Although the claimant's separation from the instant employer was disqualifying, the job was subsidiary base period employment, and the claimant did not know that his hours from his primary employer would be cut or reduced when he quit this job. Therefore, he is not subject to a constructive deduction or any disqualification.

Board of Review
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Issue ID: 0028 2066 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 (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from his position with the employer on October 26, 2018. He filed a claim for unemployment benefits with the DUA on December 7, 2018, and the claim is effective November 25, 2018. On January 4, 2019, the DUA sent the employer a Notice of Approval, stating that the claimant was eligible to receive unemployment benefits. 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 March 9, 2019.

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 allow the claimant an opportunity to offer evidence regarding his separation and to take additional evidence as to whether a constructive deduction, as provided for in 430 CMR 4.71–4.76, was applicable in this matter. 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.

The issue before the Board is whether the review examiner's conclusion that the claimant is not eligible to receive unemployment benefits is supported by substantial and credible evidence and is free from error of law, where the claimant quit his part-time job with this subsidiary employer while he continued to work for his primary employer in his occupational field, believing that he would maintain his job with his primary employer.

Findings of Fact

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

1. The claimant worked as a Host for the employer, restaurant, from 8/9/18 until he separated from the employer on 10/26/18.

2. The claimant was hired to work part time, 15 to 20 hours a week, earning $12.50 an hour.

3. The claimant left work on 10/25/18. He verbally told his Manager that he was leaving his job immediately.

4. The Manager asked the claimant if there was anything he could do to make him stay. The claimant told the Manager there was not.

5. The claimant had been verbally spoken to recently for calling out of work. His job was not in jeopardy at the time of his leaving.

6. The claimant had mention [sic] in August, 2018, that he was going to quit but decided to continue working at that time.

7. Prior to leaving, the claimant did not request a leave of absence nor did he request a transfer into another position.

8. The claimant never indicated any issues with his employment prior to leaving. The claimant's job duties remained the same throughout his employment.

9. In early October of 2018, the claimant was working at a photography studio while working for the instant employer. The claimant had been looking for a job more in his field of photography while working for the instant employer. The claimant had previously told his Manager that he was ready to move on because he was not cutting it there and wanted to focus on photography. The claimant had also been getting certified to be a teacher at the time.

10. As of 4/17/19, the claimant was still working for the photography studio. He worked 20 hours a week for this new employer.

11. The effective date of the claimant's most recent unemployment claim was 11/25/18. He filed the claim on 12/7/18. His benefit rate is $94.00.

12. The claimant filed the claim on 12/7/18 because he was waiting to see the number of hours he would be working for the photography studio. When he did not get the hours he was told he would be working, he filed the claim. The claimant waited a little while after leaving employment with the instant employer to file his claim.

13. In the period prior to the claimant's separation, the claimant had worked for the instant employer contemporaneously with the photography studio.

14. The claimant's base period employers are as follows: **(1) [Employer A]** - The claimant worked as a Social Media Marketing Manager. He started work with this employer in late March 2018 and ended in beginning of July 2018. The claimant was earning $13.00 an hour working part time, 17 hours a week. His base period earnings were $2,450.04 for second quarter of 2018. He left this employment due to the commute and working more hours than what he was being paid for; **(2) [Employer B]** - The claimant worked as a Host. He began work on 8/9/18 and ended work on 10/26/18. He was earning $12.50 an hour working part time 15 to 20 hours a week. His earnings were $1,059.59 for the third quarter of 2018. He left this employment to remain employed in other employment in his field; **(3) [Employer C]** – The claimant worked as a Screen Printer. He started work with this employer on 7/15/18 and ended his employment as of 7/30/18. The claimant was earning $12.00 an hour working full time 40 hours a week. He earned a total of $304.20 in wages for third quarter of 2018. He quit this employment because the working environment was very hot. **(4) [Employer C]** – The claimant worked as a Digital Printer for this employer. He began employment with them in December of 2017 [sic] and ended employment in January of 2019. It is not known how much he earned per hour. He did work full time 40 hours. The claimant earned wages totaling $2,216.08 during the first quarter of 2018. He was terminated by this employer because he could not match the speeds of printing. **(5) [Employer E]** - The claimant worked as a Photographer and Photographer Assistant. He began working for this employer on 8/7/18 and continued to work for them through the remand hearing date. He earns $15.00 per hour and works 35 hours a week. He earned a total of $1062.32 during the third quarter of 2018 and $4472.55 for fourth quarter of 2018.

15. The claimant's usual occupation is a Photographer. He does this work freelance as well.

16. At the time the claimant quit his position with the instant employer, he was not aware of any impending separation from any other job or work.

17. The claimant did quit his position with the instant employer believing that he would still have employment with the Photography Studio.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 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, except for the date noted in Consolidated Finding of Fact # 3. Based on the other findings of fact, and the testimony from

the hearings, the separation date was October 26, 2018, not October 25. This appears to have been a typographical error. We further note a *de minimis* discrepancy with Consolidated Findings ## 10 and 14, in the number of hours that the claimant worked for the photography studio.[1] As discussed more fully below, however, we reject the review examiner's legal conclusion that the claimant is not eligible to receive unemployment benefits.

Because the claimant's separation was voluntary, his eligibility 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under this statutory provision, the claimant has the burden to show that he is eligible to receive benefits. The review examiner concluded that the claimant had not carried his burden, and we agree with that conclusion.

The claimant quit his part-time job with the employer, because "he was ready to move on . . . and wanted to focus on photography," which is his primary occupation. Consolidated Findings of Fact ## 9 and 15. The claimant did not testify that the employer caused his separation, or that the employer created a situation which led him to resign. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (noting that in "good cause" cases, focus is on the employer's conduct, not an employee's personal reasons for leaving work). The claimant did not testify that circumstances beyond his control forced him to give up his job with the employer. On the contrary, the claimant's testimony clearly indicated that his decision to leave his job as a host at the employer's restaurant was entirely voluntary. No good cause was shown. Therefore, the claimant has not shown that he is eligible to receive benefits under G.L. c. 151A, § 25(e)(1).

However, our analysis does not end here. The review examiner's consolidated findings of fact indicate that the claimant worked part-time for the employer while he also worked at another job. Although the claimant earned roughly the same amount in his base period from both employers, he had a higher hourly wage with the photography studio, the photography work was in his usual occupation, and he had the potential to work more hours for the photography studio.[2] Based on this information, we conclude that the claimant's position with this employer was subsidiary base

[1] The number of hours that the claimant works for the photography studio varies between twenty hours per week and 35 hours per week. *Compare* Consolidated Finding of Fact # 10 *with* Consolidated Finding of Fact # 14. The claimant testified to both figures during the remand hearing. Taken together, and drawing reasonable inferences from the testimony, the claimant's testimony suggested that when work was slow, he worked fewer hours (for example, 20 hours per week), but when there was more work to do, he worked 35 hours per week. In any event, we do not think that the figures are unsupported by the record.

[2] The claimant worked 15 to 20 hours per week for the employer. He worked 20 to as much as 35 hours per week with the photography studio.

period employment, and his other job with the photography studio was his primary base period employment.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction, not a full disqualification, should apply. 430 CMR 4.76 provides, in relevant part, the following:

> (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:
>
> 1. from subsidiary, part-time work during the base period and, at the time of the separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work . . . .

On the facts as found by the review examiner, this regulation does not apply so as to impose a constructive deduction. Although the claimant quit his part-time job and was then not offered hours from his primary employer, *see* Consolidated Finding of Fact # 12, the review examiner found that, at the time the claimant quit, he had no knowledge that he would not have steady work with the photography studio. *See* Consolidated Findings of Fact ## 16 and 17.[3] Therefore, a constructive deduction pursuant to 430 CMR 4.76(1)(a)(1), cannot be imposed.

As we have held in previous cases of similarly situated claimants, we decline to impose any disqualification at all. *See* Board of Review Decision 0011 4858 86 (June 19, 2014). In Board of Review Decision 0011 4858 86, after reviewing the apparent purpose of the constructive deduction regulation, we noted the following:

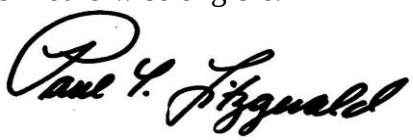
> Subsection (1)(a)(1) is thus designed to penalize an individual who chooses to leave gainful part-time employment when he knows he is about to lose his full time employment. The penalty, however, is a partial, not a complete, reduction of benefits. Clearly, then, it would be an anomaly to interpret the regulation to mean that an individual who quits a part-time job without knowledge of an impending separation from his full-time work receives the even harsher penalty of a full disqualification. Faced with a choice between this inequitable — or even illogical — construction and a more reasonable one that comports with both the beneficent purposes of the unemployment compensation statute and the express purpose of the specific regulations under scrutiny, we adopt the reasonable construction. We conclude that the claimant should not be penalized at all but instead be eligible for full benefits.

[3] The regulation speaks in terms of a "separation." No permanent, full separation is noted in the consolidated findings of fact. However, a reduction in hours, or the photography studio's failure to give the claimant hours of work, is akin to a situation like a separation, in which the claimant is in unemployment and potentially eligible to receive benefits based on the actions of his primary employer.

Pursuant to this precedent, the claimant in this case suffers no denial of benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to fully disqualify the claimant is based on an error of law, because the claimant quit his part-time, subsidiary job with the employer with no knowledge of any impending separation or reduction in work hours from his primary job, and that such a separation is non-disqualifying under the DUA's regulations.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 21, 2018, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - June 24, 2019

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