

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0024 4771 51

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 the claimant benefits following his separation from employment on September 22, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

On February 16, 2018, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed and both parties attended the hearing. In a decision rendered on September 11, 2018, the review examiner affirmed the agency determination, concluding that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, he was disqualified under G.L. c. 151A, § 25(e)(2).¹ The Board accepted the claimant's application for review.

Ruling of the Board

After considering the recorded testimony and evidence from the *de novo* hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's decision that the claimant is disqualified under G.L. c. 151A, § 25(e)(2), is based on substantial evidence and is free from any error of law affecting substantive rights.

However, because this was part-time benefit year employment, the claimant's disqualification from receiving benefits is limited to a constructive deduction. 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(1)(a)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 4.78(1) provides as follows:

¹ This decision arose following a *de novo* hearing in this matter. The claimant had appealed the original hearing, held before a different review examiner, but on June 6, 2018, the Board remanded the case for a *de novo* hearing due to the original review examiner's failure to inquire about material facts or to make sufficient findings or credibility assessment on contested facts.

- (c) 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.

The review examiner's findings show that the claimant worked for the employer from the week beginning July 16, 2017 through the week beginning September 17, 2017, a total of 10 weeks, which was during his 2017-01 benefit year, and that he worked part-time. The DUA's administrative record-keeping system reveals total reported gross wages for this employment as \$2,534.25. His average part-time earnings were, therefore, \$253.43 per week, and the amount of the constructive deduction to be applied to the claimant's claim is \$136.73.²

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, 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 September 17, 2017, the claimant shall be subject to a \$136.73 constructive deduction until he meets the requalifying provisions of the law.³

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in the 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)**

² See 430 CMR 4.78(2).

³ See CMR 4.76(2) and (3).

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.

AB/jv