The claimant did not have good cause to quit his job, where his general manager made rude comments to him on one day of work only. However, because the job was subsidiary to other base period work, the claimant is subject to a constructive deduction.

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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 or about July 7, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 24, 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 November 10, 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, primarily as to whether a constructive deduction pursuant to 430 CMR 4.71–4.71, was applicable to the claimant's unemployment claim. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.[1] 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 following a shift in which the employer's general manager was rude to him; and (2) if the separation is disqualifying, whether the claimant should be subject to a constructive deduction.

[1] The remand hearing took place on January 30, 2018. The review examiner's consolidated findings of fact were submitted to the Board on April 19, 2018.

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 for the instant employer, a restaurant, as a line cook from May 19, 2017 until July 7, 2017. He worked between 30 – 50 hours per week earning $12/hr.

2. On August 1, 2017, the claimant initiated a claim for unemployment benefits and obtained an effective date of July 30, 2017.

3. During the base period of his claim, the claimant's wages were as follows:

	3Q16	Q16	1Q17	2Q17
[Employer]				$1,711.20
[Employer P]			$2,817.75	$3,870.75
[Employer L]	$650	$4,411.55	$793.00	

4. He was determined monetarily eligible for a Weekly Benefit Amount of $192 for 27 potential weeks, with an Earnings Disregard of $64.

5. The claimant worked for the instant employer during 7 weeks of the last quarter of the base period.

6. The claimant left his full time (40 hour, $13/hr) job with [Employer P] to work full time with the instant employer. He worked for this employer as a server from January 12, 2017 until approximately May 19, 2017.

7. The claimant testified that he worked for both [Employer P] and the instant employer concurrently.

8. He ceased work with [Employer L] in January 2017.

9. The claimant's usual field of work was food service.

10. The claimant worked with General Manager S for the entirety of his employment with the instant employer.

11. Prior to July 7, 2017, the GM did not interact with the claimant in any manner that the claimant felt to be inappropriate.

12. On July 7, 2017, the claimant added an extra onion ring to an order because he felt the rings were small. The GM remarked that the claimant should go back to school to learn to count since his order did not contain the standard 6 onion rings.

13. During the same shift, the claimant was responsible for placing sauces on dishes.

14. When the claimant placed the wrong sauce with an item, the GM pushed the dish back toward him, spilling the sauce on him. The claimant asked the GM what the problem was and she responded that she asked for a different sauce.

15. The claimant was displeased with the GM's demeanor toward him on the day in question and sought out a second manager to speak to regarding his concern.

16. While the claimant was speaking to the second manager, the GM was unaware of his whereabouts and asked another employee to fill in at the claimant's station during his absence.

17. When the claimant returned from his conversation and saw another employee at his station, he believed that he had been replaced permanently and left work mid-shift.

18. After the GM was unable to locate the claimant for some time, the second manager informed her that the claimant went home because he was unhappy with how she had spoken to him.

19. The GM did not yell or swear at the claimant, or behave in any manner that she believed to be unprofessional or insulting.

20. Approximately 30 minutes after the claimant left work, the GM made the first of multiple attempts to contact the claimant by phone. She left multiple voicemails asking the claimant to come in to talk, and attempted to reach him through his emergency contact.

21. The claimant received approximately 10 calls from the GM on July 7, 2017 but did not answer her calls or respond to her messages because he was too upset.

22. On the morning of July 8, 2018, the GM successfully reached the claimant by phone.

23. She apologized for speaking to the claimant the way she had the prior night and for the incident with the sauce, and stated she was sorry if she had done anything else to offend him.

24. The claimant told the GM that when he saw another employee standing at his station, he assumed she wanted him to go home.

25. The GM assured the claimant that was not the case.

26. The claimant acknowledged that there appeared to have been a misunderstanding during his July 7, 2017 shift.

27. The GM told the claimant that she wanted him to come back to work. She stated that she had obtained coverage for all shifts the claimant was already scheduled to work based on her assumption that he had quit the prior evening. She informed the claimant that, if he wanted to return, she could place him back on those shifts.

28. The claimant responded that he would think about the offer.

29. He did not return to work and made no further contact with the employer after the July 8, 2017 call because he felt the GM's behavior toward him was unprofessional and that she assaulted him by splashing him with sauce on July 7, 2017.

30. The employer maintained a written Discrimination, Harassment, Bullying and Sexual Harassment policy that described avenues for reporting complaints of harassment. The claimant signed for receipt of the policy on May 22, 2017.

31. The claimant did not report to either the VP of Operations or President that he took issue with the manner in which the GM spoke to him. He did not pursue any other avenue documented in the employer's policy prior to making the decision not to return to work.

32. The claimant left work effective July 7, 2017 when he walked out prior to the end of his scheduled shift and failed to appear for work thereafter.

NOTE: The claimant expressed minimal disagreement with the Findings of Fact contained in the November 10, 2017 Hearing Appeal Results.

Based on the claimant's recollection of his employment dates with [Employer P], it is unclear for what period, if any, these jobs overlapped.

As requested in the December 20, 2017, order of the Board of Review:

The Monetary Summary and Employment History for the claimant's current claim have been marked as Remand Exhibit 5 and entered into the record.

Wages paid to the claimant during each quarter of the base period are documented in [Consolidated] Finding of Fact # 3.

The number of weeks worked for the instant employer during the final quarter of the claimant's base period were determined using the 2017 DUA Operational Calendar.

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. We do note that the review examiner found that the claimant worked for the instant employer and Employer P simultaneously, *see* Consolidated Finding of Fact # 7, even though she stated in the Note that the period of overlap, "if any," was unclear. The "if any" comment appears to be at odds with the finding. We interpret this simply as an indication that the review examiner was unsure of how long the claimant worked for both employers. We accept the finding as being supported by the claimant's testimony. As discussed more fully below, we conclude that the review examiner's determination that the claimant's separation from his job 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.

Because there was no dispute that the claimant quit his job with the employer after his experience during the July 7, 2017 shift, his qualification 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 . . . .

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.

The review examiner has found that the claimant quit his job following several interactions with the general manager on July 7, 2017. Prior to July 7, 2017, there had been no significant issues between the general manager and the claimant. *See* Consolidated Finding of Fact # 11. On July 7, the general manager told the claimant that he "should go back to school to learn to count" after he put seven onion rings on an order rather than the usual six. Consolidated Finding of Fact # 12. She also pushed a dish of sauce toward the claimant, spilling some of the sauce on him. Consolidated Finding of Fact # 14. After the claimant went to talk with another manager about the general manager's behavior, the general manager put another person at his place in the kitchen. When he returned to his station and saw the person there, the claimant left.

As the review examiner did in Part III of her decision, we also conclude that the general manager did not engage in any "egregious behavior that would cause a reasonable person to leave work." At most, we think that the general manager's behavior may be interpreted as rude, impolite, and disrespectful. However, isolated incidents of such conduct on one day of work does not create good cause for the claimant to resign. There is no evidence in the record that the general manager's behavior was ongoing or pervasive. She was not intentionally trying to insult, belittle,

or harass the claimant. *See* Consolidated Finding of Fact # 19. Based on the record, it appears that she was critical and rushed when dealing with the claimant on July 7. This is not harassment, and it did not give rise to a reasonable workplace complaint which could result in a qualifying separation.

Even if the behavior did rise to the level of good cause, however, we note that the claimant made no effort to correct the situation prior to quitting. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984) (an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile). He did go to speak with another manager on July 7, *see* Consolidated Findings of Fact ## 15 and 16, but he did not pursue this further. The general manager tried calling the claimant several times, until he finally spoke with her on July 8. The general manager explained what had happened the day before and profusely apologized. The general manager told the claimant that his job was still available for him. The claimant, unmoved by her apology, "did not return to work . . . because he felt the [general manager]'s behavior toward him was unprofessional and that she assaulted him by splashing him with sauce on July 7, 2017." Consolidated Finding of Fact # 29. The claimant did not attempt to return to work to see if the general manager's behavior would change for the better. He did not pursue any complaints to upper management. He chose to quit when he did without making efforts to work things out with the general manager. Therefore, the claimant did not carry his burden to show that he quit his job for good cause attributable to the employer or its agent.

In her original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning July 9, 2017. However, the findings of fact indicate that the claimant's job with the employer was part-time, so the claimant may be subject to a constructive deduction pursuant to the provisions of 430 CMR 4.71–4.78. Although the review examiner found that the claimant could work between thirty and fifty hours per week, *see* Consolidated Finding of Fact # 1, and he may have been hired with that understanding, his only base period quarter with wages from this employer indicates that he made $1,711.20 over the course of seven weeks. *See* Consolidated Findings of Fact ## 3 and 5. Dividing the weekly earnings by $12.00 per hour gives approximately twenty hours of work per week. This is decidedly part-time work, compared to the prior work with Employer P. *See* Consolidated Finding of Fact # 6.

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 part-time for the employer from approximately May 19, 2017, until July 7, 2017. The review examiner found that the claimant worked for the employer at the same time as he worked for Employer P, even if it was an overlap of only about one or two days. *See* Consolidated Finding of Fact # 7. Indeed, he left Employer P to take his job with this employer, and last worked for Employer P on or about May 19, 2017. Consolidated Finding of Fact # 6. Given that he worked full-time for Employer P and was paid far more in wages during his base period from Employer P than he was with the instant employer, Employer P was his primary work. We note that there is no indication in the findings of fact or the DUA's UI Online computer system that the DUA has considered the separation from Employer P to be disqualifying. Because the claimant separated from a subsidiary base period job prior to filing his claim for benefits, he is subject to a constructive deduction.

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 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 second quarter of 2017, which ran from April 1, 2017 through June 30, 2017. During that quarter, the claimant was paid $1,711.20 by the employer. *See* Consolidated Finding of Fact # 3. During that quarter, the claimant worked for seven weeks. Consolidated Finding of Fact # 5. Therefore, the claimant's average weekly earnings were $244.00, 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.

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

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 2, 2017, earnings of $244.00 per week shall be attributable to the claim.[3] The constructive deduction shall remain in effect until the claimant meets the requalifying provisions of the law. He may receive the unemployment benefits only if he is otherwise eligible under G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

SF/rh

[3] The claimant separated during the week of July 2, 2017. However, his claim is not effective until July 30, 2017. Effectively, then, the disqualification does not have any effect until the start of his claim.