The claimant is disqualified under G.L. c. 151A, § 25(e)(1), because she failed to make a reasonable effort to preserve her job before leaving. However, the penalty is limited to a constructive deduction from her weekly benefit amount.

Board of Review
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Issue ID: 0028 9842 17

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 impose a constructive deduction on her claim following a disqualifying separation from employment on January 11, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On February 7, 2019, the agency initially determined that the claimant was not entitled to unemployment benefits. The Notice of Disqualification informed the claimant that she was disqualified under G.L. c. 151A, § 25(e)(1). However, because her job with the employer was part-time, she was subject to a constructive deduction pursuant to 430 CMR 4.71–4.78. In this case, because the amount of the constructive deduction was greater than her benefit rate, she would not be eligible for any benefits, beginning January 6, 2019. The claimant appealed, and both parties attended the hearing. In a decision rendered on March 14, 2019, the review examiner affirmed the agency determination, concluding that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). The review examiner affirmed the imposition of the constructive deduction. The Board accepts the claimant's application for review.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), because the claimant did not make reasonable efforts to preserve her job, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

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

1. The claimant worked as a Respiratory Therapist for the employer, a hospital. The claimant began work for the employer on October 29, 2018.

2. The claimant was hired to work per diem as needed. She earned $37.50 per hour. During her initial employment she worked a training schedule. From October to late December, 2018, [her] training schedule was three, 8-hour shifts each week. After late December, 2018, her training schedule was two, 8-hour shifts each week.

3. Before working for the employer, the claimant had [health] issues including migraine headaches and back pain. At about the time she began her employment, she also began experiencing leg pain caused by vascular issues.

4. Before she began working for the employer, the claimant saw her physicians. They cleared her to work full-time and without restriction.

5. The claimant's job duties required her to set-up equipment, stand for long periods of time, make rounds around the hospital, and to occasionally respond quickly to emergency calls.

6. On or about her second week of work, the claimant began to feel pain in her legs.

7. The claimant began wearing compression stockings however the pain continued.

8. The claimant made an appointment to see her physician specializing in vascular issues. The earliest available appointment was in mid-January, 2019.

9. The claimant last performed work for the employer on January 8, 2019.

10. The claimant called out on January 9, 2019, because of a migraine headache.

11. The claimant decided that because of her health concerns she would not return to work.

12. The claimant's next scheduled work day was January 11, 2019. On January11, 2019, she met with her supervisor, the Clinical Manager. She told him she was resigning because of health issues. She gave him a written letter of resignation. She told him she was going to look for other employment opportunities at the employer.

13. The claimant did not ask for time-off, modified or different job duties, or any other accommodation.

14. After meeting with the Clinical Manager, the claimant went to the employer's human resources office and asked about work. She was referred to the employer's recruiter.

15. During her tenure with the employer, the claimant worked an average of 17.04 hours each week.

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 findings of fact are supported by substantial and credible evidence in the record, except for the following. In Finding of Fact # 6, the review examiner found that the claimant began experiencing pain during the second week of work. The claimant testified several times that his happened during the second week of December. In Finding of Fact # 8, the review examiner found that the claimant made an appointment to see a doctor in mid-January of 2019. The claimant actually testified that the appointment was made for the first week of February, 2019. In Finding of Fact # 12, the review examiner found that the claimant was scheduled to work on January 11, 2019. No testimony indicated this. The claimant testified that she spoke with her supervisor on January 11, 2019, regarding her resignation. However, she did not testify that she was supposed to be working that day.

As to the substantive decision made by the review examiner under G.L. c. 151A, § 25(e)(1), we conclude that the decision is reasonably supported by the record and free from any error of law affecting substantive rights. In short, the review examiner denied benefits, because he concluded that the claimant had not shown that she separated from her job involuntarily. Specifically, she did not try to preserve her job. Even if the claimant had carried her burden to show that circumstances beyond her control were forcing her to resign, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve her employment' as would indicate the claimant's 'desire and willingness to continue her employment.'" Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009), *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–98 (1974). In this case, prior to resigning her job on January 11, 2019, the claimant took no steps to try to keep her job. The claimant has argued, in effect, that making such attempts would have been futile. While it is true that her specific physical ailments were making it difficult to perform her job duties, *compare* Finding of Fact # 3 *with* Finding of Fact # 5, it does not necessarily follow that the employer would have been unwilling to give her some sort of accommodation.[1] Especially where the claimant indicated in her resignation letter that she was having "a temporary health issue," we cannot conclude that even informing the employer about her medical issues prior to resigning would have been fruitless.

[1] To argue that no accommodation would be made, the claimant latches on to the employer's response to the DUA in a fact-finding questionnaire that a leave of absence would not have been available to her. *See* Exhibit # 3, p. 5. During the hearing, the employer's witness clarified that a personal leave, rather than an FMLA leave, may have been allowed. Moreover, this one response by the employer does not mean that it would have been unwilling to find another resolution to the claimant's issues. For example, the review examiner found that the claimant did not ask for modified job duties. Such a request would have been reasonable, given her health situation. In sum, the claimant has not shown that trying to preserve her job would have been futile.

We have also carefully considered whether the job was unsuitable for the claimant. A job which is objectively unsuitable from the start implies that attempts at preservation would be futile. *See* Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28* (noting that one who is collecting unemployment benefits becomes ineligible only if she refuses unsuitable work and that work which a claimant subjectively believes she can do may actually be "objectively unsuitable from the start"). However, we cannot conclude that the job was objectively unsuitable from the start. The claimant testified that she had done respiratory therapist work before at another hospital, for about ten years. Thus, she was familiar with the type of work.[2] She also testified that the job with the employer was around one mile from her home. She did not complain about the pay rate of $37.50. Moreover, her medical providers submitted documentation stating that she was able to do the job without restrictions. *See* Finding of Fact # 4 and Exhibits ## 10a and 10b. Thus, the job was objectively suitable for her. When her personal situation changed, she was obligated to try to keep her job. She made no such attempts.

We, therefore, conclude as a matter of law that the claimant separated voluntarily without establishing good cause attributable to the employer or urgent, compelling and necessitous circumstances under G.L. c. 151A, § 25(e).

Because this was benefit year, part-time employment, the claimant is subject to a constructive deduction. 430 CMR 4.76(1)(a)2. The amount of the constructive deduction was not calculated pursuant to the provisions of 430 CMR 4.78(1)(c). However, the claimant always worked at least sixteen hours per week at a rate of $37.50 per hour. *See* Finding of Fact # 2. Therefore, at the minimum, she had an average of $600.00 gross per week in earnings from the employer. This is substantially over her benefit rate of $234.00 per week. The constructive deduction effectively reduces her benefit rate to $0.00.

[2] 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).

The review examiner's decision is affirmed. The claimant is subject to a constructive deduction beginning the week of January 6, 2019. The constructive deduction shall remain in effect until she meets the conditions noted in 430 CMR 4.76(2) or (3).[3]

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 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

[3] The amount of the constructive deduction was not calculated pursuant to the provisions of 430 CMR 4.78(1)(c). However, the claimant always worked at least sixteen hours per week at a rate of $37.50 per hour. *See* Finding of Fact # 2. Therefore, at the minimum, she had an average of $600.00 gross per week in earnings from the employer. This is substantially over her benefit rate of $234.00 per week. The constructive deduction effectively reduces her benefit rate to $0.00.