Although the claimant's separation from the employer is disqualifying pursuant to G.L. c. 151A, § 25(e)(1), because she failed to show good cause attributable to the employer or urgent, compelling, and necessitous reasons for not telling the employer that she would not report for work, the claimant remains eligible for benefits. This is because her work for the employer was part-time and subsidiary to a full-time job, and she separated from the instant employer more than four weeks prior to filing a claim based upon losing her primary job.

Board of Review
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Issue ID: 0082 0911 34

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 her position with the employer on December 16, 2023. She filed a claim for unemployment benefits with the DUA, effective January 21, 2024, which was denied in a determination issued on May 7, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 25, 2024. 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 obtain additional evidence pertaining to the claimant's new full-time employment and the reduction to her hours with the instant employer. Only the claimant 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 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 the claimant stopped going to work because the employer failed to fulfill its promise to give her a server position.

Findings of Fact

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

1. The instant employer is a restaurant.

2. The instant employer's assistant general manager (AGM) and the claimant had previously worked together at a different restaurant.

3. The claimant and the AGM were friends on Facebook.

4. Around February, 2023, the AGM posted on Facebook that the instant employer had openings for server and host positions.

5. A host greets the restaurant guests at the entrance and earns a consistent hourly rate, with no tips. A server takes orders from the restaurant guests and earns tips from the guests. Servers typically earn "a lot more" than hosts.

6. The claimant had worked as a server for "several" years.

7. The claimant was interested in the server position posted by the AGM.

8. The claimant messaged the AGM about the open positions. The AGM scheduled the claimant for an interview.

9. During the interview, the AGM explained that there was no opening for a server position at that moment, but that server positions would become open in the spring or in the summer, and the claimant would be offered an open server position.

10. The AGM encouraged the claimant to accept a host position so they could "learn the restaurant, the flow, and the menu and everything."

11. After the interview, the claimant was offered a host position by the instant employer. The claimant accepted the offer.

12. The claimant accepted the host position because they believed a server position would later become available to them. If the instant employer had not told the claimant that a server position would open up later, the claimant would not have accepted the host position.

13. On February 10, 2023, the claimant began working as a part-time (8+ hours per week) host for the instant employer, for $16.50 an hour.

14. When the claimant worked for the instant employer, they also concurrently worked as a full-time special education teacher during the school year.

15. During the school year, the claimant typically worked on Fridays, Saturdays and Sundays, for a total of about 18 hours per week.

16. During the summer, the claimant typically worked more hours because they were not working at the school during the summer. Typically, the claimant worked about 30-36 hours per week in the summer.

17. The claimant's direct supervisor was the instant employer's general manager (GM).

18. During their employment, the claimant sometimes asked the GM and AGM about a server position. Every time the claimant asked, both the GM and AGM agreed that the claimant should be considered for a server position, but they never offered them the position at any time.

19. One time around June or July, 2023, the claimant asked the GM about a server position. The GM stated that the claimant would receive training for a server position.

20. One time in July, 2023, the instant employer trained the claimant for a server position.

21. The claimant had some attendance issues from February to September, 2023.

22. On September 24, 2023, the instant employer had a discussion with the claimant. The instant employer told the claimant that because of their "reliability issues," the instant employer would slash their hours from three days a week (Fridays, Saturdays and Sundays) to one day a week (Saturdays only). This would reduce the claimant's hours from 18 hours per week to 7 hours per week. The claimant did not request this change in hours; the employer initiated it to address the claimant's "reliability issues."

23. The instant employer told the claimant that the instant employer would reassess the situation "over winter break."

24. The "reliability issues" in question were the claimant's attendance issues, whereby the claimant was absent for some of their scheduled shifts.

25. The claimant's attendance issues were due to the claimant's own medical issues, the fact that the claimant was also working a full-time job during the school year, and the claimant's need to care for their brother, who was ill.

26. The claimant did not protest the reduction in hours and never asked the instant employer to increase the hours because at that point, the claimant was dealing with stresses [sic] caused by caring for the brother.

27. In July, 2023, the instant employer gave a server position to the claimant's colleague who was previously a host. In December, 2023, the instant employer hired two new employees for two server positions.

28. When the two new servers were hired by the instant employer, the claimant felt that they would never be offered a server position.

29. On December 16, 2023, the claimant was scheduled to work. The claimant did not show up for work, and they did not inform the instant employer that they would not show up for work as scheduled.

30. After December 16, 2023, the instant employer never scheduled the claimant for any more shifts, and the claimant never contacted the instant employer asking to be scheduled for more shifts.

31. The claimant quit their job with the instant employer on December 16, 2023, when they were a no call/no show.

32. The claimant quit their job because the instant employer had failed to promote them to a server position.

33. The instant employer's decision to reduce the claimant's hours factored into the claimant's decision to quit, in that working one day a week only as a host did not make financial sense for the claimant. However, ultimately, the claimant made the decision to quit because of the instant employer's failure to offer them a server position.

34. The claimant would have continued to work for the instant employer if the instant employer had offered them a server position.

35. On December 11, 2023, the claimant began a full-time (36 to 40 hours per week) medical receptionist job with a new employer, an OBGYN clinic, for $23 an hour.

36. At the time the claimant started the new job, they were also still working for the instant employer. From December 11, 2023, to December 16, 2023, the claimant worked concurrently for the instant employer and the new employer.

37. On January 26, 2024, the claimant was discharged by the new employer.

38. Because of the discharge by the new employer, the claimant applied for Unemployment Insurance (UI) benefits with the Massachusetts Department of Unemployment Assistance (DUA), with an effective date of January 21, 2024.

39. On May 7, 2024, the DUA issued a notice of disqualification (Issue Identification Number 0082 0911 13-01) disqualifying the claimant from receiving UI benefits under Massachusetts General Laws Chapter 151A, § 25(e)(2). This disqualification addressed the claimant's separation from the new employer. The claimant appealed this disqualification. After a hearing, the disqualification was reversed, the claimant's separation from the new employer

was found not to be disqualifying, and the claimant was approved for benefits based on their separation from the new employer.

Credibility Assessment:

The claimant and the instant employer's Human Resources (HR) Generalist attended the initial virtual hearing held on August 16, 2024. Only the claimant participated in the remand telephone hearing held on November 18, 2024. The instant employer did not attend the remand hearing.

The claimant's testimony regarding their separation from the instant employer is consistent and unrefuted. The claimant consistently testified that they quit the job because they had accepted a host position in faith that they would later be offered a server position, and the instant employer ended up passing them over for server positions and offering them to three different people. The instant employer's witness did not have firsthand information about the claimant's initial interview and whether or not a server position was promised to them at hire. Because of the claimant's consistency, and the instant employer's failure to provide substantial and credible evidence to refute the claimant's account of events, this review examiner credits the claimant's testimony as credible.

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 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 reject the portion of Consolidated Finding # 14 that states that the claimant worked as a special education teacher. The claimant testified that she worked as a special education teaching assistant. We also reject the portion of Consolidated Finding # 21 that states that the claimant's attendance issues began in February of 2023. During the hearing, both parties testified that her attendance issues began in the summer.[1] 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.

Because the claimant resigned from her position with the instant employer, this case is properly analyzed pursuant to G.L. c. 151A, § 25(e), 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 (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

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

> satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under the above provisions, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

"[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under G.L. c. 151A, § 25(e)(1), which may render involuntary a claimant's departure from work." Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Although the claimant testified that her own medical issues and her brother's mental illness affected her attendance, she did not contend that she left her employment for this or any other personal reason. Consolidated Finding # 25. Therefore, we consider only whether the claimant established good cause attributable to the employer to leave her job.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Here, the consolidated findings provide that the claimant decided to quit because the instant employer failed to promote her to a server position. Consolidated Finding # 32. Indeed, when the claimant was hired as a host for the instant employer in February, 2023, the employer had promised during her interview that it would change her position from a host to a server by the summer of 2023. *See* Consolidated Findings ## 4, 9, 11, and 12. By December, 2023, the employer had not fulfilled its promise to make the claimant a server. Instead, it had hired three others as servers during that time. Consolidated Findings ## 27–28. Because the employer had not fulfilled its promise to make her a server despite her repeated requests and reminders to do so, an argument can be made that the claimant had good cause attributable to the employer to resign.[2] *See* Consolidated Findings ## 18 and 19.

However, in this case, our analysis must also consider the manner in which the claimant chose to resign. She did not merely decide to stop working on December 16, 2023. She was a no-call, no-show. *See* Consolidated Finding # 29. This is treated as job abandonment, and the employee must sustain her burden for both the decision not to work and for failing to tell the employer. *See* Board of Review Decision 0076 1267 09 (Sept. 29, 2023) (although lack of transportation may have constituted an urgent, compelling, and necessitous reason for not being able to report for work, Board denied benefits because that did not explain why the claimant failed to notify the employer of his absences).

Here, the claimant has not presented any reason for her failure to either notify the employer that she had decided to resign or simply communicate that she would not report to work on December 16, 2023. Without such an explanation, we have no basis to conclude that this lack of notice was either for good cause attributable to the employer or due to urgent, compelling, and necessitous

[2] The record indicates that the claimant's attendance issues may have provided the employer with a good reason not to make her a server, as promised. *See* Consolidated Findings ## 21–24. However, we need not delve further into the employer's reasoning in light of our further analysis below.

reasons. As such, the claimant's separation from the instant employer was disqualifying pursuant to G.L. c. 151A, § 25(e)(1).

However, because the claimant merely worked part-time for the instant employer, we must consider her other employment and the timing of her separation. The DUA has taken the position that "a disqualifying separation from subsidiary, part-time employment, more than four weeks before the filing of a claim for benefits based on a separation from the primary employer or principal employment, has no effect on the claim as the part-time employer would not be considered an interested party." DUA UI Policy and Performance Memorandum (UIPP) 2014.05 (May 29, 2014), p. 3.

The consolidated findings show that, while still working part-time for the instant employer, the claimant started a full-time job with a new employer on December 11, 2023. Consolidated Finding # 35. This means that her job with the instant employer was subsidiary part-time work. *See* 430 CMR 4.73.

Only after separating from this new employer on January 26, 2024, did the claimant file a claim for unemployment benefits. *See* Consolidated Findings ## 37 and 38. We note that the DUA's electronic record-keeping system, UI Online, shows that the claimant filed her claim on January 30, 2024. Further, the claimant's separation from the new employer was held to be non-disqualifying. *See* Consolidated Finding # 39.

In short, even though the claimant's resignation from the instant employer is disqualifying pursuant to G.L. c. 151A, § 25(e)(1), she remains eligible for benefits, because the instant employer is not an interested party to her claim. Her work for the instant employer was part-time, subsidiary employment, and she separated more than four weeks prior to filing her claim based upon a subsequent separation from her primary employer.

We, therefore, conclude as a matter of law that the claimant failed to show that her resignation from the instant employer was for good cause attributable to the employer or due to urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e). We further conclude that, because the instant employer was not an interested party employer to this claim, the claimant may not be disqualified from receiving benefits due to this separation.

The review examiner's decision to disqualify the claimant pursuant to G.L. c. 151A, § 25(e)(1), is affirmed. However, the decision to deny benefits is reversed. The claimant is entitled to receive benefits for the week beginning December 17, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2025

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.

SVL/AB/rh