

**Claimant, who quit her part-time job because she did not like the shifts being offered, is disqualified under G.L. c. 151A, § 25(e)(1), but is only subject to a constructive deduction because she separated during her benefit year.**

**Board of Review  
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Member  
Michael J. Albano  
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**Issue ID: 0025 4739 52**

## **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 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 agency initially determined on June 6, 2018 that the claimant was not entitled to unemployment benefits. The claimant appealed and attended the hearing. The employer did not participate. In a decision rendered on August 24, 2018, the review examiner affirmed the agency's determination, concluding 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). The Board accepted the claimant's application for review.

### **Findings of Fact**

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

1. Prior to working for the instant employer, the claimant worked as a full time program specialist until February 16, 2018. The claimant's employment with the instant employer and her previous employer did not overlap.
2. The claimant accepted a job and began her employment with the instant employer on [March] 26, 2018. The claimant accepted a position as a part time home health aide. The claimant had prior experience working as a home health aide from 2012 until 2016.
3. The claimant accepted the position knowing it was part time. At no time did the instant employer guarantee the claimant a minimum number of hours. The employer does not have full time home health aides.

4. The claimant was assigned to care for different clients at their homes. When the claimant accepted the position, she understood that she would be required to travel to each client's home.
5. During her employment, the claimant worked about 13 hours per week at a rate of \$13.00 per [hour].
6. The claimant was dissatisfied with the number of hours she was assigned. The claimant asked the director for more hours. The claimant was told that she could work up to 40 hours per week and could pick up any available shifts.
7. On a weekly basis, the employer sends its employees an email containing shifts that are available to be picked up.
8. The claimant was dissatisfied with the scheduling of her clients. Often the claimant's clients were scheduled back to back and her schedule did not account for travel time.
9. If the claimant was late to an appointment, the client could refuse to be seen by the claimant and if so, the claimant was not paid for that appointment.
10. The claimant was dissatisfied with the length of some of her appointments. The claimant did not like working 1-hour appointments, the claimant preferred to work 3-4 hour appointments.
11. On April 5, 2018, the claimant filed a claim for unemployment benefits. It is unknown why the claimant filed her claim on April 5, 2018.
12. On April 6, 2018, the claimant was scheduled for a 1 hour appointment at 9:00 a.m., a 2-hour appointment at 10:00 a.m. and a 1-hour appointment at 1:30 p.m.
13. The claimant worked the 9 a.m. shift.
14. The claimant was late to the 10:00 a.m. appointment, and the client refused to be seen by the claimant. The claimant notified the employer that the claimant [sic] had refused to be seen.
15. Prior to the start of the claimant's 1:30 p.m. shift, she was involved in a car accident. At that time, the claimant was driving a rental car because her car was being fixed after it had been involved in a prior accident. The claimant notified the employer that she was involved in an accident and would not be reporting to the 1:30 p.m. shift.
16. The claimant returned the rental car.

17. The claimant left on an employer approved vacation from April 9, 2018, until April 20, 2018.
18. On or around April 22, 2018, the claimant contacted the director and informed her that she did not want to commit to ongoing [assignments] and only wanted to work on a per diem basis.
19. The director agreed to allow the claimant to pick up shifts on a per diem basis and continued to send the claimant weekly email with available shifts.
20. The claimant did not pick up any work because she did not like the shifts and durations begin [sic] offered.
21. The claimant effective quit her position after requesting to be removed from any ongoing assignments and failing to pick up available work hours offered to her as a per diem employee.
22. The claimant's personal vehicle was repaired and returned to her in early May, 2018.
23. Thereafter, the claimant did not pick up any available work because she did not like the shifts and durations being offered.

#### Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's decision that the claimant's separation from employment was disqualifying is based on substantial evidence and is free from any error of law affecting substantive rights. However, because this was part-time subsidiary employment, the disqualifying separation did not render the claimant ineligible for her entire weekly benefit amount. The claimant is merely subject to a constructive deduction, rather than a complete denial of benefits. 430 CMR 4.76(1)(a)(2).

We affirm that part of the review examiner's decision, which concluded that the claimant's separation from the employer was disqualifying under G.L. c. 151A, § 25(e)(1). We reverse the portion of the decision, which subjected the claimant to more than a constructive deduction from her weekly benefit rate as of the week ending April 28, 2018. Under 430 CMR 4.78(1)(b), the claimant's constructive deduction is calculated by determining the claimant's average weekly wage since the effective date of her claim. A review of the record indicates that the claimant worked from the week ending March 24, 2018, through the week ending April 21, 2018, and earned a total of \$383.75<sup>1</sup>. This results in an average weekly wage and a constructive deduction of \$77.00 per week.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 14, 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](http://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.

SVL/rh

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<sup>1</sup> See Exhibits ## 8A, 8B, and 14. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).