The review examiner reasonably rejected as not credible the claimant's testimony that he was discharged. In the absence of any other evidence that the claimant quit for good cause attributable to the employer or for urgent, compelling, and necessitous reasons, the review examiner properly concluded that the claimant is disqualified pursuant to G.L. c. 151A, § 25(e)(1). However, the claimant's work for the instant employer was subsidiary employment, as he worked more hours and earned more for a second employer during his base period. Because the claimant separated from subsidiary employment during his benefit year, he was only subject to a constructive deduction based on his base period earnings from the instant employer pursuant to 430 CMR 4.71–4.78.

Board of Review
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Issue ID: 0078 2072 22

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 August 22, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 10, 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 December 9, 2022. 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 was not entitled to benefits because he failed to return to work or otherwise contact the employer after his leave of absence had ended, 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 is not a native English speaker.

2. Beginning in June 2016, the claimant worked full-time (30 hours weekly) as a cook for the instant employer, a skilled nursing facility.

3. The claimant worked five days a week from 6:30 a.m. to 12:00 p.m. The claimant's hourly rate was $17.00. The claimant's direct supervisor was the employer's food service manager.

4. Beginning in August 2016, while working for the instant employer, the claimant worked fulltime (40 hours weekly) as a cook for a second employer, a restaurant (Restaurant). The claimant had a set schedule and worked nights from 3:00 p.m. to 11:00 p.m.

5. Prior to the subject claim, in March 2020, the claimant applied for unemployment benefits after he was laid off by the Restaurant due to COVID-19. Subsequently, the claimant filed weekly requests for benefits reporting he did not work and earned no wages, while working full-time for the instant employer. In the instant employer's responses to the DUA's requests for information, the HR Director reported that for the weeks the claimant requested unemployment benefits, he worked full-time for the instant employer and earned his regular wages. Subsequently, on October 29, 2020, the DUA determined the claimant was not entitled to benefits beginning March 29, 2020, because he had worked full-time for the instant employer. The disqualification resulted in an overpayment of $19,725. The claimant appealed the disqualification.

6. On or about May 1, 2022, the claimant's wife was pregnant with the couple's fourth child with an early June 2022 due date. The claimant decided to quit his employment with the instant employer in order to help his wife care for the new baby and the couple's three other children. The claimant intended to continue working full-time for the Restaurant.

7. On May 1, 2022, the claimant told his supervisor that his wife was due to give birth in early June 2022, with the couple's fourth child. The claimant told the supervisor he was quitting his employment effective May 28, 2022 because he could not work two full-time jobs and help his wife care for the new baby and the couple's three other children.

8. The supervisor liked the claimant and believed the claimant was a good employee. The supervisor suggested the claimant take a leave of absence instead of quitting, in order to preserve his employment. The claimant discussed taking a leave of absence with the instant employer's HR director. The claimant agreed to, and the HR Director approved a twelve-week unpaid leave of absence. The HR director told the claimant as a full-time employee he was eligible for three months of paid leave under Massachusetts Paid Family and

Medical Leave (PFML) or eligible under the Family and Medical Leave Act (FMLA), and gave the claimant information on applying for PFML and about contacting the employer's insurer to apply for FMLA.

9. At some point, after May 5th and before May 20th, the claimant contacted the employer's insurer, and was told he was not eligible for FMLA. The claimant was not eligible for FMLA because he was working full-time for the Restaurant. Subsequently, the claimant never applied for FMLA.

10. On or about May 20, 2022, unexpectedly the Restaurant notified the claimant that the Restaurant would close on May 31, 2022, and the claimant would be laid off. The claimant last physically worked for the Restaurant on May 28, 2022.

11. On May 22, 2022, the claimant's three month leave of absence began. The claimant's last physical day working for the instant employer was May 22, 2022.

12. After May 22, 2022, and before June 3, 2022, the claimant learned he was not eligible for PFML because the Restaurant had not paid sufficient funds.

13. On June 3, 2022, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) with an effective date of May 29, 2022. In his application for unemployment benefits, the claimant reported he was on a leave of absence from the instant employer beginning May 28, 2022. The claimant did not report his employment with the Restaurant.

14. On June 4, 2022, the claimant's wife gave birth. Subsequently, the DUA issued a disqualification notifying the claimant he was not eligible for unemployment benefits while on the leave of absence. resulted in an overpayment of $19,725. The claimant appealed the disqualification.

15. On or about the last week of July 2022 to the first week of August 2022, at the request of the HR Director, the supervisor, contacted the claimant and asked if the claimant intended to return to work when his twelve week leave of absence ended on August 22, 2022. The claimant said he would not return to work before August 29, 2022. Subsequently, the supervisor told the HR Director that he had spoken to the claimant and that the claimant had said he would not return to work before August 29, 2022 because the DUA hearing for the October 2020 disqualification was scheduled for August 30, 2022.

16. On August 8, 2022, the HR Director called the claimant to remind him his leave of absence expired on August 22, 2022, which was twelve weeks since he had last worked for the instant employer. The HR Director told the claimant, if he did not return to work by August 22, 2022, his job would no longer be protected. The HR Director told the claimant that his leave of absence was unrelated to the DUA hearing scheduled for August 30, 2022. The HR Director did not tell

the claimant he would be fired if he did not return by August 22, 2022. The claimant told the HR Director that he would not return to work before August 29, 2022. The conversation became argumentative, and the HR Director ended the phone call. Subsequently, the HR Director asked the supervisor to follow up with the claimant about returning to work. The HR Director did not want to contact the claimant directly because of the argument during the August 8, 2022 phone call.

17. On August 22, 2022, the claimant's employer-approved leave of absence ended, and the claimant did not return to work.

18. On or about August 26, 2022, the supervisor texted the claimant the employee work schedule for the weeks ending August 27, 2022 and September 3, 2022. The supervisor posted a physical copy of the employee work schedule at the facility a week in advance. On or about August 15, 2022, the supervisor posted the schedule for the week ending August 27, 2022. The schedule listed the claimant as a staff member, and the claimant had no assigned shifts. On or about August 22, 2022, the supervisor posted the schedule for the week ending September 3, 2022, and the claimant was not listed as a staff member.

19. On August 30, 2022, the claimant testified at the DUA hearing that he was no longer employed by the instant employer. The HR Director participated in the hearing and was confused because the claimant was still an employee. During the hearing, the HR Director attempted, but was unable, to ask the claimant about why he believed he was no longer an employee.

20. After August 30, 2022, the claimant did not contact the instant employer.

21. On or about September 17, 2022, in response to the DUA's request for information, the claimant, with the assistance of an advocate ("advocate") for a non-profit organization, reported that, he "had approval to retunr [sic] to work at [instant employer] August 29 [HR Director] called me August 8 and said if I was not back to work by August 22 I would be terminated and off the scheudule [sic]. My direct supervisor [Name Omitted] was my supervisor and agreed for me to come August 29, 2022." The claimant reported that for the week beginning May 29, 2022, he was able and available to work, and was actively searching for full-time work. The claimant reported he was always able and available to work full time.

22. On September 18, 2022, when the claimant had not returned to work, the HR Director determined that the claimant had quit and terminated the claimant's employment.

23. On August 22, 2022, the claimant quit his employment when he failed to return to work.

24. At the time the claimant quit, his job was not in jeopardy.

25. At the time the claimant quit, work was available.

26. Prior to September 18, 2022, the claimant could have returned to work at any time.

27. The supervisor would not have discharged the claimant without notifying the HR Director.

28. When the instant employer approved the claimant's unpaid leave of absence, the claimant knew the leave was for twelve weeks.

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 ultimate 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. While we believe that the review examiner's findings of fact support the conclusion that the claimant voluntarily quit his employment, we believe that the claimant is only subject to a constructive deduction based on his separation from the instant employer.

The review examiner rejected as not credible the claimant's testimony that he was discharged based on a series of inconsistencies in the testimonial and documentary evidence presented by the claimant. Rather, the review examiner found that the claimant quit. Finding of Fact # 23. 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Since it has been determined that the claimant resigned, this case is properly analyzed 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 . . . [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 the statute places the burden of proof upon the claimant.

As the claimant maintained that he was discharged, he did not present substantial and credible evidence showing that he resigned either voluntarily for good cause attributable to the employer

or involuntarily for urgent, compelling, and necessitous reasons. Accordingly, we agree with the review examiner's legal conclusion that the claimant separated from his employment for disqualifying reasons under G.L. c. 151A, § 25(e)(1).

However, the findings of fact indicate that the claimant's position with the instant employer may not have been his primary employment. *See* Findings of Fact ## 3 and 4. Under such circumstances, the claimant may be subject to a constructive deduction rather than a full disqualification from benefits, in accordance with the provisions of 430 CMR 4.71–4.78.

For the purposes of determining whether a constructive deduction applies, 430 CMR 4.73 provides that:

> 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 work or 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.

Even though the instant employer classified the claimant as a full-time employee, he worked more hours in the same position for his second employer. Findings of Fact ## 3 and 4. Further, as UI Online, the DUA's electronic record-keeping database, indicates that he earned more from his second employer, we conclude that his work for the second employer was his primary full-time employment. 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 will be imposed if a disqualifying separation from subsidiary part-time work "occurs during the benefit year." 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: . . .
>
> 2. if the separation from part-time work occurs during the benefit year . . . .

The benefit year of the claimant's 2022-01 claim for benefits runs from May 29, 2022, to May 27, 2023. *See* Finding of Fact # 13. As the claimant separated from instant employer for disqualifying reasons on August 22, 2022, he is subject to a constructive deduction in accordance with the above-referenced regulations. Finding of Fact # 23.

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.

The claimant had begun a three-month unpaid leave of absence from the instant employer on May 22, 2022. Findings of Fact # 11 and 13. Because he did not perform any wage-earning services for the instant employer while on leave and subsequently declined to return to work when his leave expired, the claimant's earnings from the instant employer during his benefit year totaled $0.00. *See* Findings of Fact ## 11, 17, and 23. Therefore, in accordance with the provisions of 430 CMR 4.78(1), the claimant is subject to a constructive deduction of $0.00.

We, therefore, conclude as a matter of law that the review examiner correctly concluded that the claimant quit his job and is disqualified under G.L. c. 151A, § 25(e)(1). However, the conclusion that the claimant should be subject to a total disqualification was an error of law, and we reverse that conclusion. The claimant is merely subject to a constructive deduction.

The review examiner's decision is affirmed as to the separation issue under G.L. c. 151A, § 25(e)(1). However, we reverse the total disqualification from benefits. Beginning the week of August 21, 2022, the claimant shall be subject to a constructive deduction in the amount of $0.00 each week until he meets the requalifying provisions under 430 CMR 4.75(2) and (3). In effect, this means that the claimant's weekly benefit amount is not reduced.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 24, 2023

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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