

The claimant abandoned her job with the instant employer because she preferred longer shifts than the employer initially offered. This is deemed to be a voluntary separation and she is disqualified pursuant to G.L. c. 151A, § 25(e)(1). Where she had separated from her primary full-time employer three months before separating from the instant subsidiary employer, held she did not file her claim on account of her separation from her primary employment and she does not qualify for a constructive deduction pursuant to 430 CMR 4.76(1)(b).

**Board of Review
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Issue ID: 0078 6441 54

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 affirm.

The claimant separated from her position with the employer on November 14, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 15, 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 March 14, 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 obtain additional information about the claimant's other base period employment. Only the claimant 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 issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to benefits because she abandoned her employment when she failed to show up for a shift as scheduled, 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. Since March 9, 2022, the claimant has been employed as a part-time personal care attendant by [Employer A], [City A], Massachusetts, a home health care agency (the HHCA). The employment is recorded under the name of the client, [Client].
2. The claimant works twelve hours a week in this position and earns \$17.00 per hour.
3. The claimant was employed as a full-time home health aide for [Employer B] in [City B], Massachusetts, an assisted living facility (the facility) from March 29, 2022, until August 25, 2022.
4. On August 25, 2022, the claimant was discharged from that position because of an incident involving a client's medication.
5. The claimant was employed as a part-time home health aide with the instant employer, a home health care provider on November 9, 2022. The claimant earned \$17.00 per hour.
6. The claimant worked one assignment for the instant employer, working one shift, visiting one client on November 9, 2022. The claimant failed to appear for any other assignments. The claimant chose not to accept additional assignments because she did not want to drive for an hour and go to someone's house for a 2-to-3-hour shift. The claimant desired 8-hour shifts.
7. After the completion of the November 9, 2022, assignment, the claimant subsequently did not communicate with the employer, effectively quitting her employment due to her dissatisfaction with the length of her assigned shifts.
8. On November 14, 2022, after the claimant no called/no showed for an assignment, the instant employer ceased to schedule thereafter and regarded her as a voluntary quit.
9. On November 22, 2022, the claimant filed a claim for unemployment benefits effective November 13, 2022.
10. As of June 20, 2023, the claimant has not separated from her position at the HCCA and remains employed on a part-time basis.

Credibility Assessment:

Both parties' testimony throughout both hearings is accepted as 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, while we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant voluntarily quit her employment, we believe that the review examiner erred in finding the claimant ineligible for benefits.

The consolidated findings provide that the claimant's separation was due to a no-call, no-show for scheduled shifts. *See Consolidated Findings ## 7 and 8.* In Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950), the Supreme Judicial Court upheld the Board'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). Consequently, 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.

There is no indication from the record that the claimant resigned because of some decision made or action taken by the employer. Therefore, we need not consider whether the claimant resigned for good cause attributable to the employer.

“[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.” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). To make such a determination, we must examine the circumstances in each case and evaluate “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.” Reep, 412 Mass. at 848, 851.

In this case, the claimant stopped accepting work from the instant employer because she preferred to work longer shifts at locations closer to her residence. Consolidated Findings ## 6 and 7. Her preferences in this regard are insufficient to show that she was compelled to resign from the instant employer because of circumstances beyond her control.

Even if the claimant had carried her burden to show that these circumstances compelled her to resign, she must also show that she “had taken such ‘reasonable means to preserve [her] employment’ as would indicate the claimant’s ‘desire and willingness to continue [her] employment.’” Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting Raytheon Co. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597–98 (1974). As the claimant failed to show up for a scheduled shift on November 14, 2022, and did not take any steps to communicate with the employer after that date, the consolidated findings confirm that she did not take reasonable steps to preserve her employment. *See Consolidated Findings ## 7 and 8.* Therefore, we agree with the review examiner’s legal conclusion that the claimant failed to meet her burden to show that she was entitled to benefits pursuant to the provisions of G.L. c. 151A, § 25(e)(1).

However, as this was part-time employment, the claimant may be subject to a constructive deduction rather than a complete disqualification from benefits in accordance with the provisions of 430 CMR 4.71–4.78. 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: . . .

(b) if, after the separation from subsidiary, part-time work, the claimant applies for and obtains unemployment insurance benefits *on account of* a non-disqualifying separation from primary or principal work that preceded the separation from part-time work.

(Emphasis added).

The claimant separated from her full-time employment on August 25, 2022, and she did not file her claim for unemployment insurance benefits until November 22, 2022, which was right after she stopped working for the instant employer. Consolidated Findings ## 3, 4, and 7–9. As the claimant did not file her claim until three months after she separated from her full-time work, we do not believe that the record supports a conclusion that the claimant filed her claim for benefits on account of her separation from her primary, full-time employment. Accordingly, the claimant does not meet the criteria to be subject to a constructive deduction pursuant 430 CMR 4.71–4.78, rather than a full disqualification.

We, therefore, conclude as a matter of law that the claimant is not entitled to benefits because she did not meet her burden to show that she resigned her position with the instant employer for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week of November 13, 2022, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 12, 2023



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