

Due to a back injury, the claimant was unable to perform his bar back position, which required lifting heavy items. The employer offered him the take-out position, but he declined the offer because he wanted to pursue a career in bartending. Because the claimant had not shown that the new work was unsuitable, or that he left work for urgent, compelling, or necessitous reasons, the Board held that he was disqualified pursuant to G.L. c. 151A, § 25(e)(1). However, he separated from this part-time job in his benefit year, and he is subject only to a constructive deduction pursuant to 430 CMR 4.76(1)(a)(2).

**Board of Review
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Issue ID: 334-FHJN-D49N

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 his part-time position with the employer on October 25, 2023. He filed a claim for unemployment benefits with the DUA, effective October 22, 2023, which was denied in a determination issued on May 22, 2024. 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 November 13, 2025. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without either 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 employment history. Both parties 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 left work for urgent, compelling, and necessitous reasons when his back injury left him unable to continue to work as a bar back but was not entitled to benefits because he had failed to take reasonable steps to preserve his employment prior to resigning, 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. The claimant worked part-time as a bar back for the employer, a restaurant, from September 18, 2023, until October 18, 2023, when he separated.
2. The claimant's supervisor was the general manager (manager).
3. The claimant was also employed part time as a mate, tickets taker, and van driver for another employer, [Employer A], since April 15, 2023.
4. The claimant worked an average of eight (8) to twelve (12) hours per week for employer A.
5. The claimant earned \$20 per hour working for employer A.
6. The claimant's job duties with the instant employer required him to clear dishes and cups, placing them in a bus bucket, and then lifting and moving the bus bucket throughout his shift.
7. The bus buckets could weigh as much as fifty (50) pounds when full.
8. The manager often informed the employees that they were not required to fill the buckets and could fill them to a weight they could lift.
9. On or around October 9, 2023, the claimant and his wife moved.
10. The claimant was required to lift and move heavy furniture which resulted in back pain.
11. The claimant informed the manager that he was experiencing back pain, which was caused by his lifting and moving heavy furniture during his move.
12. The claimant spoke with the manager and informed him that he was going to rest for a few days to see if his pain would lessen.
13. The manager agreed the claimant could take a few days off in the attempt to get better.
14. On October 18, 2023, the claimant worked his last shift for the instant employer.
15. The claimant exchanged text messages with the manager while he was resting regarding his back pain.
16. On October 22, 2023, the claimant informed the manager that he was still experiencing back pain when he moved due to pinched nerves.

17. On October 25, 2023, the claimant informed the manager that he was diagnosed with a hernia, which did not allow him to continue to lift and move heavy items without experiencing pain and worsening the hernia.
18. The manager informed the claimant there was a takeout position available for him, that did not include any lifting or moving. The takeout job duties included retrieving the ordered food, giving it to the customer, and taking payment for the order.
19. The claimant did not accept the takeout position because his real interest was to become a bartender.
20. The claimant did not contact human resources.
21. The claimant did not request a leave of absence.
22. An unpaid leave of absence would have been available to the claimant.
23. The claimant did not return to work for the employer.
24. The claimant worked for the instant employer for five (5) weeks and earned \$1,389.73 in total gross earnings during his employment.
25. On October 22, 2023, the claimant resigned from his position with employer A because he was no longer interested in working for employer A and wanted to find employment where he could earn more money.
26. In April 2024, the claimant stopped certifying for unemployment benefits.
27. DUA records indicate the claimant began working for another employer (employer B) on June 21, 2024. He worked for employer B as a cook.

Credibility Assessment:

The review examiner entered the claimant's employment history screen from the DUA's EMT system into the record as remand exhibit 9.

The claimant was unable to remember his specific dates of employment and other information throughout the hearings. For example, when asked why he stopped certifying for benefits in April of 2024, the claimant did not know but testified that it must have been because he started working with employer B. However, records show he started work several months later. As a result, the reason why the claimant stopped certifying for benefits in April 2024 was not established. Nevertheless, as to the other details of his employment, the claimant's testimony during the original hearing and the remand hearing is deemed to be 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 1 that states that the claimant separated from the instant employer on October 18, 2023, as it is inconsistent with Consolidated Findings ## 14–19. We also reject the portion of Consolidated Finding # 25 that states that the claimant separated from employer A on October 22, 2023, as the record reflects that he separated from employer A on October 21, 2023, and we accept the remaining portion insofar as it states the claimant's reasons for not returning to work for employer A.¹ In adopting the remaining findings, we deem 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 his employment, we do so on different grounds. Furthermore, the review examiner's decision to subject the claimant to a full disqualification from the receipt of benefits was an error.

Because the claimant resigned from his employment, we analyze his eligibility for benefits 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. . . .

The express language of these provisions assigns the burden of proof to the claimant.

We believe that the review examiner erred in concluding that the claimant left his employment for urgent, compelling, and necessitous reasons. The consolidated findings establish that the claimant worked for the instant employer as a bar back, a position that required the claimant to lift and move bus buckets that could weigh as much as 50 pounds when full. *See* Consolidated Findings ## 1, 6, and 7. Because the claimant sustained a back injury from lifting and moving furniture and was subsequently diagnosed with a hernia, he took time off from work to heal. *See* Consolidated Findings ## 9–13. At that point, the claimant had not separated from his employment. He continued to maintain contact with the instant employer regarding the status of his condition and his ability to return to work. *See* Consolidated Findings ## 14, 15, 16, and 17.

When the claimant informed his manager that he was unable to continue to work in his current position due to his medical condition, the employer offered him work in a take-out position that

¹ The DUA's electronic record keeping system confirms the claimant separated from employer A on October 21, 2023, due to lack of work, with a return-to-work date of May 15, 2024. Based on the information provided by employer A, the agency determined that the claimant was eligible for benefits based on that separation.

did not involve any lifting or moving. *See Consolidated Findings ## 17 and 18.* However, the claimant declined the offer because he wanted to focus on other career interests. *See Consolidated Finding # 19.* His personal preference in this regard does not show that he was compelled to resign from the instant employer because of a medical condition. Therefore, the claimant has not shown that he left work for urgent, compelling, or necessitous reasons.

Alternatively, the claimant may show that he left work for good cause attributable to the employer. To determine whether there was good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

Because the claimant's hernia diagnosis made it physically difficult to move and lift heavy items, we consider whether the employer's offer to work in the take-out position was unsuitable. "Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.' *See Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n. 3 (1981)." Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*. The claimant bears the burden of showing that the new position he declined was not suitable work. "Suitability is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances." Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948).

In this case, the take-out position did not require any heavy lifting and required light movement. *See Consolidated Finding # 18.* The claimant's paystubs and work schedules show that he had a set schedule, working Mondays and Wednesdays, for six hours each day earning \$6.75 per hour plus tips. *See Exhibits ## 12 and 13.*² Nothing in the record suggests that the claimant's pay or hours would have been reduced by the employer if he had accepted the take-out position. Further, nothing indicates that he did not have the skills necessary to perform the job. In fact, the only reason that the claimant declined the new position was because he wanted to be a bartender. *See Consolidated Finding # 19.* Absent any medical evidence indicating that he was medically unable to perform the job duties of the new position, and we see none, the claimant has not established that the new work offered was unsuitable. Therefore, the claimant has failed to meet his burden to show that he separated from his employment with good cause attributable to the employer.

However, our analysis does not end there. We note that the DUA's electronic record-keeping system shows that the claimant filed for unemployment benefits on November 1, 2023, effective October 22, 2023. Because the claimant separated from the instant part-time employer on October 25, 2023, this separation occurred during his benefit year. Pursuant to 430 CMR 4.76(1)(a)(2), the claimant is subject to a constructive deduction and not a full disqualification from receipt of benefits.

² The claimant's paystubs are Exhibit # 12 and the time sheets are Exhibit # 13. While not explicitly incorporated into the review examiner's findings, these exhibits are 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).

The amount of the constructive deduction each week is determined by the claimant's earnings from the part-time employer. The DUA regulation at 430 CMR 4.78(1)(a), provides, in relevant part:

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.

The review examiner's consolidated findings show that the claimant worked for employer A during the same period he worked for the instant employer. *See Consolidated Findings ## 1, 3, 17, and 25.* When a claimant has "multiple contemporaneous" employers, the claimant will be presumed to have worked full-time for the employer with which he or she has worked more hours or earned more money. *See 430 CMR 4.75(3).* Employment and Wage Detail Reports submitted by the employers and maintained in the DUA's electronic record keeping system show that the claimant earned substantially more money from employer A in 2023.³ As such, the claimant's primary employer was employer A. Since the claimant worked for the instant employer contemporaneously with employer A, his position with the instant employer was subsidiary part-time benefit-year employment. *See 430 CMR 4.73.*

Inasmuch as the employer paid the claimant gross wages totaling \$1,389.73 in 2023, the claimant's average weekly part-time earnings from this employer were \$277.95. (Total gross wages of \$1,389.73 divided by five weeks worked.) *See Consolidated Finding # 24.* Finally, the DUA's record-keeping database shows that the claimant's weekly benefit amount is \$293.00, and his earnings disregard is \$97.67. Subtracting the claimant's earnings disregard from his average weekly earnings from this employer, the claimant is subject to a constructive deduction of \$180.28 ($\$277.95 - \$97.67 = \180.28).

We, therefore, conclude as a matter of law that the claimant resigned his position without good cause attributable to the employer or urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e)(1). We further conclude that the claimant is subject to a constructive deduction rather than a full disqualification from benefits pursuant to 430 CMR 4.76(1)(a)(2).

We affirm the part of the review examiner's decision that concluded that the claimant's separation from the instant employer was disqualifying under G.L. c. 151A, § 25(e)(1). However, we reverse the portion of the decision that subjected the claimant to a full disqualification from the receipt of benefits. Beginning the week ending October 21, 2023, the claimant is subject to a constructive deduction from his weekly benefit in the amount of \$180.28, each week until he meets the qualifying provisions under 430 CMR 4.76(2) and (3).

³ In 2023, the instant employer reported that the claimant had earned a total of \$1,389.73, while employer A reported total earnings in the amount of \$16,145.40.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 26, 2026



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**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