**Where claimant resigned from her subsidiary job with the employer and had no knowledge that she would later be laid off by her primary employer, she was not disqualified nor subject to a constructive deduction.**

**Board of Review Paul T. Fitzgerald, Esq.
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**Issue ID: 0015 6369 62**

**BOARD OF REVIEW DECISION**

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. I. Cofer, 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 resigned from her position with the employer on January 9, 2015. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 20, 2015. 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 April 17, 2015. 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion that the claimant was subject to a disqualification for voluntarily quitting her job is supported by substantial and credible evidence and is free from error of law, where the claimant’s job with the instant employer was subsidiary part-time employment from which the claimant separated prior to being laid off from her primary employer.

Findings of Fact

The review examiner’s findings of fact and credibility assessments are set forth below in their entirety:

1. The employer is a manufacturer. The claimant worked as a part-time marketing assistant for the employer from 4/14/14 until 1/09/15.

2. The claimant worked twenty-four hours per week for the employer. The employer paid her $20.00 per hour.

3. The claimant applied for a sales operations manager position with another employer (“Employer X”). Employer X offered the position to the employer. Employer X told the claimant that she would start on 9/12/14, that she would work twenty-five hours per week, and that it would pay her $22.50 per hour. The claimant accepted the position.

4. In the period 9/12/14 to 1/09/15, the claimant worked both the marketing assistant job for the employer and the sales operations manager position for Employer X.

5. In December, Employer X offered an hours increase to the claimant. Employer X offered thirty hours. The claimant accepted.

6. The claimant decided to resign from her position with the employer because Employer X paid her more money and offered more schedule flexibility. The claimant worked a two week notice period for the employer.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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, we believe that the review examiner’s findings of fact do not support disqualifying the claimant from benefits.

Since the claimant quit her employment, her qualification for benefits is governed, in part, by G.L. c. 151A, § 25(e)(1), which provides:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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, . . .

Of primary relevance here, however, are 430 CMR 4.71 through 4.78, which are the DUA’s regulations governing separations from subsidiary part time employment. These regulatory provisions will be set forth in pertinent part where appropriate in the discussion, below.

Generally, in cases governed by G.L. c. 151A, § 25(e)(1), the claimant has the burden to show that the circumstances of her separation entitle her to receive benefits. However, pursuant to 430 CMR 4.76 (1), where the job in question is subsidiary part time work, from which the claimant separates prior to separating from her primary job and before she has established an unemployment claim, her separation from the subsidiary job has no bearing on her claim for benefits. The only exception to this rule applies where the claimant knew or had reason to know of her impending separation from her primary job at the time she leaves her subsidiary job. This principle was extensively discussed in Board of Review Decision 0011 4858 86 (June 19, 2014). We must determine, therefore, whether the claimant’s job for the instant employer was “subsidiary part time work,” within the meaning of the DUA’s regulations, and, if so, whether the claimant quit this job prior to establishing a claim based upon her separation from her primary employer and without foreknowledge of that subsequent separation.

“Subsidiary Part-time Work” is defined in the applicable regulations as “employment worked contemporaneously with full-time work.” 430 CMR 4.73. The regulations also address a situation, as here, where a claimant has two contemporaneous jobs, neither of which are “full time” in the usual sense of that term: “The claimant’s most recent work will, in the case of multiple contemporaneous employees, be presumed full-time if he or she worked more hours or earned more money in the most recent work than in all other contemporaneous employment.” 430 CMR 4.75 (3).

Here, the review examiner’s findings establish that the claimant worked part-time for this employer for a period of time while she also worked at a job for another employer. The claimant worked 24 hours a week for the instant employer from April 14, 2014 until January 9, 2015, and earned $20.00 per hour. She started working for the other employer on December 12, 2014, working 25 hours per week, and earning $22.50 per hour. She thus worked contemporaneously for both employers from December 12, 2014 until January 9, 2015. She resigned from the instant job after the other employer increased her hours to 30 hours per week, increased her pay, and offered more schedule flexibility. We take administrative notice of DUA’s UI Online records which reflect that the other employer laid the claimant off for lack of work on February 16, 2015, and that the claimant initiated her claim for benefits on February 18, 2015.

Under these facts, the claimant’s most recent position was with the other employer, and the other employer was her primary employer because she worked more hours and received more pay from that employer than from the instant employer.

Nothing in the record suggests that, at the time the claimant quit the instant subsidiary job, she knew or had any reason to know of an impending separation from the claimant’s primary employer. Indeed, the findings of fact indicate that the claimant’s genuine reason for quitting when she did was that the primary employer was offering her more hours and pay. Thus, based upon the facts found by the review examiner, where the claimant did not know of the impending layoff, the circumstances surrounding the claimant’s separation from the instant subsidiary part time job have no effect on her qualification for benefits or the amount of her benefits in the claim she established after being laid off from her primary employment.

We, therefore, conclude as a matter of law that the review examiner’s decision to disqualify the claimant is erroneous as a matter of law. The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending December 28, 2014, and for subsequent weeks, if otherwise eligible.

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**BOSTON, MASSACHUSETTS** Paul T. Fitzgerald, Esq.

**DATE OF DECISION -** **September 30, 2015** Chairman

 

Judith M. Neumann, Esq.

Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT\* OR TO THE BOSTON MUNICIPAL 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.

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.

SPE/jv

**\* To locate the nearest Massachusetts District Court, see:**

[**www.mass.gov/courts/court-info/courthouses**](http://www.mass.gov/courts/court-info/courthouses)