Although the claimant's separation from the instant employer was disqualifying, because the job was subsidiary base period employment, and the claimant did not know that he was going to be soon laid off from his primary employer when he quit this job, he is not subject to a constructive deduction or any disqualification.

Board of Review
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Issue ID: 0022 2900 09

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, 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 June 14, 2017. After separating from another employer, he filed a claim for unemployment benefits with the DUA. On August 3, 2017, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not eligible to receive unemployment benefits, beginning June 11, 2017, pursuant to G.L. c. 151A, §§ 29(a) and 1(r). The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination that the claimant was not eligible to receive benefits, in a decision rendered on October 28, 2017.

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).[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 about the claimant's other employment prior to filing his claim for benefits. 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 conclusion that the claimant is not eligible to receive benefits is supported by substantial and credible evidence and is free from

[1] During the initial hearing, the review examiner asked the claimant to waive notice of G.L. c. 151A, §§ 25(e)(1) and 25(e)(2). He indicated that he would waive notice of those provisions, so that the hearing could proceed. The employer is not an interested party in this matter.

error of law, where the claimant worked his part-time job with this employer at the same time as he worked full-time for another employer and he quit this job without any awareness that he was soon going to be laid off from his full-time employer.

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 as a Meat Cutter, for the employer, a Restaurant, from September 15, 2016 until June 14, 2017, when he was separated.

2. The claimant worked approximately twenty-four hours per week for the instant employer.

3. The claimant was paid $11 per hour by the instant employer.

4. The claimant's primary language is Cantonese.

5. The instant employer mostly spoke Mandarin.

6. The claimant interviewed with the employer without the aid of an interpreter.

7. The claimant and the employer understood each other at hire.

8. One of the claimant's co-workers spoke both Mandarin and Cantonese. The co-worker would help the claimant communicate with the employer when necessary.

9. The claimant also worked approximately forty hours per week for another restaurant ("employer X") as a Kitchen Worker.

10. The claimant began working for employer X in November 2016.

11. Employer X paid the claimant approximately $2,900 per month salary, but at least $1,000 of that was paid in cash and "under the table".

12. The claimant began to experience pain in his right hand during the spring of 2017.

13. The claimant did not seek medical attention for his hand pain when it began during the spring of 2017.

14. The claimant did not think he had time to see a doctor.

15. The claimant did not ask for time off from the employer to address the pain in his hand.

16. The claimant did not ask for a workplace accommodation so that he would not have to use his hand as much.

17. On June 1, 2017, the claimant informed his employer that he was resigning, effective, June 14, 2017.

18. The claimant decided to resign because of the pain in his right hand.

19. The claimant worked through his notice period even though his hand hurt.

20. The claimant never informed his employer of his hand issues.

21. The claimant never looked into the possibility of going out of work on a leave of absence.

22. The claimant's last day of work was on June 14, 2017.

23. The claimant worked for the instant employer every week from April 1, 2017 through June 14, 2017.

24. Employer X called the claimant and informed him on July 3, 2017 that the business was being sold and therefore he no longer would be working for them. The claimant was told not to report to work for any further shifts.

25. At the time the claimant quit his job with the instant employer, he did not know that he was going to be separated from employer X.

26. The claimant filed for unemployment benefits on July 7, 2017 and received an effective date of July 2, 2017.

27. The claimant sought medical attention at some point for the pain in his right hand.

CREDIBILITY ASSESSMENT

Although the claimant testimony was very vague concerning specific dates of employment with both the instant employer and employer X, it is being accepted as true that there was approximately two weeks between the time the claimant ended his employment with the instant employer and when the claimant was laid off from his employment with employer X. Although the claimant originally reported that he was separated from employer X on June 12, 2017, the claimant consistently testified at both hearings that he was laid off from employer X approximately two weeks after he quit his job with the instant employer on June 14, 2017. Furthermore, the claimant's file date of July 7, 2017 makes the most sense if he was laid off from his job with employer X on July 3, 2017.

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 credibility assessment and deems them to be supported by substantial and credible evidence. As discussed more fully below, however, we reject the review examiner's legal conclusion that the claimant is not eligible to receive unemployment benefits.

Because the claimant's separation was voluntary, his eligibility for benefits is governed by G.L. c. 151A, § 25(e)(1), 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 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.

The claimant quit his position with this employer, because of pain in his hand. From what we can discern from the record and the consolidated findings of fact, the employer did not do anything to cause this separation. He was working the job he was hired to do. He was paid what he was supposed to be paid. He was not subject to any workplace harassment or other adverse working conditions. The reason for the separation related solely to the claimant's own medical issue. Therefore, the claimant has not shown that he quit for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (in "good cause" cases, focus is on employer's actions which led to the resignation).

As to whether the claimant quit involuntarily for urgent, compelling, and necessitous reasons, we agree with the review examiner that the claimant also did not carry his burden. Although physical pain, as a result of his job duties, could constitute a qualifying reason for resigning a job, the claimant made no efforts to preserve his employment prior to quitting. Even if we accept that the claimant's hand was making it very difficult for him to do his job, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve h[is] employment' as would indicate the claimant's 'desire and willingness to continue h[is] employment.'" Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009), *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). Here, the review examiner found that the claimant never informed the employer about the pain in his hand, did not ask for a workplace accommodation for his hand issue, did not see a doctor prior to quitting, and did not

request time off to seek treatment for his hand. Although there was somewhat of a language barrier between the claimant and the employer, a co-worker often helped to translate for the claimant. It does not appear from this record that the claimant ever asked the co-worker to help him inform the employer of his hand issue. Under the circumstances presented to him, such an action would have been reasonable. Because the claimant took few, if any, steps to preserve his job, we cannot conclude, as a matter of law, that the separation was truly involuntary in nature.

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 also worked at another job. The claimant earned more money in his base period from the other employer, *see* Remand Exhibit # 12, and worked more hours for the other employer as well. *Compare* Consolidated Findings of Fact ## 2 and 9. Based on this information, we conclude that the claimant's position with this employer was subsidiary base period employment, and his other job was his primary 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 the primary job later, the review examiner found that, at the time the claimant quit, he had no knowledge of his impending separation from the primary job. *See* Consolidated Finding of Fact # 25. Therefore, a constructive deduction pursuant to 430 CMR 4.76(1)(a)(1), cannot be imposed.

As we have held in previous cases of similarly situated claimants, we also decline to impose any disqualification at all. *See* 0011 4858 86 (June 19, 2014). In 0011 4858 86, after reviewing the apparent purpose of the constructive deduction regulation, we noted the following:

> 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.

Pursuant to this precedent, the claimant in this case suffers no denial of benefits.

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 primary job, and that such a separation is non-disqualifying under the DUA's regulations.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 11, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

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.

SF/rh