

Claimant quit her part-time subsidiary job with knowledge of her impending separation from her full-time job. Although ineligible pursuant to G.L. c. 151A, § 25(e)(1), she is not subject to a constructive deduction or loss of benefits because she quit her part-time job more than four weeks prior to her filing a claim for benefits.

**Board of Review
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Issue ID: 0078 5162 55

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 reverse.

The claimant resigned from her position with the employer on September 23, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 30, 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 28, 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 for urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was subject to complete disqualification of benefits when she voluntarily quit her part-time job, is supported by substantial and credible evidence and is free from error of law, where the review examiner found the claimant was still working her full-time job.

Findings of Fact

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

1. The employer is [a] restaurant. The claimant worked as a part-time prep cook for the employer. The claimant worked for the employer from March, 2022 to 9/23/2022.
2. The employer's chef ([A]) supervised the claimant.

3. Throughout her employment with the employer, the claimant was also employed full-time by another employer (ER-2).
4. On or about 9/15/2022, the claimant told [A] that she was quitting. The claimant determined that she did not want to continue working two jobs any longer. The claimant determined that she was going to continue working her full-time for ER-2.
5. The claimant's last day of work for the employer was 9/23/2022.
6. Work remained available to the claimant upon her separation from the employer.
7. Prior to quitting, the claimant did not raise any issues with the employer.
8. The claimant continued to work for ER-2 on a full-time basis upon quitting her employment with the employer.
9. The claimant left her employment with the employer because she had a full-time job with ER-2 and determined she no longer wanted to work two jobs.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, while we agree with the review examiner's legal conclusion, we do not agree that the claimant is subject to a total disqualification from receiving benefits based upon her separation from this employer.

Because the claimant resigned from her employment, this case is properly analyzed pursuant to 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.

Under the above statutory regulation, the claimant has the burden of proof to show she is entitled to benefits. We agree with the review examiner's conclusion that the claimant was disqualified from receiving benefits, pursuant to G.L. c. 151A, § 25(e)(1), as the claimant has not presented any evidence that her reason for leaving was for good cause attributable to the employer or for

urgent compelling, and necessitous reasons. Rather, her reason was personal. She quit this part-time job because she no longer wanted to work two jobs. *See* Findings of Fact ## 1 and 4.

However, the findings also show the claimant was working this part-time job concurrently with her full-time job during the base period of her unemployment claim.¹ *See* Finding of Fact # 3. This means her part-time job was subsidiary employment. *See* 430 CMR 4.73.

When a claimant separates from subsidiary part-time employment, we must consider whether a constructive deduction should apply. 430 CMR 4.76 provides in relevant part, as follows:

(1) A constructive deduction as calculated under 4.78, from the otherwise payable weekly benefit amount, rather than the 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:

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; . . .

Here, the claimant separated from her part-time subsidiary employer on September 23, 2022. The claimant testified that her full-time job was seasonal in nature, and that she separated from her full-time employer (primary employer) on October 30, 2022.² Thus, we can reasonably infer from the claimant's testimony that she was aware of her impending termination from her primary employer due to the seasonal nature of her employment.

Although the claimant's separation from her part-time subsidiary employer was disqualifying under G.L. c. 151A, § 25(e), and the claimant was aware of her impending separation from her primary employer at that time, in this case it does not render her ineligible for benefits.

In order to calculate a constructive deduction, the timing of claimant's separation from part-time subsidiary employment must fall within one of three scenarios listed under 430 CMR 4.78. 430 CMR 4.78(1) provides as follows:

a. 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.

¹ The base period of the claimant's 2022-01 unemployment claim was from October 1, 2021-September 30, 2022.

² 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).

b. 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.

c. 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 claimant separated from her part-time subsidiary work prior to filing a claim for benefits. This sequence of events suggests we should apply 430 CMR 4.78(1)(a).

However, 430 CMR 4.78(1)(a) only provides for a four-week look back period for a separation from subsidiary part-time employment prior to filing a claim. The DUA has taken the position that, “a disqualifying separation from subsidiary, part-time employment, more than four weeks before the filing of a claim for benefits based on a separation from the primary employer or principal employment, has no effect on the claim as the part-time employer would not be considered an interested party.”³ Here, the claimant separated from her part-time subsidiary employment on September 23, 2022, and filed a claim for benefits following her separation from her primary employer on October 31, 2022, five weeks later. Since she separated from the instant part-time subsidiary employer more than four weeks prior to filing her claim, there is no constructive deduction or loss of benefits because of that separation.

Finally, we note that the review examiner imposed the disqualification as of September 15, 2021. This appears to be a typographical error, as Findings of Fact ## 1 and 5 show the claimant separated from the instant employer on September 23, 2022.

We, therefore, conclude as a matter of law that the claimant is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), based upon her separation from the instant employer. We further conclude that, pursuant to DUA policy in UIPP 2014.05, the claimant is not subject to a constructive deduction or loss of benefits.

We affirm the review examiner’s decision under G.L. c. 151A, § 25(e)(1). We reverse the part of the review examiner’s decision which concluded that the claimant was subject to a total disqualification from the receipt of benefits. The claimant is entitled to receive benefits for the week beginning September 25, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 2023



Charlene A. Stawicki, Esq.
Member



Michael J. Albano

³ See DUA’s UI Policy and Performance Memo (UIPP) 2014.05 (May 29, 2014), p. 3.

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.

DY/rh