

Because the claimant's separation from his part-time job with the employer was disqualifying and in the benefit year, he is subject to a constructive deduction, rather than a full disqualification.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Marielle Abou-Mitri, 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. We affirm the review examiner's conclusion that the claimant's separation was disqualifying; however, we reverse her conclusion that the claimant is subject to a total disqualification from the receipt of benefits.

The claimant stopped performing services for the employer on November 13, 2016, and was discharged from his position on November 29, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 18, 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 June 14, 2017.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 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, pursuant to 430 CMR 4.71–4.78, a constructive deduction, rather than a complete disqualification from the receipt of benefits, was applicable to the claimant's claim. 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 issues before the Board are: (1) whether the review examiner's conclusion, that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where (1) the review examiner has found that the claimant took a lunch break without notifying anyone of it or logging it on a timekeeping report, thereby being paid for time he was not working; and (2) if the separation is disqualifying, whether the claimant should be subject to a constructive deduction.

Findings of Fact

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

1. The claimant worked part time as a temporary brand ambassador for the employer, a third party company that represents other companies in trainings, brand advocacy and sales representing, from October of 2010 through November 13, 2016.
2. The claimant worked 8-12 hours per week and earned \$15 per hour.
3. The claimant did not work continuously for the instant employer since October of 2010. The claimant is a per diem employee and accepts assignments from the employer based on his availability. Most recently, the claimant worked for the instant employer from September 7, 2015 through February 7, 2016. The claimant worked approximately 10-15 hours per week during this time period until the program ended on February 7, 2016. The claimant did not work for the instant employer again until November 5, 2016. The claimant's last assignment was on November 5, November 12 and November 13, 2016.
4. In previous years, the claimant has worked for the instant employer during the spring and summer months. The claimant's assignments are usually around the holiday season. The claimant's assignments are not strictly in the fall and winter months.
5. The claimant has never worked for this employer while also working simultaneously for another employer. The claimant accepted assignments with the instant employer during periods when he was not employed full-time by another employer.
6. The claimant's direct supervisor was the District Manager.
7. The employer has a policy in its employee handbook which provides, "**Grounds for Immediate Termination:** This list is not exhaustive. Falsification – Submitting call reports for hours not worked, incorrectly reporting mileage, submitting expenses for service not rendered."
8. The claimant signed for receipt of the employee handbook.
9. When the employer determines that a violation of the policy occurs, the employer launches an investigation and the human resources department determines an outcome depending on the circumstances.
10. The purpose of the policy is to ensure that the employer can fulfill its contract with its clients and provide the services that the client paid for and to protect company assets.

11. On November 13, 2016, the claimant was assigned to work at a [Company A] in the computer department. The claimant was expected to sell computers and take inventory of the [Company A] products.
12. The claimant reported to the [Company A] and signed in on the vendor log at 11:00 a.m. At the start of his shift, the claimant also signed out of the vendor log. The claimant provided that he would be leaving at 4:45 p.m.
13. The claimant checked in with the manager on duty in the computer department and spoke to the associates in the computer department. The claimant did not check in with the front line manager or the store manager.
14. At 1:30 p.m., the District Manager arrived at the [Company A] to conduct an audit. The District Manager was in the [Company A] from 1:30 p.m. to 2:05 p.m. The District Manager was unable to locate the claimant while he was in the store. The District Manager spoke to the front line manager and the store manager regarding the claimant's whereabouts and both the front line manager and the store manager provided that they had not seen the claimant. The District Manager walked the entire store looking for the claimant and could not locate him. The District Manager also asked associates if they had seen the claimant. The associates reported that they had not seen the claimant.
15. The claimant left the [Company A] for 45 minutes to get lunch. The claimant went to a restaurant that was 10 minutes away from the [Company A] location.
16. The claimant did not sign out on the vendor log when he left [Company A] for 45 minutes to take his lunch.
17. The claimant filled out his timekeeping report and provided that he worked from 11:00 a.m. to 4:45 p.m. The claimant did not report that he had taken a 45 minutes lunch on the timekeeping report.
18. The claimant believed that he deserved to take a 15–20 minute break time. The claimant did not want to report that he took a lunch break because he understood that the employer would deduct it from his paycheck.
19. The claimant did not notify any management members from [Company A] that he was leaving the building to take his lunch.
20. The District Manager called the claimant when he was unable to locate him in [Company A]. The claimant did not answer the District Manager's call because he had failed to pay his cell phone bill and lost service from November 10, 2016 through November 14, 2016.

21. On November 14, 2016, the District Manager and the National Sales Manager participated in an investigative telephone call with the claimant. The claimant did not tell the employer that he left the building to take his lunch. The claimant believed he should be entitled to a paid lunch break. During the investigative telephone call, the claimant told the District Manager that no person could stay in one area for five hours. The claimant also reported that he was walking around the store talking to vendors when the District Manager came in for the audit and could not find him.
22. The claimant's last physical day of work was November 13, 2016. The claimant was paid \$86.81 for working on November 13th.
23. The claimant was placed on an unpaid investigatory suspension from November 14, 2016 through November 29, 2016.
24. On November 29, 2016, the claimant was discharged by the employer for falsification of time keeping records.
25. On November 16, 2016, the claimant filed a claim for unemployment benefits effective November 13, 2016. The claimant's weekly benefit rate is \$344 and the earnings disregard is \$114.67.
26. The claimant has three other base period employers: "Employer [B]," "Employer A," and "Employer [C]."
27. The claimant earned the following wages during the base period of his claim:

Employer	4th Quarter of 2015	1st Quarter of 2016	2nd Quarter of 2016	3rd Quarter of 2016
Employer [B]	\$4,063.25	\$0	\$0	\$0
Employer A	\$76.55	\$0	\$0	\$0
Employer [C]	\$0	\$557.09	\$7,629.45	\$8,888.46
Instant Employer	\$4,875	\$1,600.85	\$0	\$0

28. The claimant worked for Employer [B] in the 4th Quarter of 2015. The specific dates of employment are unknown. The claimant worked full-time, 40 hours per week, for this employer as a direct energy consultant. When the claimant worked for Employer [B], he did not pick up any additional hours with the instant employer. On December 5, 2016, the DUA issued the claimant a Notice of Approval providing he separated from Employer [B] for non-disqualifying reasons.

29. The claimant worked for Employer A for one month in the 4th Quarter of 2015. The specific dates of employment are unknown. The claimant worked full-time, 40 hours per week, for this employer as a residential alarm systems salesperson. The claimant was discharged from his employment with Employer A at the end of his training period.
30. The claimant worked for Employer [C] in the 1st Quarter of 2016 through the 3rd Quarter of 2016. The specific dates of employment are unknown. The claimant worked full-time, 40 hours per week, for this employer as a direct energy consultant. When the claimant worked for Employer [C], he did not pick up any additional hours with the instant employer. On December 5, 2016, the DUA issued the claimant a Notice of Approval providing he separated from Employer [C] for non-disqualifying reasons.

CREDIBILITY ASSESSMENT:

It is important to note, the Board requested that the claimant provide specific dates of employment with the instant employer and for his other base period employers. The claimant was unable to recall any specific dates of employment for any of his employers. The claimant agreed with the dates provided by the employer witness at the remand hearing regarding his employment with the instant employer. As such, this Review Examiner relied on the credible and detailed testimony of the employer witness. With regard to the dates of employment for the other base period employers, this Review Examiner relied on the wages reported in each quarter to estimate the quarters in which the claimant worked.

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. As discussed more fully below, we conclude that the review examiner's conclusion that the claimant's separation from his job with the employer was disqualifying is supported by the record. However, we reject the legal conclusion that he is subject to a complete disqualification from the receipt of benefits. On the contrary, a constructive deduction is applicable to the claimant's claim.

There was no dispute that the claimant was discharged from his job with the employer. Because the claimant was terminated from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, 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 . . . (2) by discharge shown to the satisfaction of the

commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest

Under this section of law, the employer has the burden to show that the claimant's separation was disqualifying. Following the initial hearing in this case, the review examiner concluded that the employer had carried its burden.

We agree with the review examiner's application of G.L. c. 151A, § 25(e)(2), substantially for the reasons noted in Part III of the decision. The claimant was discharged for falsifying timekeeping records. Specifically, the claimant had not noted or told the employer that he left his job site for forty-five minutes to take a lunch. Consequently, the claimant was paid for time he had not worked.

As to the employer's policy, expectations, the claimant's awareness of them, and the existence of misconduct on the part of the claimant, the review examiner concluded the following:

The employer established that it has an expectation that employees are prohibited from falsifying time keeping records for hours not worked. The claimant was aware of the employer's expectation through receipt of the policy. Furthermore, the claimant had a commonsense awareness of this expectation. The expectation is reasonable when taking into consideration the employer's interest in ensuring it fulfills its obligations to its clients and its assets are protected. The claimant chose not to fulfill the employer's reasonable expectation and consequently brought about his own unemployment when he falsified his timekeeping report on November 13, 2016.

These conclusions are supported by the review examiner's findings of fact and by a reasonable view of the evidence. Although the claimant testified that he did not need to notify the employer, either verbally or on the timekeeping log, that he was leaving to take a lunch, the review examiner clearly did not find that to be credible or reasonable. Indeed, the log has a space dedicated to addressing what to do if an employee takes a lunch. *See Exhibit # 14, p. 6.* The claimant did not notify the employer that he was out of the job site location and submitted his log falsely representing that he was continuously at work, thus violating the expectation that he keep accurate records of his time and not falsify timekeeping reports.

However, a showing that the claimant engaged in prohibited conduct is insufficient to conclude that he is disqualified under G.L. c. 151A, § 25(e)(2). The employer must also show that the claimant had the state of mind necessary for disqualification. In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). To evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

As noted above, the employer's timekeeping expectations were reasonable, and the conclusion that the claimant was aware of them is supported by the record. As to mitigation, the review examiner noted the following in her decision:

Initially, the claimant alleged that he was in the [Company A] throughout the District Manager's visit. However, upon further questioning the claimant admitted that he left the store for 45 minutes to take his lunch. The claimant also admitted that he did not want to report that he left the building because this would have been deducted from his paycheck. The claimant further provided that he did not provide the District Manager or the National Sales Manager with an accurate account of his whereabouts on November 13th because he felt like he was entitled to get a break. The claimant's testimony shows that he understood the employer's expectation and that he deliberately violated the expectation by leaving work without reporting it.

This discussion implies that no mitigation was present on November 13, 2016. Rather, the claimant appears to have chosen not to report that he left the store. He wanted to be paid for time he was not at the store, as he thought that he was entitled to a break. However, regardless of whether he was entitled to a break, it was expected that he keep accurate time records (not falsify the records). If he left the store for lunch (whether he was entitled to do so or not), he was obligated to report it. The fact that he knew that, if he reported the break, it would be deducted from his paycheck further indicates that he was obtaining pay for a situation (a lunch break) which he knew the employer did not expect to pay him. These findings and conclusions generally support the review examiner's conclusions that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest when he failed to accurately report his time records for November 13, 2016. Therefore, the separation was a disqualifying one under G.L. c. 151A, § 25(e)(2).

In her original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning November 27, 2016. However, the findings of fact show 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 during the benefit year." 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:

(a) If the separation is: . . .

2. if the separation from part-time work occurs during the benefit year; . . .

In this case, the claimant worked part-time for the employer on November 13, 2016, which was the first day of his benefit year.¹ Since the claimant separated from a part-time job in his benefit year, the regulation noted above is applicable.²

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 employer. 430 CMR 7.78(1) addresses how to calculate the amount of a constructive deduction. We note that this regulation does not address the circumstance presented by this case, which is a benefit-year separation from a non-subsidiary part-time job that began prior to the start of the unemployment claim. Two of the provisions address circumstances related to subsidiary part-time work. *See* 430 CMR 7.78(1)(a) and (c). The third circumstance addresses separations from part-time work *obtained* in the benefit year. As noted previously, the work for this employer was not subsidiary to other work, and it was obtained prior to the establishment of the claimant’s unemployment claim (that is, the claimant worked for the employer prior to the start of her benefit year).

Nevertheless, we think that the regulation relating to work obtained in the benefit year applies in this case. As noted above, a constructive deduction is intended to reduce weekly unemployment benefits by the average amount of earnings the claimant would have had if he continued to be employed in his part-time job. Regardless of when a part-time job is obtained, the regulation’s goal is to identify the average amount of earnings. 430 CMR 4.78(1)(c) provides as follows:

On any separation from part-time work which is obtained after the establishment of a benefit year claim, the average part-time earnings will be computed by dividing the gross wages paid by the employer by the number of weeks worked.

Here, the claimant performed work for the employer for 1 week in his benefit year. He worked only on November 13, 2016. The review examiner found that the claimant was paid a total of \$86.81 for his work in that week. *See* Consolidated Finding of Fact # 22. Therefore, the claimant’s average weekly earnings were \$87.00, and this is the amount of the constructive deduction to be applied to the claimant’s claim.³

We, therefore, conclude as a matter of law that the review examiner’s conclusion that the claimant was discharged under disqualifying circumstances is free from error of law. However,

¹ The “benefit year” is, generally speaking, the period of one year beginning on the effective date of an unemployment claim. In this case, the effective date of the claimant’s unemployment claim is November 13, 2016. *See* Remand Exhibit # 5.

² Because the final date of the claimant’s unemployment was unclear from the initial hearing and decision, the Board also remanded the case for further evidence as to whether the claimant’s job with this employer was subsidiary to other base period employment. A different portion of 430 CMR 4.76 applies to separations from subsidiary base period employment. At this point, we need only note that the work for this employer could not have been subsidiary, because he never performed it contemporaneously with other work. *See* Consolidated Finding of Fact # 5 and 430 CMR 4.73 (defining “subsidiary part-time work” as “employment worked contemporaneously with full-time work”).

³ We note that this amount is less than the earnings disregard of \$114.67. Therefore, he would be entitled to his full benefit rate in any week of total unemployment.

the conclusion that the claimant should be subject to a total disqualification from receiving benefits 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)(2). However, we reverse the total disqualification from benefits. Beginning the week of November 27, 2016, the claimant shall be subject to a constructive deduction in the amount of \$87.00 each week, until he meets the requalifying provisions of the law.⁴

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 28, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Charlene A. Stawicki, 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, [B]day, 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.

SF/rh

⁴ See CMR 4.76(2) and (3).