

Claimant whose discharge from newly obtained, part-time employment in her benefit year was disqualifying was subject to a constructive deduction rather than total disqualification from benefits. Since the amount of the claimant's constructive deduction was less than her earnings exclusion, the constructive deduction was effectively zero.

**Board of Review
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Issue ID: 0053 6968 20

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 a different employer and was awarded benefits under a claim effective September 15, 2019. Subsequently, she was discharged from her benefit year position with the instant employer on October 21, 2019, and re-opened her prior claim. On April 19, 2021, the DUA determined she was eligible for benefits beginning October 20, 2019, and 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 December 1, 2021.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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. Our decision is based upon our review of the entire record. We also take administrative notice of information available to us in the DUA's UI Online computer database.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was completely disqualified from receiving benefits because she was discharged for a knowing violation of a reasonable and uniformly enforced policy of the employer after failing a background check, is supported by substantial and credible evidence and is 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 part-time as event security for the employer, a sports and entertainment venue, from October 8, 2019, until October 20, 2019.
2. The claimant's immediate supervisor was the senior security event manager.

3. The employer maintained a policy requiring approved background checks for all employees following hire. The background check takes approximately 2-4 weeks to complete. The background check policy is required by the Department of Homeland Security for credentialed security organizations. Employees who do not pass the background check are given ten days to address discrepancies and then immediately discharged. The claimant was informed of the policy in her offer letter, upon hire, and by acknowledging the background check paperwork.
4. The employer maintained an expectation that employees would pass a background check. The employer maintained this expectation because it was required by law. The employer informed the claimant of the requirement in her offer letter, upon hire, and during training.
5. Between October 8, 2019, and October 20, 2019, the claimant worked 13.76 hours for the employer.
6. On an unknown date, the claimant's background check came back as unapproved for unknown reasons.
7. On October 21, 2019, the claimant was discharged for failing to pass a background check.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, while we agree with the review examiner's legal conclusion that the claimant's separation from employment is disqualifying under G.L. c. 151A, § 25(e)(2), we conclude that the claimant's separation does not fully disqualify her from unemployment benefits.

We take administrative notice of the information in the DUA's UI Online computer database, which shows that the claimant filed a claim for unemployment benefits on September 16, 2019, which was effective September 15, 2019. Her weekly benefit amount on this claim is \$263.00, and her earnings disregard is \$87.67. Because the claimant began working for the instant part-time employer on October 8, 2020, her work for this employer constitutes benefit year employment.

When a claimant separates from a part-time benefit year employer during her benefit year for disqualifying reasons under G.L. c. 151A, § 25(e)(2), she is not rendered ineligible for her entire weekly benefit amount. Rather, she is merely subject to a constructive deduction from her weekly benefit rate. *See* 430 CMR 4.76(1)(a)(2) and 430 CMR 4.78(1)(c).

Here, the claimant worked for this employer for two weeks. This employer subsequently reported the claimant earned \$165.12 during the fourth quarter of 2019.¹ Thus, the claimant's average weekly part-time earnings were \$82.56. Accordingly, \$83.00, minus the earnings disregard, should be deducted from the claimant's weekly benefit amount as the constructive deduction. Since the claimant's earnings disregard of \$87.67 is greater than \$82.56, the constructive deduction is effectively zero.

We, therefore, affirm the part of the review examiner's decision which concluded that the claimant's separation from the instant employer on October 20, 2019, was disqualifying under G.L. c. 151A, § 25(e)(2). However, we reverse the portion of the decision which subjected the claimant to a full disqualification from the receipt of benefits. The claimant is only subject to a constructive deduction from her weekly benefit amount in the amount of \$83.00.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 25, 2022



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
(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.

JPCA/rh

¹ The claimant subsequently filed a new claim for benefits in 2020, and “[Employer A]” reported that she earned \$165.12 during this period. Although “[Employer A]” has a different name and employer identification number from the instant employer, they share the same business address. Thus, we infer that “[Employer A]” was the entity that disbursed payment to the claimant on behalf of the instant employer.