Claimant discharged from her part-time subsidiary job after failing to report to or call out from work. 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 separated from this on-call job more than four weeks prior to her filing a claim for benefits.

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0078 8024 38

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 separated from her position with the employer on September 1, 2022. She filed a claim for unemployment benefits with the DUA, effective December 4, 2022, which was denied in a determination issued on January 10, 2023. 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 July 21, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). 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 a complete disqualification of benefits after being discharged from employment for failing to report to or call out from work, 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. From December 20, 2021, to September 1, 2022, the claimant worked as a residential caretaker for the employer, a human services organization.

2. The claimant worked in a residential facility caring for individuals with autism.

3. The claimant initially worked full-time (40 hours a week) and had a set schedule. The claimant worked Monday through Friday from 11:00 p.m. to 7:00 a.m.

4. On or about January 30, 2022, the claimant requested to change her employment status to per diem, and the employer approved her request. Beginning on or about January 30, 2022, the claimant worked as a residential relief staffer for the employer, and did not have set schedule.

5. As a per diem employee, the claimant provided her supervisor with her availability, and received a physical copy of her schedule two weeks in advance.

6. The claimant's direct supervisor was the employer's director for the children residential program.

7. The employer maintains an Attendance Policy, in order to ensure that its employees report to work for their scheduled shifts. If an employee cannot report to work, they are expected to notify the employer in advance by using the employer's "call out line".

8. The purpose of the policy is to ensure adequate staffing to comply with mandatory staffing ratios and ensure residents' safety.

9. The claimant was aware that the employer expected her to report to work for her scheduled shifts and to notify the employer via the "call out line", if she could not report to work.

10. On August 30, 2022, the claimant worked from 11:00 p.m. to 7:00 a.m. the following day.

11. On August 31, 2022, the claimant was scheduled to work from 11:00 p.m. to 7:00 a.m. the following day. The claimant did not report to work and did not contact the employer.

12. It is unknown why the claimant did not report to work and did not contact the employer.

13. On September 1, 2022, or about 1:00 a.m. [sic], the employer's overnight program supervisor learned the claimant had not reported to work. The supervisor called the claimant using the phone number that the claimant had provided to the employer. The claimant did not answer the phone, and the supervisor received an automated message stating that the phone number was not accepting phone calls at this time. The supervisor could not leave a voicemail. The supervisor notified the employer's human resources director that the claimant had failed to report to work.

14. On September 1, 2022, after 7:00 a.m., the HR Director called the claimant's phone number and received the same automated message. The HR director determined that the claimant had violated the employer's policies and expectations, by failing to report to work on August 31, 2022, and not notifying the employer, and decided to discharge the claimant.

15. On September 1, 2022, the employer discharged the claimant for failing to report to work on August 31, 2022, and not contacting the employer. The HR director mailed a letter to the claimant's correct address via U.S. Mail notifying the claimant that due to her failure to report to work on August 31, 2022, and failure to contact the employer, the employer had determined the claimant had voluntary resigned, and had terminated her employment.

16. Following her discharge, the claimant continued to work for two other employers.

17. Subsequently, the claimant filed an initial claim for unemployment benefits with the Department of Unemployment Assistance (DUA) with an effective date of December 4, 2022. In her application, the claimant reported she worked for the employer from November 10, 2021, until October 15, 2022, when she quit her employment.

18. Prior to her discharge, the claimant had no history of disciplinary action.

19. If the claimant had contacted the employer, she would not have been discharged.

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.

The review examiner rendered her decision pursuant to the discharge provision under G.L. c. 151A, § 25(e)(2). However, we have held that, where a person is discharged for not calling or showing up for work, her eligibility for benefits is more properly analyzed under G.L. c. 151A, § 25(e)(1). 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)).

G.L. c. 151A, §§ 25(e)(1), 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.

These provisions expressly place the burden of proof upon the claimant.

Nothing in the record indicates that the employer's actions were unreasonable. Thus, the resignation was not for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (to show good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. 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 v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992).

As the review examiner notes in her decision, the claimant testified that she could not recall if she was scheduled to work on August 31, 2022. Consequently, the review examiner found that it is unknown why the claimant did not report for work or call in. *See* Finding of Fact # 12. Given this record, the claimant has not demonstrated that her behavior was due to urgent, compelling, or necessitous circumstances.

Thus, we agree with the review examiner's conclusion that the claimant was disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e).

However, the findings also show that, after the claimant was discharged from this on-call employment, she continued to work for two other employers.[1] *See* Finding of Fact # 16. This suggests that her part-time job could have been subsidiary employment. *See* 430 CMR 4.73. Although the review examiner found that the claimant continued to work for two other employers after separating from the instant employer, the review examiner did not question the claimant about whether she worked full- or part-time for her other employers, or when she separated from them.

We note that here, the review examiner found that the claimant separated from the instant employer on September 1, 2022 — not on October 15, 2022, as the claimant initially reported to the DUA. Compare Findings of Fact ## 1 and 15 to Finding # 17.

Review of the claimant's employment history in the DUA's UI Online computer database shows that the claimant separated from one of these employers (Employer A) on November 1, 2022; and from the other employer (Employer B) on November 5, 2022.

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

Review of the claimant's monetary summary in UI Online shows that the claimant earned $2,677.76 from the instant employer between July 1, 2022, and September 30, 2022 — the fourth quarter of the claimant's base period on this claim for benefits. During this same time period, the claimant earned $7,818.90 from Employer A, while she earned $6,234.48 from Employer B. Although the claimant was discharged from the instant employer two months into the three-month calendar quarter, her reported wages from the instant employer are clearly subsidiary to those she earned from both of her other employers.

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; . . .

Although the claimant's separation from the instant part-time subsidiary employer was disqualifying under G.L. c. 151A, § 25(e)(2), 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.
>
> 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.

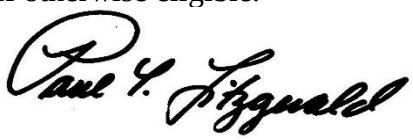
In this case, the claimant separated from the instant employer prior to filing a claim for benefits. This sequence of events suggests we should apply 430 CMR 4.78(1)(a).

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."[2] *See* Board of Review Decision 0078 5162 55 (Apr. 27, 2023) (claimant who quit part-time subsidiary employment with knowledge of her impending separation from her full-time job was not subject to a constructive deduction or loss of benefits based on her separation from the part-time job because she quit more than four weeks before filing her claim for benefits).

Here, the claimant separated from her instant part-time subsidiary employment on September 1, 2022, and filed a claim for benefits following her separations from her other two employers on December 16, 2022, fifteen 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.

While we conclude that as a matter of law, that the claimant is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), given the factual circumstances set forth above, and pursuant to DUA policy in UIPP 2014.05, the claimant is not subject to either a constructive deduction or a loss of benefits based on her separation from this employer, who is not an interested party in this matter.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 3, 2022, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 2024

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

[2] *See* DUA's UI Policy and Performance Memo (UIPP) 2014.05 (May 29, 2014), p. 3.

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.

JPCA/rh