

Where the claimant quit because he did not think that working 4 hours per week was worth it, he did so for disqualifying reasons, pursuant to G.L. c. 151A, § 25(e)(1). However, since the separation was from a part-time, subsidiary employer, and the claimant was laid off from his primary employer prior to quitting the subsidiary job, the claimant is subject to a constructive deduction only.

**Board of Review**  
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**Issue ID: 0020 1138 63**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Matthew Shortelle, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits beginning October 30, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41. Although we affirm the conclusion that the claimant's separation from the employer was disqualifying, we reverse the imposition of a complete disqualification from the receipt of unemployment benefits.

The claimant separated from his position with the employer on or about November 9, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 6, 2017. 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 February 8, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer 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 accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence as to whether, in the event that the separation from this employer was disqualifying, the claimant should be subject to a constructive deduction, pursuant to 430 CMR 4.71–4.78, rather than a complete disqualification. 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 conclusion that the claimant is subject to a complete disqualification from receipt of benefits is supported by substantial and credible evidence and is free from error of law, where the claimant worked for two employers simultaneously in his base period, his primary employer laid him off, and the claimant

subsequently separated from the instant employer when he decided that working four hours per week was not worth it to him.

### Findings of Fact

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

1. On an unknown date before January 2016, the claimant's wife (the Wife) and the claimant began taking care of their four-year old granddaughter (the Grandchild) beginning at approximately 12 P.M. each day.
2. In January 2016, the claimant began working as a part time valet for the employer, a car dealership, earning \$10.00 per hour.
3. January 1, 2016, the Wife and the claimant began taking care of their two-year old granddaughter (the Granddaughter) beginning at approximately 10:30 A.M. each day.
4. It is unknown till what time the claimant and the Wife care for the Grandchild and the Granddaughter.
5. The Manager supervised the claimant.
6. In January 2016, the Manager told the claimant he would work based on the employer's needs. The employer did not guarantee the claimant any minimum number of hours or any set schedule.
7. From January 1, 2016 through March 31, 2016, the claimant earned \$2,587.50 working for the employer.
8. Around May 5, 2016, the claimant requested his hours be cut to zero so that he could work for an unrelated golf course employer. The Manager told the claimant he would be eligible for rehire, but he would not hold the claimant's employment while he worked for the golf course.
9. From January 2016 until May 5, 2016, the claimant worked approximately fourteen (14) to twenty (20) hours per week for the employer.
10. From January 2016 until May 5, 2016, the claimant worked mornings, afternoons, and full days based on the employer's needs. The claimant did not tell the employer he could not work afternoons.
11. On May 5, 2016, the claimant quit his employment with the employer for new employment with the golf course.
12. On May 5, 2016, the claimant began working part time, approximately fifteen (15) hours per week for the golf course, earning \$15.00 per hour.

13. During the claimant's employment with the golf course, the claimant worked Saturdays, Sundays and Mondays, cutting golf greens and managing golf carts.
14. During the claimant's employment with the golf course, if the golf course requested he work days other than Saturdays, Sundays and Mondays, the claimant worked.
15. From April 1, 2016 through June 30, 2016, the claimant earned \$1,002.50 working for the employer.
16. From April 1, 2016 through June 30, 2016, the claimant earned \$1,890.00 working for the golf course.
17. On August 28, 2016, the claimant returned to his part time valet employment with the employer.
18. Beginning August 28, 2016, the claimant worked one day per week, four (4) hours per day.
19. After August 28, 2016, the claimant worked mornings based on the employer's need.
20. From July 1, 2016 through September 30, 2016, the claimant earned \$160.00 working for the employer.
21. From July 1, 2016 through September 30, 2016, the claimant earned \$2,257.50 working for the golf course.
22. On October 2, 2016, the unrelated golf course laid the claimant off due to the change in season.
23. From August 28, 2016 through October 2, 2016, the claimant worked for the employer and the unrelated golf course simultaneously.
24. From July 1, 2016 through September 30, 2016, the claimant worked for the employer six weeks.
25. On October 3, 2016, the claimant quit his employment with the employer so that he could travel to Florida.
26. On October 3, 2016, the Manager told the claimant he could return to his employment but he would not hold the claimant's employment for him while he traveled to Florida.
27. Around October 3, 2016, the claimant traveled to Florida.

28. On October 26, 2016, the claimant returned to work for the employer as a part time valet. The employer scheduled the claimant to work one day, four (4) hours, per week based on the employer's needs.
29. After October 26, 2016, the claimant worked mornings based on the employer's need.
30. On November 9, 2016, the Manager posted a schedule including the claimant for one afternoon shift.
31. On November 9, 2016, the claimant told the Manager he would not work the afternoon hours.
32. The Manager told the claimant if he refused hours then he believed the claimant to be quitting.
33. On November 9, 2016, the claimant told the manager he quit.
34. The claimant quit his employment because working four hours per week was not "worth it" to him to work one afternoon shift.
35. On November 9, 2016, the claimant did not request to be scheduled at a different time, ask if the afternoon schedule was a permanent switch, or ask to switch shifts with any other employee because working four hours was not "worth it" and he wanted to spend time with the Granddaughter and the Grandchild.
36. The claimant did not refuse to work the afternoon shift but remain employed because it was not "important to" him.
37. During the claimant's employment with the employer, the claimant did not tell the Manager he could not work afternoons.
38. During the claimant's employment with the employer and the unrelated golf course, the Wife cared for the Grandchild and the Granddaughter without the claimant present.
39. During the claimant's employment with the employer and the unrelated golf course, the claimant believed the Wife could care for the Granddaughter and the Grandchild alone but that it was "a lot" for her.
40. During the claimant's employment with the employer, the Manager created the work schedule based on the employer's full time and part time employee's schedules and tried to accommodate employees.

41. On November 11, 2016, the claimant filed a claim for unemployment benefits with an effective date of November 6, 2016.
42. The Department of Unemployment Assistance (the Department) determined that the claimant was monetarily eligible to receive weekly unemployment benefits in the amount of \$105.00, with an earnings disregard of \$35.00.
43. From October 1, 2016 through December 31, 2016, the claimant worked for the employer two weeks.

### 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We reject that portion of Consolidated Finding # 37 stating that the claimant did not tell the Manager that he could not work afternoons, because it is inconsistent with Consolidated Finding # 31.<sup>1</sup> As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant separated from his position under disqualifying circumstances, pursuant to G.L. c. 151A, § 25(e)(1). However, because his job with this employer was subsidiary base period employment, which the claimant left after he was laid off from his primary employment, he is subject to only a constructive deduction, rather than a full disqualification from the receipt of benefits.

Although the claimant was unsure if he quit his position with this employer in the fall of 2016, the employer's witness testified that he had quit. The employer's witness testified that when the claimant told the employer to give his four hours to someone else, he told the claimant that if he did not want to work the available hours, he would assume that the claimant was refusing hours and quitting. The claimant responded "yes," essentially confirming that he was quitting. The review examiner clearly adopted this version of events. *See* Consolidated Findings of Fact ## 30–35. Because the claimant did not ask for other hours, acquiesced to the employer's characterization of his actions as "quitting," and offered testimony to the review examiner that he did not consider the four hours per week of work to be "worth it," we conclude that application of G.L. c. 151A, § 25(e)(1), to this matter is appropriate. In other words, by refusing hours of work, and by confirming that he was quitting, he caused his own separation.

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] . . . (e) For the period of unemployment next ensuing . . . after

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<sup>1</sup> We also note that there was some testimony during the remand hearing from the claimant that his last day of work with his other employer (the golf course) was either October 2 or October 3, 2016. Documentation in the record, *see* Remand Exhibit # 6, and some of the claimant's testimony about when he left for Florida suggest that the last day was October 3. However, the claimant gave other testimony that the last day was October 2. We adopt the review examiner's findings, as this date has little effect on the outcome of our decision.

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 . . . .

Under this section of law, the claimant has the burden to show that he is eligible to receive unemployment benefits. The review examiner concluded that the claimant had not carried his burden to show that he separated for good cause attributable to the employer, and we agree.

Although the claimant separated and went back to work multiple times, the separation in November of 2016 occurred immediately prior to the filing of his unemployment claim. Therefore, our focus is on what happened at that time. The review examiner concluded that the claimant quit his job “because working four hours per week was not ‘worth it’ to him to work one afternoon shift.” Consolidated Finding of Fact # 34. While working four hours per week could be unsuitable in certain circumstances, we think, in light of the claimant’s employment history, the claimant has not shown that the work offered to him in November, 2016, was unsuitable. After all, he had worked four hours per week from late August of 2016, through to October 3, 2016, when he left his job to go to Florida for several weeks. During the hearing, the claimant did not indicate that the commute or the job duties were such that four hours of work per week meant that the shift offered to him just prior to quitting was not “worth it.” Moreover, the employer had not changed the claimant’s job location. All aspects of the job remained the same.<sup>2</sup> We also note that the employer had never guaranteed the claimant any number of hours of work per week. *See* Consolidated Finding of Fact # 6. Thus, we conclude that the claimant’s feeling that four hours of work per week was not “worth it” (or not suitable) does not constitute a reasonable workplace complaint or good cause to quit his job.

It was undisputed that much of the claimant’s work took place in the mornings until the employer offered him the final shift in November, which was in the afternoon. The claimant testified that he could not take the shift, because he needed to help his wife care for their grandchildren. Although the offer of work on this occasion did interfere with the claimant’s desire to care for his grandchildren, we still do not believe that this gave the claimant good cause to quit. Although caring for the grandchildren would have been “a lot” for the claimant’s wife, *see* Consolidated Finding of Fact # 39, the claimant’s shift lasted only four hours and was for one day. This is a very limited period of time. There was also testimony from the hearing that, although perhaps limited, the claimant’s wife did sometimes care for the grandchildren on her own. *See* Consolidated Finding of Fact # 38. The claimant did not present sufficient evidence for the Board to conclude that his wife really was unable to care for the children while he worked a short shift at the employer’s place of business. In the end, it appears that the claimant just preferred not to leave his wife alone with both grandchildren. Indeed, he testified that he did not inquire about other shifts or try to stay working with the employer after his supervisor told him

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<sup>2</sup> A claimant can carry his burden to show that he quit his job for good cause attributable to the employer if he shows that the job was unsuitable or became unsuitable after a period of time. *See Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n.3 (1981); *Jacobsen v. Dir. of Division of Employment Security*, 383 Mass. 879, 880 (1981). The suitability of a particular job is dependent on many factors. *See* G.L. c. 151A, § 25(c) (noting factors to be considered include health, safety, morals of claimant; prior education and training; travel distance and costs; and remuneration); *Pacific Mills v. Dir. of Division of Employment Security*, 322 Mass. 345, 349-350 (1948).

that the employer would consider him to have quit his job if he refused the work, because the work for the employer “was not ‘important to’ him.” Consolidated Findings of Fact ## 35 and 36. We, therefore, agree with the review examiner’s legal conclusion that the claimant did not quit his job for good cause attributable to the employer.<sup>3</sup>

Having concluded that the review examiner was correct to determine that the separation was disqualifying, we now move on to the main issue addressed by our remand order. In the original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning October 30, 2016. However, the findings of fact indicate that the claimant’s job with the employer was part-time. This suggests that the claimant may be subject to a constructive deduction, pursuant to the provisions of 430 CMR 4.71–4.78.

A constructive deduction, rather than a full disqualification, will be imposed if a disqualifying separation from part-time work occurs after a claimant has already separated from his primary employment. 430 CMR 4.76 provides, in relevant part, as follows:

(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: . . .

(b) if, after the separation from subsidiary, part-time work, the claimant applies for and obtains unemployment insurance benefits on account of a non-disqualifying separation from primary or principal work that preceded the separation from part-time work.

In this case, the claimant worked two part-time jobs in the base period of his claim.<sup>4</sup> The review examiner found that the claimant worked the two jobs simultaneously for at least one week. *See* Consolidated Finding of Fact # 23. Therefore, one of the jobs was subsidiary. If the job with this employer was subsidiary, then the claimant is subject to a constructive deduction, pursuant to the above-cited regulation.

After reviewing the consolidated findings of fact, we conclude that the claimant’s job with this employer was subsidiary. To determine whether the claimant’s job with this employer was subsidiary, we must examine and compare the number of hours spent on the work for each employer, the wages earned from each employer, the duration of employment, and the general occupation of the claimant. *See* 430 CMR 4.74. The most important criteria are the number of hours worked and the earnings from each employer. *See* 430 CMR 4.75(1)–(3). Here, the claimant earned more per hour with the golf course employer (\$15/hour vs. \$10/hour with this employer). While he worked the jobs simultaneously, he worked more hours per week with the golf course employer (15 hours per week) than the four hours per week with this employer.

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<sup>3</sup> Since the work was for such a limited period of time, and since it appears that the claimant did not work due to his preference to be with his grandchildren, we similarly conclude that the claimant has not separated for urgent, compelling, or necessitous reasons.

<sup>4</sup> The base period is loosely defined as the year prior to the effective date of an unemployment claim.

Moreover, in the most recent base period quarters, he was paid more wages overall from the golf course employer. *See* Exhibit # 10 and Consolidated Findings of Fact ##15, 16, 20, and 21. Therefore, the claimant's work with the instant employer was subsidiary to the golf course work.

The review examiner found that the claimant was laid off from the golf course work in early October of 2016. *See* Consolidated Finding of Fact # 22. A lay off is a non-disqualifying separation. Since the disqualifying separation from this employer occurred after the layoff from his primary employer, and since the separations occurred prior to the filing of the unemployment claim, 430 CMR 4.76(1)(b) applies.

A constructive deduction is defined as "the amount of remuneration that would have been deducted from the claimant's weekly benefit amount . . . if the claimant had continued to be employed on a part-time basis." 430 CMR 4.73. The amount of the constructive deduction each week is determined by the claimant's earnings from the part-time, or subsidiary, employer. 430 CMR 4.78(1)(a) provides as follows:

If the separation from part-time subsidiary work occurred in the last four weeks of employment prior to filing of the unemployment claim, the average part-time earnings will be computed [by] dividing the gross wages paid by the subsidiary employer in the last completed quarter by 13. If there are less than 13 weeks of work, then the gross earnings shall be divided by the actual number of weeks worked.

Under this regulation, the amount of the constructive deduction is calculated by dividing the number of weeks worked in the last completed quarter of the base period into the gross amount of wages paid in that quarter. The last completed quarter of the claimant's base period was the third quarter of 2016, which ran from July 1, 2016, through September 30, 2016. During that quarter, the claimant was paid \$160.00 by the employer. *See* Consolidated Finding of Fact # 20 and Exhibit # 10. During that quarter, the claimant worked for six weeks. Consolidated Finding of Fact # 24. Therefore, the claimant's average weekly earnings were \$27.00, and this is the amount of the constructive deduction to be applied to the claimant's claim.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant quit his job under disqualifying circumstances is free from error of law. However, the conclusion that the claimant should be subject to a total disqualification was an error of law, and we reverse that conclusion. The claimant should be subject to a constructive deduction.



The review examiner's decision is affirmed as to the separation issue under G.L. c. 151A, § 25(e)(1). However, we reverse the total disqualification from benefits. Beginning the week of November 6, 2016, the claimant shall be subject to a constructive deduction in the amount of \$27.00 each week, until he meets the re-qualifying provisions of the law.<sup>5</sup>

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – April 14, 2017**



Judith M. Neumann, Esq.  
Member



Charlene A. Stawicki, Esq.  
Member

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

**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](http://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.

SF/rh

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<sup>5</sup> See CMR 4.76(2) and (3).