The claimant caused his own separation after accepting a different job with a new employer because he would only continue working for the employer if they agreed to a substantial change in the terms of his employment. He separated because he had accepted new work. Board further held that he is not entitled to benefits because he knew the new work was going to be of a finite duration and, therefore, did not separate to accept new permanent employment within the meaning of G.L. c. 151A, § 25(e).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0081 3928 16

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 October 13, 2023. He filed a claim for unemployment benefits with the DUA, effective October 29, 2023, which was denied in a determination issued on November 21, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 19, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 employer did not show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectations because the employer maintained the claimant resigned his employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. From July 19, 2023, to October 13, 2023, the claimant worked part-time as a bartender/server for the employer, a restaurant.

2. The employer is located in [City] and is open year-round. The restaurant is open 7 days a week from 11:30 a.m. to 9:30 pm. During the winter season, there are fewer tourists, and the employer has less work available.

3. The claimant has rented a home in [City] for the past 10 years. For the past three years, the claimant has not lived in [City] during the winter.

4. At the time of hire, the claimant told the employer that he could not work beyond November 1, 2023. The claimant's lease expired on November 1, 2023. The home was not winterized and had no heat.

5. At the time of hire, the employer told the claimant that year-round employees and employees with more seniority, would get scheduling preference.

6. The claimant's direct supervisor was the employer's manager.

7. The claimant did not have a set schedule or a guaranteed number of hours.

8. The claimant typically worked 4 shifts or 24 to 30 hours weekly. Typically, the claimant did not work Tuesdays and Saturdays.

9. The claimant's hourly rate was $6.75 plus tips.

10. Every Friday at the restaurant, the employer posts a physical copy of the employee work schedule for the following week, the employee work schedule runs Monday through Sunday.

11. Beginning in September 2023, the claimant's hours were reduced due to a lack of work.

12. On October 9, 2023, the owner and the claimant discussed the claimant's frustration with the lack of hours and assigned shifts. Later that same day, the owner and the claimant had a verbal altercation following a friend's memorial.

13. On October 10, 2023, the claimant called his supervisor and stated he could not report to work for his scheduled shift because he had an eye infection. The supervisor told him that he needed a doctor's note to return to work.

14. On October 11, 2023, a second employer, another restaurant, offered the claimant a full-time position as a host.

15. On October 12, 2023, the claimant began working for the new employer. The claimant accepted the new position due to the lack of hours with the instant employer.

16. On October 13, 2023, the claimant was scheduled to work at 10:30 a.m. Prior to the start of his shift, the employer notified him that he had been "cut from the schedule" and should not report to work.

17. Later that day, the claimant notified the owner via email correspondence that due to the lack of hours, he had started working as a host for a different employer, another restaurant, who had guaranteed him 7 shifts per week. The claimant wrote "I will not have the same availability going forward because I have to make money in order to survive. Let me know if you would like to speak with me and I can stop by at your convenience." The owner responded that he was happy for the claimant and would have the manager take him off the schedule. The owner wrote, "Good luck in the future and I'm sorry you had to quit [employer]". The claimant asked a coworker to check the posted schedule for the following week. The claimant was not scheduled to work.

18. Subsequently, the claimant responded to the owner's email, stating, "My new availability will be more clear in the coming hours, As of now I can work Monday Lunch on the upcoming schedule if needed." The owner did not respond. The claimant asked a coworker to cover his scheduled Sunday night shift, and the coworker told him the shift had already been reassigned.

19. The claimant determined that the employer had discharged him.

20. On October 13, 2023, the claimant did not quit his employment.

21. On October 13, 2023, the employer discharged the clamant.

22. The claimant continued working for the new employer until October 29, 2023, when the new employer closed for the winter season, and he was discharged due to a lack of work.

23. On October 31, 2023, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance with an effective date of October 29, 2023.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Findings of Fact ## 20 and 21 as inconsistent with the evidence of record, as explained below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

As the parties disputed whether the claimant resigned his position or was discharged, we first consider whether to analyze this separation as a resignation pursuant to G.L. c. 151A, § 25(e)(1), or a discharge pursuant to G.L. c. 151A, § 25(e)(2), for purposes of unemployment benefit eligibility. On October 13, 2023, the claimant informed the employer that he was going to have a more limited availability going forward, because he had accepted a new job where he was guaranteed to work seven shifts a week at a different restaurant. Because the owner would not agree to the claimant's new terms, the claimant's employment ended that day. Finding of Fact # 17. Effectively, the claimant informed the owner that he was unwilling to continue working for the instant employer unless it guaranteed him shifts that did not conflict with his other work. Inasmuch as the claimant made his continued employment contingent upon the employer's acceptance of these new terms, we believe that the claimant's decision to end his employment was his own.

Thus, we view this as a resignation, and the claimant's eligibility for benefits is properly analyzed pursuant to the following provisions under G.L. c. 151A, § 25(e), which state, in relevant 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.

These statutory provisions expressly assign the burden of proof to the claimant.

In this case, the claimant separated from the instant employer because he had accepted new work with a different employer. Therefore, there is no basis to conclude that the claimant left his employment for good cause attributable to the employer or for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e). Rather, based on the claimant's testimony and the documentary evidence of record, we consider his eligibility for benefits based on the third paragraph under G.L. c. 151A, § 25(e), which states, in relevant 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.

By its express terms, this section of law places the burden of proof upon the claimant to show that he left his employment in good faith to accept new employment.

Finding of Fact # 14 provides that the new job was to be full-time. However, the claimant also conceded that, at the time that he accepted this new job, he understood that his work with his new employer would end when it closed the restaurant for the duration of the quickly approaching off-season. Finding of Fact # 22. Because the claimant understood that his new job would be finite

in duration, the claimant did not show that he resigned to accept an offer of *permanent* full-time employment within the meaning of § 25(e).

We, therefore, conclude as a matter of law that the claimant has not satisfied his burden to show that he left his employment in good faith to accept new employment on a permanent full-time basis pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is denied benefits for the week of October 29, 2023, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 26, 2024

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
(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.

LSW/rh