The claimant separated from a subsidiary, part-time employer during her base period. Although the claimant's separation from the instant employer was disqualifying, the claimant continued to work for her primary employer on an on-call basis and expected to continue doing so. As she did not meet any of the criteria under 430 CMR 4.76, she is not subject to a constructive deduction or any disqualification.

Board of Review
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Issue ID: 0029 5723 53

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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on December 1, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 29, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 25, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to establish that she voluntarily left employment for good cause attributable to the employer or urgent, compelling, and necessitous reasons 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 remanded the case to the review examiner to obtain additional information relevant to the claimant's multiple base period employers. Only the claimant 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 decision, which concluded that the claimant was not entitled to benefits because she separated from the instant employer to relocate and pursue a different career, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked part-time as needed for the employer's product promotion business from sometime in approximately August or September 2018 until sometime in November 2018. The claimant was hired in March 2018 but did not perform any work for the employer prior to August or September 2018. The claimant was paid $25 per hour for her work.

2. While working for the instant employer, the claimant worked on-call or in GIG work for three other employers: [Employer A]; [Employer B]; and [Employer C].

3. The claimant quit her position with the instant employer because she relocated on 12/1/18 to the state of Pennsylvania. The claimant decided to relocate in order to be closer to the tri-state area of New York/New Jersey/Pennsylvania in order to pursue her dream of working in the arts.

4. When notifying the employer that she would be relocating, the claimant requested information for an employer contact in the New York area. The employer received contact information for an individual who works for the instant employer. The claimant was uncertain where the contact is located but was aware that the contact is responsible for hiring for events in Pennsylvania. Correspondence from the contact contained the main business name under which the instant employer operates.

5. The instant employer operates in the area where the claimant relocated. The claimant did not perform any work for the instant employer after moving. The claimant has not performed any work for the instant employer since filing for unemployment benefits.

6. The claimant is not in contact with the instant employer's contact because she did not receive any response to her prior attempts to obtain work. The claimant's last attempt occurred on or about April 5, 2019.

7. Work was available in Massachusetts through the instant employer at the time the claimant moved to Pennsylvania. The claimant was an at-will employee and was not under contract to perform work for the instant employer in Massachusetts at the time of relocating to Pennsylvania.

8. During her base period, the claimant worked on call, part-time as a brand ambassador for three other employers: [Employer B], [Employer A], and [Employer C]. The claimant's work as a brand ambassador involved promoting a client's products or services by speaking with clients, potential clients, and/or handing out samples. The claimant performed this work in various settings, such as restaurants and bars, and at events such as fairs and festivals. Although she has not performed services for the employers, the claimant is still on-call.

9. The claimant began working for the [Employer B] sometime in 2016 and does not recall the date when she last worked for this employer. The claimant was

paid $25 per hour for her work. The number of hours available to the claimant was dependent upon the season.

10. The claimant began working for [Employer A] sometime in the spring or early summer of 2016. The claimant does not recall when she last worked for this employer. The claimant was paid $25 per hour for her work. The claimant's schedule was varied and depended on the specific assignment.

11. The claimant began working for [Employer C] in November 2017. The claimant was paid $21 per hour for her work. The claimant last worked for this employer in October or November 2018. The claimant was paid for her work directly from [Employer C], and from its payroll processing company, [Company A], which handles pay for services performed for a separate division of the [Employer C].

12. During her base period, the claimant worked for [Employer A] while working for the instant employer.

13. During her base period, the claimant was paid $444.50 from the instant employer. The claimant was paid $49.50 in the 3rd quarter 2018 and $395 in the 4th quarter 2018.

14. During her base period, the claimant was paid $475 from [Employer B]. The claimant was paid $40 in the 3rd quarter 2018 and $435 in the 4th quarter 2018.

15. During her base period, the claimant was paid $5046.34 from [Employer C] and [Company A]. The claimant was paid $4315.34 in the 1st quarter 2018; $402.50 in the 2nd quarter 2018; and $328.50 in the 4th quarter 2018.

16. During her base period, the claimant was paid $4416.24 from [Employer A]. The claimant was paid $736.04 during the 2nd quarter 2018; $1840.10 during the 3rd quarter 2018; and $1840.10 during the 4th quarter 2018.

17. The claimant filed an initial claim for unemployment insurance benefits, effective 2/17/19.

18. On 8/29/29, the DUA issued the claimant a Notice of Disqualification, finding the claimant ineligible for benefits under Section 25(e)(1). A total disqualification was imposed on the claimant.

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 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. However, as discussed more

fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to benefits because she separated from the instant employer for disqualifying reasons.

Because the claimant's separation was voluntary, her 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 she separated for qualifying reasons. The review examiner concluded that the claimant had not carried her burden, and we agree with that conclusion.

The claimant quit her position with the instant employer because she relocated to Pennsylvania on December 1, 2018 in order to pursue her dream of working in the arts. Consolidated Finding # 3. In order to articulate good cause attributable to an employer, the claimant must show that the employer's actions, and not the claimant's personal circumstances, are what caused the claimant to leave work. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). The claimant here did not indicate that the employer took any action or otherwise created a situation which led her to resign. Her reason for leaving was a personal career choice. *See* Consolidated Finding # 3. Further, the claimant did not indicate that she was forced to relocate due to any urgent, compelling, or necessitous circumstances. Therefore, the claimant has not shown that she is eligible to receive benefits under G.L. c. 151A, § 25(e)(1).

However, our analysis does not end there. The review examiner's consolidated findings show that the claimant worked for four different employers during the relevant period. Consolidated Finding # 8. The claimant earned considerably more from two of her other employers during her base period. Consolidated Findings ## 13, 15 and 16. From the information contained in the Consolidated Findings, it appears she continued to seek work from Employers A, B, and C after she separated from the instant employer. Consolidated Findings ## 3 and 8. Because the claimant separated from one of multiple employers, we must determine whether she separated from a primary or a subsidiary employer in order to correctly determine her entitlement to benefits.

Where, as here, a claimant has "multiple 'most recent' employers under the substantially the same terms of wages and hours, the claimant will be presumed to have worked full time for the employer with which he or she has had the longest duration of employment." 430 CMR 4.75(4). The claimant began working for Employer A sometime in the spring or summer of 2016 and began working for Employer B sometime in 2016. Consolidated Findings ## 9 and 10. As we cannot discern from these facts which of the two companies the claimant had worked for longest, we consider the claimant's earnings from each employer. *See* 430 CMR 4.75(3). The claimant earned substantially more money from Employer A in 2018, and as such we conclude the claimant's primary employer was Employer A. *See* Consolidated Findings ## 14 and 16. Since the claimant

worked for the instant employer contemporaneously with Employer A, her position with the instant employer was subsidiary part-time base period employment. *See* 430 CMR 4.73.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction, rather than full disqualification from receiving benefits, 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; or
> 2. if the separation from part time work occurs during the benefit year

The claimant filed for unemployment benefits effective February 17, 2019. Consolidated Finding # 17. Her base period is from January 1, 2018, to December 31, 2018. Because the claimant did not separate from the instant employer during her benefit year, 430 CMR 4.76 (1)(a)(2), does not apply. *See* Consolidated Finding # 3.

Although the claimant did separate from the instant employer during her base period, her uncontested testimony from the hearing was that she expected to continue to be employed by Employer A, her primary employer.[1] The claimant's undisputed testimony, when considered in conjunction with evidence relating to her status with and earnings from Employer A, suggest that she was unaware that she would not be getting steady work from Employer A at the time she separated from the instant employer. *See* Consolidated Findings ## 8 and 16. Therefore, a constructive deduction pursuant to 430 CMR 4.76(1)(a)(1), cannot be imposed. *See* Board of Review Decision 0028 2066 52 (June 24, 2019) (where the claimant separates from a subsidiary employer and had no knowledge that he would not have steady work with his primary employer 430 CMR 4.76(1)(a)(1) does not apply).

Since the express provisions of 430 CMR 4.76(1) do not apply, we decline to impose any disqualification at all. In Board of Review Decision 0011 4858 86 (June 19, 2014), after reviewing the apparent purpose of the constructive deduction regulation, we stated 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

[1] 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).

> 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.

Pursuant to this precedent, we conclude that the claimant in the present appeal should not be denied benefits.

We, therefore, conclude as a matter of law that the review examiner correctly concluded that the claimant failed to prove that she separated from the instant employer for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1). We further conclude that because this was a separation from subsidiary part-time, base period employment and the claimant continued to work for her primary employer, she may not be disqualified from receiving benefits pursuant to the language and intent of 430 CMR 4.76(1).

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week beginning February 17, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS Paul T. Fitzgerald, Esq.
DATE OF DECISION - June 29, 2020 Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020[2]. If the thirtieth

[2] *See* Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (coronavirus) Pandemic, dated 5-26-20.

day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

LSW/rh