

The claimant separated from subsidiary part-time employment for disqualifying reasons after establishing her unemployment claim. Pursuant to 430 CMR 4.76(1)(a)(2) and 430 CMR 4.78(1)(b), the claimant is subject to a constructive deduction, rather than a full disqualification from the receipt of benefits.

**Board of Review
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Issue ID: 0056 1740 15

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 filed a claim for benefits with an effective date of July 12, 2020. He subsequently resigned from his position with the employer on September 26, 2020. On December 22, 2020, the DUA issued a Notice of Disqualification to the claimant under G.L. c. 151A, § 25(e). 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 May 6, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without either 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 take additional evidence as to whether a constructive deduction applies rather than a full disqualification from benefits. Both parties participated in 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's separation from the instant employer subjects him to a full disqualification under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that his work for the instant employer was part-time subsidiary base period employment from which he separated during the benefit year.

Findings of Fact

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

1. The claimant did not work for any employer in 2019.
2. From February 9, 2020, until May 31, 2020, the claimant worked for the primary employer, a casino, as a full-time (40 hours weekly) busser.
3. The primary employer paid the claimant \$14.00 an hour.
4. The claimant separated from the primary employer because the primary employer's workplace closed due to the COVID-19 pandemic, and, thus, the primary employer laid the claimant off from work.
5. From January 10, 2020, until September 26, 2020, the claimant worked for the secondary employer, a retail restaurant, as a part-time (9 hours weekly, on average) crew member.
6. There is some overlap between the claimant's employment with the primary employer and the secondary employer.
7. The claimant's direct supervisor with the secondary employer was the secondary employer's store manager (store manager).
8. The claimant earned \$16.00 an hour from the secondary employer.
9. At the beginning of his employment with the secondary employer, the claimant was hired to work the night shift from Saturday 10:00 p.m. until Sunday at 7:00 a.m. (the night shift).
10. The claimant was aware (and accepted) that he was being hired for the night shift at the time that he began working at the secondary employer.
11. The claimant would occasionally pick up other shifts at different times (including the day) other than the night shift for coworkers for the secondary employer.
12. Sometime during his employment with the secondary employer, the claimant experienced minor headaches and eye irritation.
13. The claimant never sought medical attention for the headaches and eye irritation.
14. The claimant never received a medical diagnosis for the headaches and eye irritation.
15. The claimant never asked the secondary employer for a change from the night shift to another shift.
16. On August 3, 2020, the claimant filed a claim for unemployment benefits with an effective date of July 12, 2020.

17. The claimant's weekly benefit amount is \$231.00 and his earnings disregard is \$77.00.
18. The claimant filed for unemployment when he did due to his loss of employment with the primary employer.
19. After filing for benefits, the claimant continued to work for the secondary employer for eleven weeks.
20. The claimant decided to quit his employment with the second employer because he believed that working the night shift was causing his headaches and eye irritation.
21. On September 16, 2020, the claimant provided notice to the secondary employer's store manager that he was quitting his employment, effective September 26, 2020.
22. The claimant worked for the secondary employer until September 26, 2020.
23. On September 26, 2020, the claimant quit his employment with the secondary employer.
24. The claimant had no other employment at the time that he quit his employment with the secondary employer.
25. At the time that the claimant quit, his job with the secondary employer was not in jeopardy and the secondary employer had work available for the claimant.
26. At the time that the claimant quit his job with the secondary employer, he was not subject to disqualification under G.L. c. 151A, § 25(e).
27. After the effective date of claimant [sic] for benefits, the secondary employer paid the claimant \$2,198.94 in gross wages until the claimant quit his job with the secondary employer.

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 subject to a full denial of benefits, as the record supports the implementation of a constructive deduction.

Because the claimant quit his employment, this case is properly analyzed under G.L. c. 151A, § 25(e), 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 . . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

After remand, the review examiner found that the claimant quit his employment with the instant employer because he believed that working the night shift was causing him to experience headaches and eye irritation. *See* Consolidated Finding of Fact # 20. A claimant may show that he left employment for urgent, compelling and necessitous reasons, if he establishes a reasonable belief that his working conditions were detrimental to his health. *See Carney Hospital v. Dir. of Division of Employment Security*, 382 Mass. 691 (1981) (rescript opinion) (leaving work under a reasonable belief that her skin infection was caused by her work environment was sufficient to support a conclusion that the claimant’s separation was involuntary under G.L. c. 151A, § 25(e)(1)). Here, the record lacks the necessary information to determine the reasonableness of the claimant’s belief that the night shift was causing his symptoms.

However, even if a claimant has established that circumstances beyond his control forced him to resign, “[prominent] 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 Systems*, 66 Mass. App. Ct. at 766, *quoting Raytheon Co. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597–98 (1974). In this case, the review examiner found that the claimant did not request an accommodation from the employer, such as a change in schedule, prior to quitting. *See* Consolidated Finding of Fact # 15. Based on this finding, we conclude that the claimant’s separation from the employer was disqualifying, as he did not take reasonable steps to preserve his employment. There is no indication in the record that such efforts would have been futile. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93-94 (1984).

Nonetheless, a reduction in benefits or a constructive deduction, rather than a full disqualification from receiving benefits will be implemented through the application of 430 CMR 4.71 through 4.78 “to any person who has an eligible claim for unemployment compensation benefits and has left subsidiary part-time work . . . in the benefit year under disqualifying circumstances within the meaning of M.G.L. c. 151A, § 25(e).” 430 CMR 4.72; *see also*, 430 CMR 4.76(1)(a)(2).

Here, the review examiner’s consolidated findings establish that the claimant’s employment with the instant employer was part-time subsidiary employment during the base period of the claimant’s 2020 claim, which has an effective date of July 12, 2020, and he separated during the benefit year.

See Consolidated Findings of Fact ## 2, 5, 6 and 16. The findings further establish that the claimant separated from the instant employer eleven weeks after the establishment of his eligible claim, which he filed after separating from his primary employer on May 31, 2020. See Consolidated Finding of Fact # 19. Thus, although the claimant's separation from the instant part-time subsidiary employer was disqualifying, because he had already established an eligible claim for benefits at the time of separation, he is only subject to a constructive deduction from his weekly benefit rate, rather than a full disqualification from the receipt of benefits.

The claimant's constructive deduction shall be calculated pursuant to 430 CMR 4.78(1)(b), which provides as follows:

On any separation from subsidiary part-time work after the establishment of a claim, the gross wages paid shall be divided by the number of weeks worked for the subsidiary part-time employer after the filing of a claim to determine the average part-time earnings.

The review examiner found that after the establishment of his claim on July 12, 2020, the claimant worked 11 weeks for the instant part-time subsidiary employer and was paid \$2,198.94 in gross wages. See Consolidated Finding of Fact # 27. Based on the above figures, the claimant's average weekly part-time earnings were \$199.90. Accordingly, \$199.90, minus the earnings disregard, shall be deducted from the claimant's weekly benefit amount. Since the claimant's earnings disregard is \$77.00, the constructive deduction shall be in the amount of \$122.90.

We affirm the part of the review examiner's decision which concluded that the claimant's separation from the instant employer on September 26, 2020, was disqualifying under G.L. c. 151A, § 25(e). However, we reverse the portion of the decision that subjected the claimant to a full disqualification from the receipt of benefits. The claimant is only subject to a constructive deduction in the amount of \$122.90, beginning on September 27, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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.

SVL/jv