The claimant resigned from the employer because she moved further away from the employer's location and did not think it was worth it to continue working a part-time schedule for the employer because of the commute. Held she did not resign for urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e)(1). However, she is only subject to a constructive deduction as this was subsidiary part-time employment and she had reason to know of an impending separation from her primary employment.

Board of Review
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Issue ID: 0078 6580 21

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 her position with the employer on October 21, 2022. She filed a claim for unemployment benefits with the DUA, effective November 13, 2022, which was denied in a determination issued on December 16, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on April 15, 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 evidence about the circumstances surrounding the claimant's separation from both of her employers. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 quit voluntarily without good cause attributable to the employer or urgent, compelling, and necessitous reasons because she resigned after choosing to move to a location that she believed was too far away from her employer to continue commuting, 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 are set forth below in their entirety:

1. In the spring of 2019, the claimant began full-time employment with an event services company (ER2). The claimant worked approximately forty hours per week at a pay rate of $19.50 per hour.

2. At hire, ER2 informed the claimant that she may experience lay-off periods when the Company gets slow during the off-season. The claimant stated she was told that the slow season could begin around October and business typically increases around April.

3. In 2019, the claimant did not experience an off-season lay-off with ER2.

4. In the spring of 2020, ER2 temporarily closed due to COVID restrictions, and the claimant was not called back to work until winter of 2022.

5. Starting in late winter / spring of 2022, the claimant again began working full-time for ER2. The claimant's hours were 2:00 p.m. – 11:00 p.m. at a pay rate of $19.50 per hour. The claimant's weekly schedule would vary between five and six days per week.

6. In June of 2022, the claimant started working part-time for the instant employer (ER1), as a personal care assistant at a pay rate of $17.00 per hour.

7. The claimant worked a set schedule of two hours per day, five days per week for ER1.

8. In October of 2022, the claimant secured an apartment approximately forty minutes away from the home of ER1. The claimant determined that the commuting expenses outweighed the earnings for her part-time employment with ER1 and decided to leave the part-time job.

9. The claimant worked for ER1 until October 21, 2022.

10. On November 1, 2022, the claimant moved into her new home.

11. On or about November 18, 2022, the claimant was informed by her supervisor at ER2 that they were slow and that they would not have hours for her. The claimant was told to file for Unemployment, and they would call her back in the future. The claimant was surprised by the lay-off.

12. The claimant did not believe that ER2 was slow, requiring her lay-off. The claimant believed they had work available but did not offer it to her. She complained to the human resource representative but was not given any additional reasons for her separation.

13. On November 25, 2022, the claimant filed for Unemployment Insurance (UI) with an effective date of November 13, 2022. The weekly benefit amount is $527 with an earnings disregard of $175.67.

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

As the claimant resigned her position with the instant employer, her eligibility for benefits is properly analyzed under G.L. c. 151A, § 25(e)(1), 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.

Under the above provisions, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.

The claimant resigned her position with the instant employer because she had moved to a new home approximately forty minutes away from the employer's location, and she felt that it was not worth it to continue working for the instant employer in a part-time capacity because of the added commuting time. Consolidated Finding # 8. As the claimant did not separate because of any decision made or action taken by employer, we need not consider whether she separated for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

We next consider whether the claimant resigned her position for urgent, compelling, and necessitous reasons. "[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.

The Board has recognized loss of housing as an urgent, compelling, and necessitous reason for leaving employment where a claimant shows that she could not find alternative housing within

commuting distance of the employer, or that she could not afford to stay in the area. *See e.g.,* Board of Review Decision BR-107914 (Jan. 14, 2009). In this case, however, the claimant testified that she did not lose her previous housing. She chose to move because she was looking for a new apartment for herself.[1] On the record before us, we are unconvinced that the length of the claimant's new commute, which resulted from this relocation, was so burdensome as to compel her to resign from her part-time work with the instant employer. *See* Consolidated Finding # 8. Thus, we cannot conclude that the claimant separated from her employment for urgent, compelling and necessitous reasons within the meaning of G.L. c. 151A, § 25(e)(1).

However, as the claimant was working full-time for another employer at the time she separated from her part-time job with the instant employer, she 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. *See* Consolidated Findings ## 5–7. 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 claimant resigned her position with the instant employer on or around October 21, 2022, prior to filing her claim for benefits. Consolidated Finding # 9. She then separated from her full-time position with her primary employer due to a lack of work on or around November 18, 2022. Consolidated Finding # 11. Accordingly, the claimant would be subject to a constructive deduction if she knew or had reason to know of her impending layoff from her primary employer. *See* 430 CMR 4.76 (1)(a)(1).

At time of hire, the claimant's primary employer informed the claimant that, beginning in October of every year, it might have to lay off staff due to lack of work in the off-season. Consolidated Finding # 2. While she had not previously experienced seasonal layoffs, in part due to the impact of the COVID-19 public health emergency, there was no dispute that she understood being laid off was a realistic possibility beginning in October, 2022. *See* Consolidated Findings ## 3 and 4. The claimant's subjective belief that she was discharged for reasons other than a lack of work on November 18, 2022, does not alter the fact that she knew the nature of the employer's work meant layoffs were likely during the off-season. *See* Consolidated Findings ## 2, 11, and 12. Because

[1] The claimant's testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

of this, the claimant had reason to know of her impending layoff from her primary employer and, as such, is subject to a constructive deduction.

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.

As the claimant filed for benefits effective November 13, 2022, the last completed quarter she performed services for the instant employer was the 3rd quarter of 2022. The claimant's profile in UI Online, the DUA's electronic recordkeeping system, shows she earned $1,567.32 from the instant employer during that quarter. Dividing the claimant's gross earnings from the instant employer by 13 weeks yields gross weekly earnings of $120.56. However, as the claimant's gross weekly earnings from the instant employer were less than her earnings disregard of $175.67, in effect, the claimant is subject to a constructive deduction of $0.00. *See* Consolidated Finding # 13.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant quit her job for disqualifying reasons under G.L. c. 151A, § 25(e)(1), is free from error of law. However, the conclusion that the claimant is subject to a total disqualification from receiving benefits was an error of law, and we reverse that conclusion. The claimant's receipt of benefit is subject only to a constructive deduction.

The review examiner's decision is affirmed in part and reversed in part. Beginning the week of November 13, 2022, the claimant shall be subject to a constructive deduction in the amount of $0.00 each week, until she meets the requalifying provisions under 430 CMR 4.76(2) and (3). In effect, this means that she will receive her full weekly benefit amount.



BOSTON, MASSACHUSETTS
DATE OF DECISION – March 18, 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