The claimant abandoned his job with the instant employer following repeated no-call/no-shows. He did not show he separated for good cause attributable to the employer, or for urgent, compelling, and necessitous under to G.L. c. 151A, § 25(e)(1). However, the instant employer was subsidiary employment. Because the claimant was aware his employment contract with his primary employer was set to end three weeks after he separated from his subsidiary employer, he is subject to a constructive deduction under 430 CMR 4.76(1)(a)(1).

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Issue ID: 0077 4815 39

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 his position with the employer on March 16, 2022. He filed a claim for unemployment benefits with the DUA effective June 19, 2022, which was denied in a determination issued on July 26, 2022. 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, 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 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 provide subsidiary findings of fact relevant to the claimant's eligibility for benefits. Thereafter, the review examiner issued his 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 abandoned his job without good cause attributable to the employer or urgent, compelling, and necessitous reasons because he was absent on three consecutive days without explanation for his absence, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked part-time as a stocker for the employer, a delivery company, from August 30, 2021, until March 16, 2022.

2. The claimant was not hired as a seasonal employee.

3. The claimant primarily speaks Haitian Creole.

4. The claimant's immediate supervisor was the hub supervisor (the Hub Supervisor).

5. The employer maintained a policy stating that three consecutive no call, no shows would be considered job abandonment.

6. On March 17, and 18, 2022, the claimant called out of work for unknown reasons.

7. On March 20, 2022, the claimant did not clock into work.

8. From March 21, 2022, through March 23, 2022, the claimant was absent from work without notice to the employer.

9. On March 23, 2022, the claimant quit his job by abandonment when he was a no call, no show for three consecutive days.

10. The claimant was not discharged from his job.

11. The claimant did not bring any issues he was having with his employment to the employer's attention.

12. The employer had work available for the claimant.

13. In filing for unemployment benefits, the claimant had a friend (the Friend) and another person ([Assistant]) help him fill out paperwork.

14. Prior to filing for unemployment benefits, the claimant had worked for another employer (the Previous Employer) on a two-year contract during his base period. The Previous Employer provided the claimant with information on how to file for unemployment insurance.

Credibility Assessment:

The hearing was remanded for subsidiary findings from the record.

The original decision in this hearing found that the claimant was not credible in his testimony concerning his separation from the instant employer. That determination was made due to the claimant giving inconsistent testimony which conflicted with his questionnaire responses. The employer's witness provided consistent testimony

and documentary evidence. As such, it was concluded that the employer's testimony was more credible and that the claimant had quit his employment.

The hearing was remanded for a question concerning the claimant's separation from the Previous Employer.

In the initial hearing, the claimant testified that he had worked for the Previous Employer prior to his claim. The claimant testified that the Previous Employer gave him information on how to file for unemployment benefits. There were no follow-up questions asked concerning this testimony and the claimant's testimony was consistent. As to whether the claimant had worked for the Previous Employer on a two-year contract and whether the Previous Employer gave the claimant information on filing for unemployment insurance, the claimant's testimony is deemed credible.

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 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. While we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant quit his employment, we believe that the review examiner erred in finding the claimant ineligible for benefits.

The review examiner rejected as not credible the claimant's contention that he was discharged. *See* Consolidated Finding # 10. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). As the claimant's testimony about the reason for his separation was inconsistent with his previous representations to the DUA, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consistent with this assessment, the claimant's separation is more appropriately viewed as voluntary job abandonment. Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)). Therefore, this case is properly analyzed under the following provisions under G.L. c. 151A, § 25(e), which provide, 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.

The express language of these provisions places the burden of proof upon the claimant.

Inasmuch as the claimant maintained that he was discharged from his employment, he did not present any evidence showing that he resigned either because of some decision made or action taken by the employer or was compelled to resign as a result of circumstances beyond his control. *See* Consolidated Findings ## 8, 9, and 11. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (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); and Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009) ("a 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under" G.L. c. 151A, § 25(e), "which may render involuntary a claimant's departure from work."), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992).

Therefore, we agree with the review examiner's legal conclusion that the claimant failed to show that he resigned for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e)(1).

However, as this was part-time employment, and the claimant performed services for another employer during his base period, he may be subject to a constructive deduction rather than a complete disqualification from benefits. *See* Consolidated Findings ## 1 and 14. For the purposes of determining whether a constructive deduction applies, 430 CMR 4.73, provides:

> Part-time Work means all employment other than claimant's primary or principal work.
>
> Subsidiary Part-time Work means employment worked contemporaneously with full-time work.

In determining whether the claimant's work with the instant employer shall be considered full-time or subsidiary part-time work, 430 CMR 4.74 provides that factors to be considered are:

> (a) The number of hours spent on the work.
> (b) The wages earned for the week.
> (c) The duration of the claimant's employment with the employer.
> (d) The occupation of the claimant.

In this case, the DUA's electronic record-keeping system, UI Online, shows that he was employed by the other employer for a longer period and earned substantially more from this other employer. Consequently, his work with the instant employer will be considered subsidiary part-time work for the purposes of determining whether a constructive deduction applies.

A constructive deduction may be imposed if a disqualifying separation from subsidiary part-time work occurs during the claimant's base period. The DUA regulation at 430 CMR 4.76, provides, in relevant part, as follows:

> (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 separation, the claimant knew or had reason to know of an impending separation from the claimant's primary or principal work . . . .

The base period for the claimant's 2022-01 claim ran from April 1, 2021, through March 31, 2022. Thus, the record confirms that the claimant separated from his subsidiary employer during his base period. Consolidated Finding # 9. UI Online indicates that the claimant separated from his primary employer on April 15, 2022, approximately three weeks after he separated from the instant subsidiary employer. The claimant testified that he understood his job with his primary employer ended because his two-year employment contract expired.[1] We can reasonably infer that the claimant knew of his impending separation from his primary employer at the time that he separated from his subsidiary employer. *See* Consolidated Finding # 14. Therefore, absent evidence that the claimant had any other employment between the date he separated from his primary employer and the effective date of his claim for benefits, and we see none, he is subject to a constructive deduction under 430 CMR 4.76(1)(a)(1).

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)(a) provides as follows:

> If the claimant's separation from part-time subsidiary work occurred in the last four weeks of employment prior to filing of the unemployment claim; the average part-time earnings will be computed dividing the gross wages paid by the subsidiary employer in the last completed quarter by 13. If there are less than 13 weeks of work, then the gross earnings shall be divided by the actual number of weeks worked.

The claimant last worked for the instant employer in the first quarter of 2022. However, as he last worked for the employer on March 20, 2022, he only performed wage-earnings services for this employer during eleven of the thirteen weeks in that quarter. *See* Consolidated Finding # 7. Wage

[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).

information reported to the DUA shows that the instant subsidiary employer paid the claimant gross wages totaling $6,536.80 during that eleven-week period. This amount, divided by the eleven weeks the claimant worked, equals $594.25 per week. Therefore, in accordance with the provisions of 430 CMR 4.78(1), the claimant is subject to a constructive deduction of $594.25

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant quit his job without showing good cause attributable to the employer or urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e), is free from error of law. However, the conclusion that the claimant should be subject to a total disqualification from receiving benefits was an error of law, and we reverse that conclusion. The claimant is subject to a constructive deduction.

The review examiner's decision is affirmed in part and reversed in part. Beginning the week of June 9, 2022, the claimant is subject to a constructive deduction in the amount of $594.25 each week from his weekly benefit amount, until he meets the requalifying provisions under 430 CMR 4.76(2) and (3).

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 20, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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 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.

LSW/rh