Employer stopped offering work to the claimant for an unknown reason after the claimant changed his schedule from a full-time to per diem, which the employer said was the only way to get three days off to interview for a second, part-time job. By not offering work, this is deemed to be a layoff and not disqualifying under G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0032 2392 04

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 July 19, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 9, 2019. 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 November 8, 2019. 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, 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 give the claimant an opportunity to present evidence. We remanded the case a second time to obtain additional evidence pertaining to the claimant's employment history. Both parties attended the remand hearings. 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 voluntarily left employment without good cause attributable to the employer, or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the employer stopped offering work to the claimant after he changed his schedule from full-time to *per diem* in order to work a second job.

Findings of Fact

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

1. The claimant worked as a Certified Nursing Assistant for the employer, a skilled nursing facility, from 9/15/11, until he separated from the employer on 7/19/19.

2. The claimant was hired to work full-time, 40 hours a week, earning $17.31 an hour.

3. The claimant needed to take off three days in July to go through the hiring process for a part-time permanent position he was applying for. The claimant's daughter and grandson live with the claimant, so he was looking to take on a part-time job in addition to his full-time job. The part-time job was not going to interfere with his full-time employment with the instant employer.

4. The claimant asked the Scheduler if he could have the three days off. The Scheduler told the claimant that she could not grant him vacation, but what she could do is change his status from full-time to per diem and if his full-time position was available after he went through the three day hiring process for his new employment, he could go back to his full-time job. And if his full-time job was not available, he could work as needed per diem.

5. The Scheduler told the claimant to write a letter for her requesting the change in his employment status. The claimant wrote the letter verbatim to what the Scheduler had requested. On 7/18/19, the claimant left the letter on the scheduler's desk as she requested.

6. The claimant completed the job process for the part-time job within that week.

7. The claimant worked part-time for the [Employer A] employer between July 29, 2019, and September 6, 2019, when he separated. The DUA did find the claimant eligible on this separation.

8. The [Employer A] employer is the same employer the claimant is referring to in his telephone fact finding as [Name A]. The claimant did request time off on or around 7/18/19, in order to attend the [Employer A] orientation.

9. The claimant attended orientation on 7/24/19 for three days.

10. On Monday, 7/29/19, the claimant called and left a message for the Scheduler to tell her he was all set with the hiring process for the part-time job and asked if he could start working picking up hours. The Scheduler called the claimant back the next morning and told the claimant there were no hours available that

week but any call outs she could put him on standby. The claimant agreed and informed the Scheduler he would be available for the morning shifts.

11. The claimant also contacted the instant employer in September of 2019, after he separated from the new employer to see if he could return to full-time work. The claimant received a call back from a different employee who took over as the Scheduler. This employee told the claimant to start picking up hours until the employer could work him back to 40 hours. She asked the claimant what hours he could work. The claimant had informed the instant employer that he was available to work 7 a.m. to 3 p.m. shifts because he would be working 3 p.m. to 11 p.m. for the new employer.

12. This employee subsequently called the claimant back to tell him he needed to speak to payroll because she was having trouble punching in his ID #.

13. The claimant called Payroll to fix his ID #. The Payroll Representative told the claimant she would do it and call him back. That next morning the claimant received a call back from the Payroll Representative informing him that he needed to speak to the Director of Nursing because the Director of Nursing instructed her to take the claimant off the payroll.

14. The claimant attempted to contact the Director of Nursing numerous times, leaving her messages. He left his number 5 times in voice messages for the Director and attempted to go into the workplace to meet with her, leaving his phone number for her. The Director of Nurses never called the claimant back.

15. The claimant reached out to the Receptionist to try to reach the Director of Nursing to no avail.

16. The claimant never heard back from the employer.

17. The claimant did not leave the instant employer in order to accept new employment. The claimant intended to work both jobs simultaneously.

18. As of July 18, 2019, the claimant planned on working part-time 3 p.m. to 11 p.m. with his new employer. The claimant did not have to make a decision whether he would work full-time or part-time with the new employer until after he completed training. The claimant was not given a deadline to make this decision. He told the Director at his new employment before training was done, that he was going to work part-time because he planned on continuing full-time work with the instant employer.

Credibility Assessment:

The claimant provided clear and concise testimony of the events leading to his separation at both remand hearings. The only employer witness at the hearings had no additional testimony to offer and indicated he was not involved in the

> claimant's separation. The claimant's testimony is, therefore, deemed more credible and given more weight.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We clarify that, by the claimant's testimony, which the review examiner credited, the events described in Consolidated Findings ## 11 through 15 occurred prior to the September, 2019, phone call noted in Finding # 11. In adopting the remaining findings, we deem 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 believe that the consolidated findings support an award of benefits to the claimant.

After the initial hearing, which the claimant did not attend, the review examiner concluded that the claimant left his job for unknown reasons. However, after hearing the claimant's testimony during the two subsequent remand hearings, she found that the employer stopped contacting the claimant for work after he changed his schedule from full-time to *per diem* in order to commence new part-time employment. In light of these findings, we conclude that the claimant did not quit his job with the instant employer and, therefore, G.L. c. 151A, § 25(e)(1) does not apply to the claimant's separation. The consolidated findings support the conclusion that the claimant was terminated from his employment, and, therefore, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. . . .

Although we recognize that the claimant chose to reduce his hours to *per diem* as of July 18, 2019, despite the availability of full-time work, the employment relationship was not severed by the claimant at that time. The claimant's separation took place only after he did not receive any work from the employer for several weeks, despite making his availability known to the employer. Specifically, after remand, the review examiner found that despite numerous calls and visits from the claimant to the employer requesting hours and sharing his availability for first shift work, the employer did not offer the claimant any work after July 29, 2019. Since it is unknown why the employer stopped offering work to the claimant, it has not been established that his separation from employment was due to either deliberate misconduct in wilful disregard of the employer's interests, or a knowing violation of an employer rule or policy within the meaning of G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant was discharged from employment due to a lack of work, which is not disqualifying under the statute.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 21, 2019, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 11, 2020

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT 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.

SVL/rh