

**During her benefit year, the claimant quit her part-time job without making efforts to preserve her employment before resigning. She is disqualified under G.L. c. 151A, § 25(e)(1). However, the claimant's weekly benefits are subject only to a constructive deduction pursuant to 430 CMR 4.76.**

**Board of Review  
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**Issue ID: 0057 9416 86**

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 resigned from her position with the employer on October 31, 2020. On November 12, 2020, the claimant reopened her earlier claim for unemployment benefits with the DUA, based on this separation. The claimant was denied benefits in a determination issued on January 14, 2021. 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 June 16, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined 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). After considering the recorded testimony and evidence from the hearing, the DUA's electronic record-keeping system (UI Online), the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional testimony and other evidence pertaining to the claimant's work history and earnings. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issues before the Board are: (1) whether the review examiner's decision, which concluded that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant quit her position after experiencing a negative customer interaction over the telephone; and (2) if the separation is disqualifying, whether the claimant should be subject to a constructive deduction rather than a full disqualification of benefits.

Findings of Fact

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

1. The claimant worked as a part-time as needed clerical assistant for the employer, an optical retailer, between 11/10/2019 and 10/31/2020, when she separated.
2. The claimant's supervisor was the Owner ("Owner").
3. As a result of the COVID-19 public health emergency, the employer had a temporary work shut down for seventy-two (72) days from 03/16/2020 until 05/26/2020. The claimant never stopped working for the employer despite the shutdown. The employer resumed business operations on 05/26/2020.
4. During the shutdown, the claimant continued working for the employer for three (3) hours a day, three (3) days a week. The claimant was paid \$160.00 by personal check from the Owner for the work the claimant did.
5. From 04/26/2020 until 10/31/2020, the claimant worked for the employer for ten (10) weeks earning a gross income of \$2,664.76. During those ten weeks the claimant worked, she was paid at a rate of \$16.50 an hour.
6. For the weeks ending 05/14/2020, 05/23/2020, 06/13/2020, 07/25/2020, 08/08/2020, 08/15/2020, 08/20/2020, 09/19/2020, and 10/10/2020, the claimant worked thirty (30), thirty (30), thirty-two (32), ten (10), eight (8), eight and three quarters (8.75), eight (8), seven and a half (7.5), seven and three quarters (7.75), and four (4) hours respectively.
7. Other than those 10 weeks, the claimant did not perform any work for the employer from 04/26/2020 through 10/31/2020 as the employer was adequately staffed and did not require the claimant's services.
8. Part of the claimant's duties for the employer included making phone calls to patients reminding them of upcoming appointments.
9. As part of the claimant's duties, she called a customer ("Customer") to inform them of their upcoming appointment.
10. During this call, the Customer yelled at the claimant saying: "How dare you call me at work."
11. The Customer accused the claimant of being racist.
12. At some point during the phone call, the Customer hung up on the claimant.
13. The claimant had no further interactions with the Customer.

14. The Customer called back shortly thereafter, at which point another employee, an optician (Optician), answered the phone.
15. The Optician and Customer had a conversation while the claimant was close-by within earshot.
16. The claimant attempted to speak to the Optician while she was on the phone with the Customer so that the claimant could explain what happened.
17. After the Optician finished with the Customer, the Optician called the Owner. The claimant was still within earshot.
18. Before calling the Owner, the Optician did not speak with the claimant.
19. While the Optician was on the phone with the Owner, the claimant could only hear what the Optician was saying to the Owner.
20. While on the phone with the Owner, the Optician stated that the claimant used the “N word” while on the phone with the Customer.
21. The claimant left work, and went home, stating that she quit.
22. The claimant did not use the “N word.”
23. The claimant did not speak with the owner.
24. The claimant did not wait to speak with the Optician after the call with the Owner.
25. A few days after the incident with the Customer, the claimant attempted to reach out to the Owner to discuss the incident.
26. The claimant wanted to make things right by apologizing.
27. On 10/31/2020, the claimant quit her job due to an interaction with the Customer over the phone.

Credibility Assessment:

The employer is determined to be more credible than the claimant. The claimant was unable to provide detailed testimony regarding hours, dates, weeks[,] or wages that she worked. The employer was able to use reports from her payroll system to provide credible testimony regarding the hours, dates, weeks, and wages the claimant earned while employed.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 1 incorrectly states that the claimant started working for the employer on November 10, 2019. The employer provided unchallenged testimony that her payroll records showed the claimant commenced work on September 10, 2019.<sup>1</sup> As a result, we believe this to be a mere typographical error. In addition, Consolidated Finding # 6 inaccurately refers to May 14, 2020, as a week ending date, when that week's end date, for the purposes of the unemployment statute, is May 16, 2020. Additionally, this consolidated finding refers to a total of ten (10) weeks of employment, which is supported by the record, but only itemizes nine (9) such weeks.<sup>2</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we also agree with the review examiner that the claimant separated from her employment under disqualifying circumstances. However, we conclude that the record supports the implementation of a constructive deduction, instead of a total denial of benefits.

Because there is no dispute that the claimant quit her job with the employer on October 31, 2020, we analyze the claimant's separation under 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 . . . .

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.

Under the above provision, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons. In his original decision, the review examiner concluded that the claimant had not carried her burden. We agree.

The review examiner found that the claimant quit her position on October 30, 2020, because of a negative interaction with a customer over the telephone. *See* Consolidated Findings ## 9–12 and

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<sup>1</sup> 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).

<sup>2</sup> Considering the undisputed nature of the employer's testimony concerning the claimant's weeks of employment, it is reasonable to infer that the review examiner inadvertently omitted the week ending May 30, 2020, as this week had been included in her testimony.

27. The claimant also testified that she quit because she was dissatisfied with how the employer handled the ensuing customer complaint. *See Consolidated Findings ## 14–20.*

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer’s conduct and not on the employee’s personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). As the customer interaction is described in the findings, the claimant could reasonably have been upset with the customer yelling at her on the telephone, accusing her of being racist, and then hanging up on her. *See Consolidated Findings ## 10–12.* However, pursuant to Conlon, our focus is on the employer’s conduct. Here, we agree that the better management practice would have been for the optician to get the claimant’s version of events before speaking with the owner. *See Consolidated Findings ## 17, 18.* However, in our view, his failure to do so does not rise to unreasonable employer behavior.

However, even if we were to consider the optician’s behavior as unreasonable, the Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer’s action has the burden to show that she made a reasonable attempt to correct the situation, or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). In this case, there is no evidence that the claimant made any efforts to preserve her employment prior to resignation. Consolidated Findings ## 21, 23 and 24 establish that the claimant quit before speaking to the optician or the owner about her concerns. Although the claimant contacted the owner a few days after resigning to discuss the incident and apologize, she had already separated from employment. *See Consolidated Findings ## 23, 24.* Therefore, she did not make reasonable attempts to preserve her job prior to resignation or show that such efforts would have been futile, as required to be eligible for benefits under G.L. c. 151A, § 25(e)(1).

Our analysis does not end here, however. In his original decision, the review examiner concluded the claimant would be subject to a full disqualification from receiving benefits, effective the week beginning October 25, 2020. The consolidated findings indicate that the claimant’s job with the employer was part-time. *See Consolidated Findings ## 1, 4, 6, and 7.* This suggests that the claimant may be subject to a constructive deduction, pursuant to the provisions of 430 CMR 4.71–4.78.

A constructive deduction, rather than a full disqualification, will be imposed if the separation in this case is from “subsidiary part-time work . . .” *See* 430 CMR 4.72.

The parties testified and agreed that the claimant held contemporaneous employment prior to her separation from the instant employer. To determine which work was primary and which was subsidiary, we examine the number of hours worked and the amount of money earned from each employer. *See* 420 CMR 4.75. In reviewing the UI Online records of the claimant’s reported wages, we find that she earned \$11,324.00 from her other employer, compared to \$2,664.76 with the instant employer. Thus, the instant employer would be subsidiary part-time employment.

In applying a constructive deduction to the claim, we follow the regulations of 430 CMR 4.76 which provides, in relevant part, as follows:

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 G.L. c. 151A, § 25(e), in any of the following circumstances:

(a) If the separation is:

2. if the separation from part-time work occurs during the benefit year. . . .

A constructive deduction is defined as “the amount of remuneration that would have been deducted from the claimant’s weekly benefit amount . . . if the claimant had continued to be employed on a part-time basis.” 430 CMR 4.73.

The amount of the constructive deduction each week is determined by the claimant’s earnings from the part-time employer. 430 CMR 4.78(1)(c) provides as follows:

On any separation from part-time work which is obtained after the establishment of a benefit year claim, the average part-time earnings will be computed by dividing the gross wages paid by the number of weeks worked.

In this case, the claim was filed on May 4, 2020, and the claimant separated on October 31, 2020. As noted above, the review examiner found that the claimant worked for the employer a total of ten (10) weeks and earned gross wages of \$2,664.76. *See Consolidated Finding # 5.* Therefore, the claimant’s average weekly earnings were \$266.48, and this is the amount of the constructive deduction to be applied to the claimant’s claim.

We, therefore, conclude as a matter of law that the review examiner’s conclusion that the claimant quit her job without good cause attributable to the employer is supported by substantial and credible evidence and free from error of law. We further conclude that the claimant’s weekly benefits are subject only to a constructive deduction pursuant to 430 CMR 4.76.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits subject to a constructive deduction in the amount of \$266.48 from her weekly benefits amount, if otherwise eligible, beginning October 25, 2020, and for subsequent weeks, until she has earned an amount equivalent to or in excess of eight times his weekly benefit amount or the claimant either returns to her former part-time job or obtains new part-time work.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 24, 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](http://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.

JMO/rh