During the benefit year, the claimant resigned from a part-time position to accept an offer of short-term full-time employment. Though disqualified under G.L. c. 151A, § 25(e)(1), the claimant was subject to a constructive deduction pursuant to 430 CMR 4.76(1)(a)(2), rather than a full disqualification. But, because she had at least eight weeks of work and in each week earned in excess of her weekly benefit amount after separating from the employer, the constructive deduction ended before she reopened her claim.

Board of Review
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Issue ID: 0077 4155 65

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 unemployment benefits with the DUA, effective October 31, 2021, which was approved. Subsequently, the claimant resigned from her part-time position with the instant employer on March 14, 2022, and reopened her claim, effective July 3, 2022. In a determination issued on July 20, 2022, the DUA denied benefits beginning March 13, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner modified the agency's initial determination, concluding that the claimant was subject to a constructive deduction rather than a complete disqualification from benefits, in a decision rendered on April 22, 2023. 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 subject to disqualification under G.L. c. 151A, § 25(e)(1). The review examiner further determined that the claimant was subject to a constructive deduction, rather than a complete disqualification under 430 CMR 4.76. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, as well as the DUA's electronic record keeping systems.

The issue before the Board is whether the review examiner's decision to deny benefits and impose a constructive deduction when the claimant left her employment for a temporary full-time job 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. On November 1, 2021, the claimant filed a claim for unemployment benefits effective October 31, 2021. The benefit rate on this claim is $974 and the earnings disregard is $324.67.

2. On January 10, 2022, the claimant began working part-time, 24 hours a week, for a hospital. This was a permanent position.

3. On February 22, 2022, the claimant received an offer of full-time employment, with the present [sic] employer, a public school, starting March 16, 2022. This offer was for the remainder of the 2021-2022 school year. The claimant was told verbally that the position could lead to permanent employment.

4. On March 1, 2022, the claimant gave notice to the hospital, the present employer, that she would be resigning effective March 14, 2022.

5. The claimant's last day with the hospital was March 14, 2022. She began working for the school on March 16, 2022.

6. On April 19, 2022, the claimant received a letter from the school Superintendent informing her that, as a teacher without professional teacher status, she was not being renewed to her position as an Occupational Therapist for the 2022–[2023] school year and thereafter. The letter stated that June 30, 2022, would be her last day.

7. The claimant's last day performing services for the present [sic] employer was June 24, 2022. She was officially laid off on June 30, 2022, as the school year had ended. She was not given any assurances of employment in the following school year.

8. Upon separating from the school, the claimant reopened her 2021-01 claim for unemployment benefits. As part of this process, the claimant informed DUA that she had worked for the present [sic] employer, the school, between the start of her 2021-01 claim October 31, 2021, and the effective date of the reopened claim.

9. On July 20, 2022, DUA issued Notice of Disqualification, 0077 4155 65-01, stating that, under MGL c. 151A, Section 25(1), the claimant was subject to disqualification for the period starting March 13, 2022, and until she had worked for 8 weeks and earned an amount equivalent to or in excess of 8 times her weekly benefit amount.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows.

We reject Finding of Fact # 3 insofar as it states that the claimant received an offer of employment from the school on February 22, 2022. There is no evidence in the record of the specific date on which the claimant received this offer. We also reject Finding of Fact # 6 insofar as it states that the claimant received a letter informing her that her position was not being renewed on April 19, 2022. The letter is dated April 19, 2022. However, the claimant testified that the letter was presented to her on the day she signed it, which was May 4, 2022.[1] Finally, in Findings of Fact ## 3, 7, and 8, the review examiner mistakenly referred to the school as the present employer. The hospital is the employer in the appeal before us. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

As discussed more fully below, we agree with the review examiner's conclusion that the claimant's separation from the hospital is disqualifying, and she is subject to a constructive deduction rather than a full disqualification. However, we disagree with the review examiner's calculation of the constructive deduction. In addition, we conclude that the claimant has met the legal requirements necessary to end the constructive deduction.

Because the claimant resigned from her job with the employer, we decide her eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1), which provides, in relevant 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. . . .
>
> No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a *permanent* full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit. (Emphasis added.)

These statutory provisions expressly assign the burden of proof to the claimant.

In the conclusion and reasoning section of her decision, the review examiner found that the claimant left her employment to accept a new job. Because her reason for leaving had nothing to do with the employer's actions, the claimant has not shown that she resigned for good cause

[1] While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony and the letter the claimant received from the school, which was entered as Exhibit 6, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (to decide good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

Nor does starting a new job constitute an urgent, compelling, and necessitous reason to resign. *See* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992) (to establish urgent, compelling, and necessitous reasons, consider "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment").

Moreover, we agree with the review examiner that the claimant has not shown that she left her employment with the instant employer in good faith to accept new employment on a permanent full-time basis and became separated from such new employment for good cause attributable to the new employing unit. The new employer at issue offered the claimant a position only for the remainder of the school year. There was no assurance that it would become permanent. *See* Finding of Fact # 3. Because the offer was not for a permanent position, the claimant does not qualify for benefits under this provision. Therefore, we agree that the claimant is subject to disqualification under the provisions of G.L. c. 151A, § 25(e)(1).

Inasmuch as the claimant separated from part-time employment during her benefit year, the review examiner properly considered whether a constructive deduction, rather than a full disqualification, should apply. The DUA regulations at 430 CMR 4.76, provide, 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 DUA's electronic record-keeping systems show that the claimant's benefit year ran from October 31, 2021, to October 29, 2022. The claimant left her part-time job with the hospital on March 14, 2022, which is within her benefit year. *See* Finding of Fact # 5. Since the claimant separated from part-time employment during the benefit year, she is subject to a constructive deduction under 430 CMR 4.76(1)(a)(2).

The amount of the constructive deduction each week is based on the claimant's earnings from the part-time employer pursuant to 430 CMR 4.78(1)(c), which 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.

To calculate the amount of the constructive deduction, the earnings disregard is applied to the average part-time earnings. 430 CMR 4.78(2).

The claimant worked in her part-time job at the hospital for nine weeks, from January 10, 2022, to March 14, 2022. *See* Finding of Fact # 5. In her decision, the review examiner noted that the DUA's electronic record-keeping systems showed that the claimant earned $13,750.00 from the hospital. She calculated the claimant's average part-time earnings to be $1,528.00 and concluded that the claimant was subject to a constructive deduction of $1,528.00.

In coming to this conclusion, the review examiner did not account for the claimant's earnings disregard, which is $324.67. *See* Finding of Fact # 1. Nonetheless, the DUA's electronic record-keeping systems show that the constructive deduction was entered as $1,203.10, properly accounting for the claimant's earning disregard.

However, the constructive deduction is only imposed for a limited duration. Pursuant to 430 CMR 4.76(2), a constructive deduction will no longer be imposed once a claimant earns requalifying wages, *i.e.,* once the claimant has had at least 8 weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the claimant's weekly benefit amount. After separating from the employer hospital, the claimant worked for the school from March 16, 2022, to June 30, 2022, for a total of 15 weeks. *See* Findings of Fact ## 5 and 7. The DUA's electronic record-keeping systems show that the claimant earned a total of $23,401.30 from the school during the second and third quarters of 2022. Thus, the claimant's weekly earnings from the school were $1,560.09 ($23,402.30 divided by 15 weeks equals $1,560.09 per week), which is greater than her weekly benefit amount of $974.00. *See* Finding of Fact # 1.

Since the claimant had at least 8 weeks of work and in each of said weeks earned an amount equivalent to or in excess of her weekly benefit amount, she met the requirements to end the constructive deduction as of July 2, 2022. This means that, when she reopened her claim effective July 3, 2022, the claimant was entitled to her full weekly benefit amount.

We, therefore, conclude as a matter of law that the claimant is disqualified pursuant to G.L. c. 151A, § 25(e)(1), based upon her separation from the instant employer. We further conclude that the claimant is subject to a constructive deduction, rather than a complete disqualification, pursuant to 430 CMR 4.76(1)(a)(2), and that the claimant met the requirements to end the constructive deduction as of July 2, 2022.

The review examiner's decision is affirmed in part and reversed in part. The claimant is subject to a constructive deduction of $1,203.10 from March 13, 2022, to July 2, 2022. Beginning July 3, 2022, the claimant is entitled to her full weekly benefit amount, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 10, 2024

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.

REB/rh