

Although the claimant quit his job for disqualifying reasons (due to a personality conflict with a co-worker), he is only subject to a constructive deduction, since the separation was from a part-time employer in the benefit year of an already established unemployment claim.

**Board of Review
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BOARD OF REVIEW DECISION

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 we affirm in part and reverse in part the review examiner's decision.

The claimant resigned from his position with the employer on July 15, 2017. He then re-opened an unemployment claim which had been filed earlier in the year and which was originally effective March 19, 2017. On September 7, 2017, the DUA sent the employer a Notice of Approval, informing the employer that the claimant was eligible for unemployment benefits following his resignation. 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 November 21, 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 a constructive deduction, pursuant to 430 CMR 4.71–4.78, was applicable to the claimant's unemployment claim. Only the claimant 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 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)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant quit his position due to a conflict with a co-worker whom he worked with for one shift during the week; 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 as a line cook for the employer, a 60-seat restaurant and bar. The claimant began work for the employer during the week beginning June 4, 2017.
2. The claimant had had a personal friendship with the owner and the manager for many years before working for the employer. He was also a customer.
3. As a customer, the claimant knew one of the line cooks who worked at the employer. They did not get along. On or about 2015, the claimant used the employer's kitchen to cook for a charity event. While there, he argued with the line cook about leaving knives around.
4. In the spring of 2017, the claimant was unemployed. The owner asked the claimant if he was interested in working at the employer. The claimant agreed. The claimant also reminded the owner of his conflicts with the line cook.
5. The claimant was scheduled to work the lunch shift, from 10 a.m. to after 2 p.m. The claimant worked with his immediate supervisor, the lead cook. The line cook he had conflicts with did not work the lunch shift. The claimant earned \$14 per hour.
6. After the claimant began working, the owner told him he was going to schedule him to work on Saturday nights. The line cook he had conflicts with also worked Saturday nights. The claimant reminded him of their conflicts and told him it was likely there would be more. The owner told the claimant he needed him to work Saturday nights.
7. Cooks at the employer receive slips for food orders from the servers and bartenders. They are expected to prepare the orders in the order the slips are received.
8. On the second Saturday the claimant worked, the line cook mixed up the order slips. The food orders were prepared in the wrong order. The restaurant was very busy and the inaccurate timing caused confusion for the claimant and servers.
9. The line cook criticized the claimant for being slow and failing to follow his instructions.
10. The claimant believed the line cook was intentionally trying to confuse him.

11. The next day the claimant complained to his immediate supervisor, the lead cook, about the line cook. He showed him the food order slips. The lead cook told the claimant that was the way he was.
12. At approximately 8 p.m. the next Saturday, the claimant and the line cook were talking to two bartenders about a mistake in an order. The line cook said to them: "I'll let you three fucking figure it out." He went into the walk-in refrigerator and did not return for a few minutes. The claimant was upset with the line cook's swearing and failure to help resolve the issue.
13. The claimant often saw the line cook snickering and smiling at him when he had difficulties or became confused.
14. On Saturday, July 15, 2017, the line cook was critical of some wings the claimant cooked. He did not put them out to be served. The claimant asked him why he did not put them out. The line cook told the claimant they were burnt.
15. The claimant asked the owner for his opinion about the wings. He asked if they were burnt. The owner told the claimant they were not burnt.
16. The claimant told the owner he could not take it anymore. He changed his clothes and left.
17. On Sunday, July 16, 2017, the claimant spoke with the lead cook and told him he would give two weeks' notice. The lead cook told him he had already replaced him.

Credibility Assessment:

The employer witness at the hearing on November 13, 2017 was the manager. The claimant did not attend the first hearing but did attend the remand hearing. The manager did not attend the remand hearing. Their testimony differed, however, the manager did not have first-hand knowledge of the interactions between the claimant and the line cook. Therefore, the claimant's testimony regarding these interactions is accepted as credible.

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, because a constructive deduction is applicable to the claimant's claim.

There was no dispute that the claimant decided to quit his job with the employer after working there for about one and a half months. 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 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. After hearing the employer's testimony during the first hearing, the review examiner concluded that the claimant had not carried his burden. Following our review of both hearings, the documentary evidence, and the review examiner's consolidated findings of fact, we agree.

The claimant quit his position due to a conflict that he had with another line cook he worked with on Saturdays. The claimant knew the line cook, and he knew that they did not get along well. *See Consolidated Finding of Fact # 3.* Despite the history between them, the claimant decided to take on the job of a line cook in the employer's restaurant. During the remand hearing, the claimant described several events which occurred between him and the other line cook. In the first incident, the line cook mixed up some order slips, leading to confusion for the claimant and the restaurant. In the second incident, two bartenders and the claimant were trying to figure out what had caused a mistake in an order. The line cook told the claimant and the bartenders: "I'll let you three fucking figure it out." In the final incident, the line cook told the claimant that the claimant had burned an order of chicken wings. The owner eventually agreed that the chicken wings were not burned. In addition to these three incidents, the review examiner found that that the line cook criticized the claimant and sometimes smiled or snickered at the claimant.

We do not think that the conflict between the claimant and the line cook gave the claimant good cause to quit his job. We first note that the claimant worked with the line cook only one day per week. Thus, the line cook's behavior was not pervasive, as it did not affect the vast majority of the time the claimant worked for the employer. As to the three incidents noted above, we think that they show that there was a conflict, but not that it affected the claimant so much that it made his continued employment untenable. Although there were disagreements between the claimant and the line cook, none of them resulted in any disciplinary action against the claimant. The interactions did not prevent the claimant from performing his job duties, even if it made the workplace more disagreeable on Saturdays. The behavior cannot be fairly described as harassment. *See 430 CMR 4.04(5).* Generally, the line cook was immature, unfriendly, and critical. The manager, who testified during the first hearing, indicated that the line cook "likes it done right." The suggestion was that the line cook could be picky and idiosyncratic. However, the behaviors described did not render the workplace intolerable for the claimant.

We consider how the DUA would treat the situation at hand. In Section 1224(D) of the DUA's Service Representative Handbook, which relates to "General Job Dissatisfaction," absent certain circumstances not relevant here, a separation is disqualifying if a person quits because he believes "his or her co-workers are uncongenial." In addition, we note that the personality conflict between the claimant and the line cook does not appear to have been "an irreconcilable conflict that interfered with the work process" such that the claimant could not continue to do his job in a manner which was satisfactory to the employer. *See* DUA Service Representative Handbook, Section 1224(H). In short, we agree that the claimant did not have good cause to quit his job.

In his original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning July 15, 2017. 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 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 from approximately June 4, 2017 through July 15, 2017. The work occurred after he had already filed a claim for benefits, which was effective in March of 2017. So, the work occurred during his benefit year.¹ Since the claimant separated from a part-time job in his benefit year, the regulation noted above is applicable.

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 4.78(1)(c) provides as follows:

¹ The "benefit year" is, generally speaking, the period of one year beginning on the effective date of an unemployment claim.

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 number of weeks worked.

In this case, the claimant performed six weeks of work for the employer after the establishment of his unemployment claim. *See Consolidated Findings of Fact ## 1 and 14.* Although the review examiner did not make a finding as to the total amount of earnings the claimant had from the employer, the employer reported a total of \$1,802.50 to the DUA. *See Remand Exhibit # 7.* Therefore, the claimant's average weekly earnings were \$300.00, and this is the amount to be applied to the claimant's claim.²

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 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)(1). However, we reverse the total disqualification from benefits. Beginning the week of July 15, 2017, earnings of \$300.00 per week shall be attributable to the claim. The constructive deduction shall remain in effect until the claimant meets the requalifying provisions of G.L. c. 151A, § 25(e) or 430 CMR 4.76(3). He may receive the unemployment benefits only if he is otherwise eligible under G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 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.

² This amount is treated as earnings and is subject to the earnings disregard provided for in G.L. c. 151A, § 29(b). 430 CMR 4.78(2).

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