same job and the opportunity to apply for more suitable full-time positions in finance with this new larger and more diverse employer.

Because his reasons for resigning had nothing to do with the employer's conduct, we agree that the claimant did not show that he left for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (to show good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving). Similarly, there is no indication that the claimant stopped working for the employer due to urgent, compelling, and necessitous circumstances. He simply found a better part-time job.

Even though we agree that the claimant did not meet his burden for eligibility under G.L. c. 151A, § 25(e)(1), the circumstances of this case do not warrant disqualifying the claimant from receiving further unemployment benefits.

It is important to note that the claimant picked up this part-time $14 per hour security guard job with the employer in the benefit year of his 2017 claim, after he had been laid off from his primary full-time job as a financial analyst.[1] In Emerson v. Dir. of Division of Employment Security, the Supreme Judicial Court had occasion to consider whether a disqualifying voluntary separation from a part-time job, which followed a non-disqualifying separation from contemporaneous full-time employment, rendered the claimant ineligible for any unemployment benefits. 393 Mass. 351 (1984). In view of the Legislative intent set forth under G.L. c. 151A, § 74, to lighten the load of the unemployed worker, the Court declined to penalize the claimant by taking away all of her benefits for leaving her part-time benefit year job. Id. at 353. The Court rejected the agency's argument that G.L. c. 151A, § 25(e)(1), requires a full disqualification, stating, "[i]f accepted, the division's interpretation would mean that an unemployed worker

[1] We take administrative notice of the annual wages reported to the DUA by his former employer for the 2016 calendar year of $91,550.88, which are recorded in the DUA's electronic record-keeping system, UI Online. *See* also Remand Exhibit 3, page 12, a copy of the claimant's 2015 Form W-2 showing wages of $85,055.40.

would be disinclined to take part-time work and would prefer to remain idle and receive full benefits." Id.

In response to the Emerson decision, the DUA promulgated a new set of regulations, which, under various similar situations, impose less than a full disqualification from benefits for individuals who separate from part-time jobs under circumstances that are disqualifying under G.L. c. 151A, § 25(e). Essentially, the penalty is limited to a constructive deduction, reducing the weekly benefit amount by the amount of wages that an individual would have earned had he or she continued working in that part-time job. *See* 430 CMR 4.71–4.78.

Prior to August, 2013, separations that qualified for a constructive deduction were limited to subsidiary part-time jobs (meaning those worked contemporaneously with full-time work) or newly obtained part-time jobs obtained within the benefit year.[2] On August 16, 2013, the regulations were expanded to include, *inter alia*, a separation from part-time work that occurs during the benefit year.[3] In the present appeal, we have just such a separation from a part-time job that occurred during the claimant's benefit year, thus rendering the claimant eligible for a constructive deduction rather than a complete disqualification from further benefits.

However, because the claimant seamlessly transitioned into another part-time job with a new employer, our analysis does not end here. A further subsection added to the regulations in 2013 provides, "If a claimant subject to a constructive deduction obtains part-time work or returns to the former part-time work, the claimant shall be subject to the earnings offset only while so employed, not that constructive deduction." 430 CMR 4.76(3). Upon separating from the employer, the claimant immediately began working the part-time security guard position for the new employer. Therefore, no penalty is imposed. Pursuant to the DUA regulations, the claimant's weekly benefit amount is subject only to the earnings offset under G.L. c. 151A, § 29(b).

In harmony with its desire to encourage benefit year employment, the DUA regulations also provide that further benefits paid to the claimant should not be charged the employer's account under these circumstances. *See* 430 CMR 5.05(1) and (4).

We, therefore, conclude as a matter of law that the claimant's separation from the employer was disqualifying under G.L. c. 151A, § 25(e). We further concluded that pursuant to 430 CMR 4.76(1)(a)2 and (3), the penalty is limited to the earnings disregard imposed under G.L. c. 151A, § 29(b).

[2] *See* 430 CMR 4.73 and 4.76(1), effective January 5, 2011.
[3] *See* 430 CMR 4.76(1)(a)2, effective August 16, 2013.

The portion of the review examiner's decision that disqualified the claimant under G.L. c. 151A, § 25(e)(1) is affirmed. The portion of the review examiner's decision which concluded that the claimant is not eligible for further benefits is reversed. The claimant is entitled to receive benefits for the week beginning September 23, 2018, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 2019

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
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/jv/rh