

Claimant separated from her employment as a direct result of her conviction of a felony and is disqualified pursuant to G.L. c. 151A, § 25(e)(3). However, because she separated from her part-time job in the benefit year, she is subject to a constructive deduction. When the claimant resumed part-time work, the constructive deduction ended pursuant to 430 CMR § 4.76(3).

**Board of Review
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Issue ID: 0079 5180 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 her position with the employer on October 21, 2022. She filed a claim for unemployment benefits with the DUA, effective July 3, 2022, which was denied in a determination issued on April 15, 2023. 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 May 13, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant left work because of a conviction of a felony or misdemeanor and, thus, was disqualified under G.L. c. 151A, § 25(e)(3). 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 regarding the claimant's separation. 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 as well as DUA's electronic record keeping systems, UI Online and EMT.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(3), because she left her employment as a direct result of a felony conviction, 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. The employer is a restaurant. The claimant worked as a part-time server for the employer. The claimant worked for the employer from November 2019 to 10/19/2022.
2. The employer paid the claimant \$6.25 per hour plus tips.
3. The claimant worked three to four shifts per week for the employer in the period from 7/3/2022 to 10/19/2022. The claimant's shift end times varied. The claimant worked twelve to seventeen hours per week.
4. The claimant performed work for the employer in each week in the period from 7/3/2022 to 10/19/2022.
5. The employer paid the claimant \$3,721.33 in net earnings for the period 7/3/2022 to 10/19/2022.
6. The claimant's average weekly gross earnings from the employer was \$400.00 to \$600.00 per week.
7. The claimant drove a vehicle while intoxicated by alcohol. The claimant did this in 2019. The claimant was arrested for this. The Commonwealth of Massachusetts charged the claimant with OUI. The claimant's trial was delayed due to the COVID-19 pandemic. The claimant was tried for the OUI in the Massachusetts Trial Court. The claimant was convicted of felony OUI on 10/21/2022. The claimant was incarcerated due to this conviction. This incarceration started on 10/21/2022.
8. The claimant was incarcerated at a prison from 10/21/2022 to 11/7/2022. The claimant was then sent to a treatment program at a correctional facility. The claimant was in this program from 11/7/2022 through 3/17/2023.
9. The claimant's daughter notified the employer that the claimant could not continue her employment with the employer. The claimant could not continue her employment because she was incarcerated.
10. The claimant began employment with a business named [Employer B] on 4/29/2023. [Employer B] is a restaurant. The claimant works as a part-time server for [Employer B]. The claimant still works for [Employer B] in this role. The claimant works twenty-two to twenty-eight hours per week for [Employer B]. [Employer B] pays the claimant \$6.75 per hour plus tips.
11. The claimant's average weekly gross earnings from [Employer B] is \$600.00 to \$800.00 per week.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 5 states that the claimant's net earnings, during the period from 7/3/2022 to 10/19/2022, were \$3,721.33. However, the claimant's bank statements, which indicate direct deposits made by the employer, show net earnings of \$3,929.90. *See* Remand Exhibit # 7.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, while we believe that the claimant's separation from employment is disqualifying, 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 review examiner determined that the claimant left her employment due to conviction of a felony, her case is governed by G.L. c. 151A, § 25(e)(3), 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 . . . (3) because of conviction of a felony or misdemeanor.

The consolidated findings provide that, on October 21, 2022, the claimant was tried and convicted of a felony OUI in a Massachusetts Trial Court. Consolidated Finding # 7. At the time the verdict was issued, a sentence of incarceration was imposed to take effect immediately. Consolidated Findings ## 7 and 8. The findings also reflect that the claimant worked as a server for the employer and knew that she would not be able to work her scheduled shift due to her incarceration, so she had her daughter inform the employer that she would no longer be able to work for them. Consolidated Findings ## 1, 3, and 9. Because the claimant left work as a direct result of her conviction of a felony, she is disqualified pursuant to G.L. c. 151A, § 25(e)(3).

However, our analysis does not stop there. Because the claimant separated from this part-time job for disqualifying reasons under G.L. c. § 25(e)(3), we must determine if the claimant would be subject to a full disqualification of benefits or a constructive deduction. *See* Consolidated Finding # 1.

In determining whether a constructive deduction applies, we look to 430 CMR 4.76, which provides, in relevant part, the following:

(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:

¹ Remand Exhibit # 7 is part of the unchallenged evidence introduced at the hearing and placed in the record and are 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).

(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; or

2. if the separation from part-time work occurs during the benefit year. . . .

The DUA's electronic record-keeping system, UI Online, shows that the benefit year under the claimant's 2022-01 claim ran from July 3, 2022, through July 1, 2023. The findings show that the claimant separated from the employer's part-time job on October 21, 2022. Thus, this was a benefit year separation. Consolidated Findings ## 1 and 4. Inasmuch as she separated from part-time work during the benefit year, she is subject to a constructive deduction under 430 CMR 4.76(1)(a)(2).

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 DUA's other electronic record-keeping system, EMT, shows that the claimant's total gross wages for the employer were \$6,376.00, and she worked for approximately 15.71 weeks. Consolidated Finding # 4. Thus, her average weekly wage was \$405.86. Finally, UI Online shows that the claimant's weekly benefit amount was \$471.00, and her earnings disregard was \$157.00. Accordingly, \$405.86, minus the earnings disregard of \$157.00, shall be deducted from the claimant's weekly benefit amount. Therefore, the claimant is subject to a constructive deduction in the amount of \$248.86 from her weekly benefit amount.

However, the constructive deduction would only be imposed for a limited duration. Since the claimant separated from the part-time instant employer on October 21, 2022, she has found new employment. Pursuant to 430 CMR 4.76(3), when a claimant, who is subject to a constructive deduction, returns to work part-time, a constructive deduction is no longer be imposed, and the claimant is only subject to the earnings offset while so employed. Here, the review examiner determined that the claimant had begun working part-time for a new employer on April 29, 2023. Consolidated Finding # 10. Because the claimant has met the requalifying events under 430 CMR 4.76(3), the constructive deduction ends on April 29, 2023.

We, therefore, conclude as a matter of law that the claimant is disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(e)(3), based upon her separation from the employer. We further conclude that the claimant is subject to a constructive deduction, rather than a disqualification of her total weekly benefit amount pursuant to 430 CMR 4.76(1)(a)(2).

We affirm the review examiner's decision under G.L. c. 151A, § 25(e)(3). 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 subject to a constructive deduction for the period beginning October 21, 2022, until April 29, 2023, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 30, 2024



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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