

Claimant quit his part-time subsidiary job with the employer with no knowledge of his impending separation from his full-time job. Because the full-time separation is non-disqualifying, the claimant is not subject to any reduction of benefits.

**Board of Review
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Issue ID: 0020 4608 14

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Margaret Blakely, 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 reverse the total disqualification of benefits.

The claimant separated from his position with the employer on November 21, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 15, 2017. 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 March 28, 2017. 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 was thus 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 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. Both parties 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 conclusion, that the claimant is subject to a complete disqualification from receiving benefits, is supported by substantial evidence and is free from error of law, where, after remand, the review examiner found that the claimant's job with the instant employer was subsidiary, part-time base period work, that the claimant separated from the instant employer before separating from his primary full-time employer, and that he had no knowledge of his impending separation from his primary employer.

Findings of Fact

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

1. The claimant filed an unemployment claim with the Department of Unemployment Assistance (DUA) effective 12/18/2016 with a benefit year end of 12/16/2017. The base period of the claimant's claim extended between 10/01/2015 and 09/30/2016. The DUA determined the claimant's weekly benefit amount to be \$742, with an earnings disregard of \$247.33.
2. The claimant worked "as needed" as a special police officer for the employer (employer A), a town, between his first swearing in on 07/01/2011 and 11/21/2016, when he resigned.
3. The claimant did not have a set schedule with employer A. He earned \$12.99 per hour when working a shift. He earned \$43.88 per hour when working a detail. Each detail was a guaranteed minimum of four (4) hours.
4. The claimant worked as a full time journeyman pipefitter/welder for another employer (employer B) between 04/05/2016 and 12/16/2016, when he was laid off.
5. The claimant worked Monday to Friday and some weekends for employer B. He earned \$68.00 per hour and usually worked forty (40) hours per week for employer B.
6. During the base period of the claimant's claim, the total gross wages he received per quarter from employer A and employer B are as follows:

	4th Qtr., 2015	1st Qtr., 2016	2nd Qtr., 2016	3rd Qtr., 2016
Employer A	\$12,389.16	\$1,159.92	\$1,191.77	\$2,503.23
Employer B	Not yet employed	Not yet employed	\$11,064.48	\$17,942.40

7. During the last completed quarter (3rd quarter, 2016), the claimant worked two (2) or three (3) weeks for employer A. The claimant's gross wages earned per week during those weeks with employer A are unknown.
8. During the last completed quarter (3rd quarter, 2016), the claimant worked every week for employer B (13 weeks). The claimant's gross wages earned per week during those weeks with employer B was \$1,380.19 (\$17,942.40 divided by 13).
9. The claimant's usual and normal occupation was as a pipefitter/welder. The claimant worked in this occupation for forty two (42) years. The claimant was a member of the Local [A] labor union and obtained his pipefitter/welder employment through the union hiring hall.

10. On an unknown date, the claimant informed the chief of police he was resigning from employment with employer A. The claimant resigned from his employment with employer A because he “had to pick one job over the other” and he wanted to make more money with employer B.
11. The administrative assistant to the chief of police processed separation documentation for the claimant and met him to return his equipment on 11/21/2016.
12. At the time of the claimant’s resignation from employment with employer A on 11/21/2016, the claimant did not know of his impending separation from employer B. The claimant learned from employer B on approximately 12/15/2016 that he was being laid off on 12/16/2016.
13. At the time of the claimant’s resignation, work with employer A remained available to him and his employment was not in jeopardy.

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. Upon such review, the Board adopts the review examiner’s consolidated findings of fact and deems 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 the governing regulations, establish that the claimant is not subject to disqualification.

The review examiner analyzed the claimant’s separation from employment under 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 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 statutory provision, the claimant has the burden to show that he is entitled to receive benefits. The review examiner concluded that the claimant had not carried his burden, and initially disqualified the claimant for quitting the instant job without good cause or urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e). Following remand, the consolidated findings support the review examiner’s conclusion that the claimant’s separation from the instant employer was disqualifying, and we affirm that conclusion. Resigning in order to earn more money at another job does not constitute either good cause attributable to the employer or urgent, compelling, and necessitous circumstances.

However, the consolidated findings establish that the claimant's job with the instant employer, employer A, was not his primary employment. Because the claimant worked part-time for the instant employer during his base period, contemporaneously with his full-time work for employer B, the claimant's job with the instant employer was subsidiary part-time employment. *See* 430 CMR 4.73.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction of benefits is in order. 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. . . .

Here, the consolidated findings show that the claimant filed his claim effective December 18, 2016, after being laid off from his primary employer on December 16, 2016. This means that the disqualifying separation from the instant part-time subsidiary employer on November 21, 2016, occurred before the claimant had separated from his primary employer and prior to filing his unemployment claim. The review examiner found that at the time the claimant left the instant part-time subsidiary employer, he did not know of the impending separation from his primary employer. Consolidated Finding # 12. Accordingly, we conclude that the claimant's separation from the instant employer, although disqualifying, does not subject him to a constructive deduction.

In Board of Review Decision 0011 4858 86, we explained that although the introductory text of 430 CMR 4.76(1) appears to contemplate only two alternatives (either a constructive deduction or a full disqualification), we believed that the full context of 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). The constructive deduction regulations were promulgated in response to the Supreme Judicial Court's decision in Emerson v. Dir. of Department of Employment Security, 393 Mass. 351, 352 (1954) (declined to penalize claimant who quit a part-time job after losing a full-time job because the effect was "to reward the idle and punish the ambitious.") The constructive deduction under 430 CMR 4.76(1)(a)(1) is designed to penalize an individual who chooses to leave gainful part-time employment when he knows he is about to lose his full-time job. It would be anomalous to interpret the regulation to impose the harsher penalty of full disqualification upon an individual who quits a part-time job without knowing of an impending separation from his full-time job. Board of Review Decision 0011 4858 86, p. 5.

In the present case, at the time the claimant left his job with the instant employer, he did not know that he was about to lose his full-time job with employer B. Therefore, his separation from the instant employer does not subject him to any disqualification from benefits.

We, therefore, conclude as a matter of law that although the circumstances of the claimant's separation from the instant employer would be disqualifying pursuant to G.L. c. 151A, § 25(e)(1), the DUA regulations at 430 CMR 4.76(1)(a)(1) preclude the reduction of benefits under the claim filed after the claimant's subsequent separation from his full-time employer.

We affirm that part of the review examiner's decision which concluded that the claimant's separation from the instant employer was disqualifying under G.L. c. 151A, § 25(e)(1). We reverse the part of the review examiner's decision which concluded that the claimant was subject to a disqualification from the receipt of benefits. The claimant is entitled to receive benefits at his full weekly benefit amount for the week beginning December 18, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – August 31, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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

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.

SPE/AB/rh