

Board of Review
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Issue ID: 0011 4858 86

BOARD OF REVIEW DECISION

0011 4858 86 (June 19, 2014) – Under 430 CMR 4.76, a claimant may not be disqualified from benefits—or subject to a constructive deduction—if he quits a part-time job without knowledge of an impending separation from his full-time job.

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 resigned from his position with the employer on August 29, 2013. After also separating from his other employer, he filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 29, 2013. 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 January 15, 2014.

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), and 25(e). 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 take additional evidence as to whether a constructive deduction, rather than a complete disqualification from the receipt of benefits, should be imposed in this case. 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 to deny benefits is based on substantial and credible evidence and free from error of law, where the claimant quit his part-time job with the employer when he was not medically able to do the work any longer, he was subsequently separated only weeks later from his regular, full-time job, and he then filed a claim for benefits.

Findings of Fact

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

1. The Claimant was employed as a part-time Homemaker for the Employer, a client service agency, from August 16, 2012 until August 29, 2013. The Claimant last physically worked on July 18, 2013.
2. The Claimant had hernia repair surgery on July 19, 2013.
3. The Claimant did not request a leave of absence.
4. The Claimant told the Employer that he would return to work on August 5, 2013.
5. On August 29, 2013, the Employer called the Claimant and the Claimant said that he was not medically able to work any longer.
6. The Claimant quit on August 29, 2013 due to not being medically able to return to work.
7. The Claimant was discharged from his full-time employment with a municipality on September 13, 2013.
8. The Claimant filed for unemployment insurance on September 13, 2013, effective September 15, 2013. (1a)
9. The Claimant worked for the municipality from October 2002-September 13, 2013, full-time. The Claimant worked for the Employer from August 16, 2012 until August 29, 2013. (1b)
10. See R. Exhibit #6 for the Monetary Summary. (1c)
11. When the Claimant quit the Employer, he did not know that he would be separated from the municipality. (2)

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact. In adopting the findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the consolidated findings of fact, as well as our application of the governing regulations, require that the claimant not be disqualified from receiving benefits.

G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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

G.L. c. 151A, § 25(e), provides in pertinent part, as follows:

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

Under both of these statutory provisions, the claimant has the burden to show that he is entitled to benefits. The review examiner concluded that the claimant had not carried his burden.

We agree with the review examiner that the findings of fact suggest that the separation from this employer would normally be a disqualifying one, pursuant to G.L. c. 151A, §§ 25(e)(1), and 25(e). Even if the claimant's medical situation was such that he thought he could no longer do the work required of him by the employer, he failed to take any steps at all to remain employed. In order to carry his burden, the claimant is required to show that he made adequate and reasonable efforts to preserve his job or that such efforts would have been futile. *See Kowalski v. Dir. of Division of Employment Security*, 391 Mass. 1005, 1006 (1984) (rescript opinion). The review examiner found that the claimant did not request a leave of absence. There are no other findings which indicate that, prior to August 29, 2013, the claimant tried to stay employed. Thus, he did not make reasonable efforts to preserve his job, and he has not shown that such efforts would have been futile.

However, our analysis does not end here. The review examiner's findings of fact indicate that the claimant worked part-time for the employer while he worked full-time at another job. The claimant's base period monetary summary, referenced by the review examiner in Finding of Fact # 10, shows that the claimant earned less than \$1,000.00 in each quarter in his base period with the employer but earned several thousands of dollars each quarter from another employer, a municipality. Based on these figures, we conclude that the claimant's position with this employer was subsidiary base period employment.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction, not a full disqualification, should apply. 430 CMR 4.76 provides, in relevant part, the following:

(1) A constructive deduction, as calculated under 430 CMR 4.78, from the otherwise payable weekly benefit amount, rather than complete disqualification from receiving unemployment insurance benefits, will be imposed on a claimant who separates from part-time work for any disqualifying reason under M.G.L. c. 151A, § 25(e), in any of the following circumstances:

(a) if the separation is:

1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work. . . .

On the facts as found by the review examiner, this regulation does not apply so as to impose a constructive deduction. Although the claimant quit his part-time job and was then separated from his full-time job several weeks later, the review examiner found that, at the time the claimant quit, he had no knowledge of his impending separation from the full-time job. Therefore, a constructive deduction, pursuant to 430 CMR 4.76(1)(a)1, cannot be imposed.¹

Although the introductory text of 430 CMR 4.76(1) appears to contemplate only two alternatives (either a constructive deduction or a full disqualification), in full context, we think the regulation means to impose no disqualification at all in the situations, like this one, that fall under 430 CMR 4.76 (1)(a)1 ("Subsection (1)(a)1").

The regulation does not expressly state what should happen in Subsection (1)(a)1 situations where no constructive deduction is warranted. Therefore, we are required to interpret the regulation. Our primary guideline is set forth in Chapter 151A, the Massachusetts Unemployment Statute, which instructs us to construe said statute and, thus, any regulations promulgated pursuant to it, "liberally in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." G.L. c. 151A, § 74. In addition, the general principles of statutory (and regulatory) construction favor harmonizing related regulations and avoiding nonsensical results. United States v. Turkette, 452 U.S. 576, 580 (1981); Champigny v. Commonwealth, 422 Mass. 249, 251 (1996). These principles strongly point toward an interpretation in which the claimant in this situation would have no disqualification from benefits.

The overarching purpose of the constructive deduction regulations is set forth in 430 CMR 4.71 ("Purpose"): to "implement the decision of the Supreme Judicial Court [SJC] in the case of Susan Emerson v. Director DES, 393 Mass. 351 (1984)." In Emerson, the SJC held that a claimant who quits a part-time job after losing her full time job should not be disqualified completely from benefits. 393 Mass. at 352. The court wrote:

If accepted, the division's interpretation would mean that an unemployed worker would be disinclined to take part-time work and would prefer to remain idle and receive full benefits. The person who took a part-time job and received only partial unemployment benefits would lose even those benefits if he voluntarily left the job. The effect is to reward the idle and punish the ambitious. We shall not lend judicial approval to this result.

Id.. In response to the court's decision, the Department promulgated a set of regulations, which impose a reduction in benefits rather than a complete loss of benefits in certain situations where an employee separates from subsidiary part-time employment for disqualifying reasons. Thus,

¹ A constructive deduction cannot be imposed pursuant to any of the other provisions of 430 CMR 4.76 either. The other circumstances in which it can be imposed are if the separation from the part-time work happens in the benefit year or if the separation from the part-time work occurs *after* the separation from the full-time job. Neither circumstance occurred in this case.

the regulations provide that employees in the Emerson situation, who quit part time employment *after* losing a full time job, and who are already in their benefit year, will have their benefits reduced by what they would have earned if they had continued working part time. 476 CMR 4.76 (1)(a)2 and (1)(b). This is labeled a “constructive deduction.” The obvious purpose is to encourage employees to accept and keep part time work while receiving unemployment benefits, rather than remain “idle,” in the court’s terminology.

Emerson itself did not directly address situations, like the instant one, in which a claimant has quit or been discharged from a part time job *before* losing his primary or full time job. Separation from subsidiary employment in these cases occurs before the employee has claimed unemployment compensation benefits. Subsection (1)(a)1 addresses this situation. It requires that a claimant who quits his part-time job with knowledge of an impending lay off from his full time job, and subsequently is deemed eligible for benefits, will have those benefits reduced by what he would have earned had he kept his part-time job. This furthers the Emerson principle of encouraging part time work rather than idleness during a period of unemployment, because it discourages an individual who knows he is about to become eligible for benefits based on losing his full time job from leaving his part time work and becoming completely “idle” during the benefit period.

Subsection (1)(a)1 is thus designed to penalize an individual who chooses to leave gainful part-time employment when he knows he is about to lose his full time employment. The penalty, however, is a partial, not a complete, reduction of benefits. Clearly, then, it would be an anomaly to interpret the regulation to mean that an individual who quits a part-time job without knowledge of an impending separation from his full-time work receives the even harsher penalty of a full disqualification. Faced with a choice between this inequitable — or even illogical — construction and a more reasonable one that comports with both the beneficent purposes of the unemployment compensation statute and the express purpose of the specific regulations under scrutiny, we adopt the reasonable construction. We conclude that the claimant should not be penalized at all but instead be eligible for full benefits.

In reaching this interpretation, we also note that the constructive deduction regulations have recently been amended in a manner that shows an intention to pay claimant full benefits in the instant situation. The specific language of Subsection (1)(a)1 is entirely new. Under the prior regulations, a constructive deduction was imposed on a claimant who quit a base period, part-time subsidiary job prior to the separation from a full-time job, regardless of whether the claimant was aware of an impending separation from full-time employment. By newly specifying that a constructive deduction will be imposed on claimants who have quit subsidiary employment during their base period *only* where the claimant knew about an impending separation from his primary employment, it is obvious that the drafters meant to narrow the situations in which the penalty of constructive deduction would be imposed.

We, therefore, conclude as a matter of law that the review examiner’s initial decision to fully disqualify the claimant is based on an error of law, because the claimant quit his part-time, subsidiary job with the employer with no knowledge of his impending separation from his full-time job, and that such a separation is now a non-disqualifying one, pursuant to the language and intent of the DUA’s new constructive deduction regulations.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 15, 2013, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 10, 2014



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh