

The claimant's separation from her part-time job with the employer was disqualifying under G.L. c. 151A, § 25(e)(2) due to disrespectful behavior. Because this employment was in her benefit year, she is subject to a constructive deduction, rather than a full disqualification.

**Board of Review
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Issue ID: 0027 7828 65

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 beginning July 29, 2018. We affirm the review examiner's conclusion that the claimant's separation was disqualifying. However, we reverse her conclusion that the claimant is subject to a total disqualification from the receipt of benefits.

The claimant was discharged from her position with the employer on July 29, 2018. She then re-opened a previously filed claim for unemployment benefits.¹ On December 12, 2018, the DUA sent the claimant a Notice of Disqualification, which informed her that she was not entitled to benefits beginning July 29, 2018, based on her separation from this employer. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 15, 2019.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). 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, pursuant to 430 CMR 4.71–4.78, a constructive deduction, rather than a complete disqualification from the receipt of benefits, was applicable to the claimant's claim. Both parties 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.

¹ The review examiner's consolidated findings of fact focus on the claim effective in November of 2018. However, during the remand hearing, the claimant offered testimony indicating that she re-opened a prior claim and then had to file a new claim when the prior claim expired. The DUA's records show that the prior claim was effective October 27, 2017.

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)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant used profanity towards the employer's Executive Director on her final day of employment; 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 assessment are set forth below in their entirety:

1. The claimant worked full time for the employer from the year 2009. As of at least the year 2017, the claimant began working per diem for the employer until the employer discharged the claimant on July 29, 2018.
2. The claimant worked per diem on the weekends as the manager on duty.
3. The claimant's coworker asked the claimant to cover the manager on duty shift for July 29, 2018. The claimant agreed to cover the shift.
4. On July 29, 2018, when the claimant reported to work, she observed that a name other than her co-worker's name was on the manager on duty schedule for that date. The claimant called her co-worker to verify that she had the right date. The co-worker did not respond to the claimant. The claimant sent a text message to the individual whose name was on the schedule. The individual did not reply.
5. The claimant sent a message to the employer's Executive Director but did not receive a response. The claimant remained for about an hour at the workplace then decided to leave.
6. The claimant was very upset that she reported to work while she was not on the schedule.
7. While at home, the claimant received a call from the Executive Director. The claimant requested to be paid for the time she was at the workplace. The claimant stated "you're fucking unprofessional" "you're going to fucking pay me" "who the fuck do you think you are". The Administrator raised his voice to speak over the claimant who was yelling. The claimant admittedly intentionally hung up the phone while talking to the Executive Director.
8. The Executive Director called the claimant again. The claimant answered and asked the Executive Director to never call her phone again.
9. The Executive Director sent a text message to the claimant stating "Due to your insubordination and your disrespect and inability to have a normal

conversation without yelling at me, do not work today you will not be paid. Have a nice day.” The claimant replied “Fuck you don’t ever use my inner again you should probably learn how to communicate idiot.”

10. The employer expects employees to be respectful and professional.
11. The employer discharged the claimant for being disrespectful.
12. On November 11, 2018, the claimant filed a claim for benefits with an effective date of November 11, 2018. The weekly benefit rate of the claim was \$795.00.
13. Prior to filing her claim for unemployment benefits, the claimant worked for employers other than [Employer A]. She worked for these employers at the same time as she worked for [Employer A].
14. The claimant worked for [Employer B] as a fulltime social worker from January 2018 through August 2018. The claimant’s rate of pay was \$40.50 per hour. The claimant worked 7:00am to 4:00pm, Monday to Friday. The claimant was discharged from her position.
15. The claimant worked for [Employer C] as a part time PCA from June 2018 through July 2018. The claimant’s rate of pay was \$15.00 per hour. The claimant quit her position. During her employment the claimant worked a total of 6 hours for the employer.
16. On September 29, 2018, the Department of Unemployment issued a Notice of Approval regarding the claimant’s separation from [Employer B], indicating that the claimant was eligible for benefits.
17. On August 1, 2018, the Department of Unemployment issued a decision regarding the claimant’s separation from [Employer C], approving the claimant for benefits.
18. The following is the breakdown of the claimant’s base period wages by quarter and employer:

| Employer | 4Q2017 | 1Q2018 | 2Q2018 | 3Q2018 |
|--------------|-------------|-------------|-------------|-------------|
| [Employer D] | \$4,485.20 | | | |
| [Employer C] | | | \$300.00 | \$300.00 |
| [Employer B] | | \$13,111.88 | \$22,680.00 | \$17,348.58 |
| [Employer A] | \$2,422.60 | \$3,374.48 | \$2,494.89 | \$288.45 |
| [Employer E] | \$10,574.40 | | | |

[Employer F] \$6,560.00 \$3,280.00

19. When the claimant separated from [Employer A] she did not know that she was going to soon separate from [Employer C] or [Employer B].

Credibility Assessment:

The employer's Executive Director offered that the claimant used a lot of profanity during their conversations on July 29, 2018. Such as "you're so fucking unprofessional" "you're going to fucking pay me" "who the fuck do you think you are".

The claimant admits that she was upset. The claimant offered that the Executive Director was unprofessional. The claimant denies using profanity during her conversation with the Executive Director nor did she recall stating "fuck you" in the text message.

Given the totality of the evidence presented including the employer's documentation corroborating the employer's testimony that the claimant used profanity towards him, it is concluded that the employer's testimony is more 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 original 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 further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's conclusion that the claimant's separation from her job with the employer was disqualifying is supported by the record. However, we reject the legal conclusion that she is subject to a complete disqualification from the receipt of benefits. Rather, a constructive deduction is applicable to the claimant's claim.

Although the claimant questioned whether she had been discharged from her *per diem* position with the employer, the employer's Executive Director testified that she had been fired following the July 29, 2018, incident. The review examiner found, in accord with the employer's testimony, that the claimant had been discharged "for being disrespectful" to the Executive Director on July 29, 2018. Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in relevant 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest

Under this section of law, the employer has the burden to show that the claimant's separation was disqualifying. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). Following the initial hearing in this case, the review examiner concluded that the employer had carried its burden.

We agree with the review examiner's application of G.L. c. 151A, § 25(e)(2), in her decision. The claimant was discharged for using profanity toward the Executive Director. The review examiner made supported findings of fact that the claimant used the profanities. *See* Consolidated Findings of Fact ## 7 and 9, and Exhibit # 8. In so doing, she was disrespectful and unprofessional. The review examiner's reasons for believing the Executive Director's testimony were reasonable in relation to the evidence presented. Therefore, we will not disturb the dispositive findings of fact. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must "[T]ake into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

During the initial hearing, the claimant testified that she was "absolutely" aware that the employer expected her to be professional and respectful. Such an expectation is reasonable, as it serves to promote a harmonious and productive work atmosphere and relationship among employees. None of the consolidated findings of fact indicate that the claimant's actions on July 29, 2018, were mitigated in some way. Although the claimant was upset on July 29, 2018, *see* Consolidated Finding of Fact # 6, she intentionally and repeatedly swore at the Executive Director. Even after some period of time had gone by, she again replied to the Executive Director in an inappropriate manner. *See* Consolidated Finding of Fact # 9. The conduct was deliberate and wilful. Therefore, the employer has shown that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest. The separation is disqualifying under G.L. c. 151A, § 25(e)(2).

In her original decision, the review examiner concluded the claimant would be subject to a full disqualification from the receipt of benefits, beginning August 1, 2018.² However, the original findings of fact indicate that the claimant's job with the employer was *per diem* (a form of part-time work), at least during the relevant period of time at issue here (2017 and 2018). This suggests that the claimant may be subject to a constructive deduction, pursuant to the provisions of 430 CMR 4.71–4.78.

² August 1, 2018, is part of the week beginning July 29, 2018.

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 in a *per diem* capacity for the employer at the time of her separation on July 29, 2018. As we have noted above, this occurred during the benefit year of her claim, which had been originally effective in October of 2017.³ Since the claimant separated from a part-time job in her 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 7.78(1) addresses how to calculate the amount of a constructive deduction. Consolidated findings of fact regarding the base period of the 2017 claim were not made. As such, it is difficult to say whether the claimant separated from “subsidiary” part-time work,⁴ or whether the *per diem* work could be said to have been “obtained,” or started, in the benefit year of her October, 2017, claim. Compare 430 CMR 4.78(1)(b) with 430 CMR 4.78(1)(c). However, in either case, the amount of the constructive deduction is determined by dividing the total amount of earnings in the benefit year by the number of weeks worked for the part-time employer.

Here, the claimant performed work for the employer during the benefit year of her 2017 claim, which also becomes the base period of her 2018 claim. Consolidated Finding of Fact # 18 shows the claimant’s earnings during the period of time she worked prior to her separation on July 29, 2018. We note that the claimant’s 2017 claim was effective on October 27, 2017. Therefore, all of the wages in the fourth quarter of 2017 were not in the benefit year of her claim. However, the constructive deduction is based on a person’s average weekly earnings; it is, at best, an approximation of earnings in a given period of time. See 430 CMR 4.78 (noting various ways to arrive at the “average part-time earnings”). Therefore, we will include the earnings from the fourth quarter of 2017 to calculate the average part-time earnings. Consolidated Finding of Fact # 18 shows that the claimant earned \$8,580.42 prior to her separation on July 29, 2018. She earned this over the course of forty-four weeks (thirteen weeks for each of the first three

³ The “benefit year” is, generally speaking, the period of one year beginning on the effective date of an unemployment claim.

⁴ Subsidiary employment must be established during the base period of the 2017 claim.

quarters, plus five weeks for the last quarter). Therefore, the claimant's average weekly earnings were \$195.00 per week, and this is the amount to be applied to the claimant's claim each week after her separation from the employer.⁵

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 July 29, 2018, earnings in the amount of \$195.00 shall be attributable to each week in which the claimant certifies for benefits. The claimant shall be subject to a constructive deduction, until she meets the requalifying provisions of the law.⁶

BOSTON, MASSACHUSETTS
DATE OF DECISION – July 25, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

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⁵ A review of the DUA's records show that this amount is less than the earnings disregard on the 2017 claim. The benefit rate of that claim is \$769.00 per week. Therefore, the claimant would be entitled to her full benefit rate in any week of total unemployment.

⁶ See 430 CMR 4.76(2) and (3).