

**Board of Review
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Issue ID: 0002 4012 73

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Peter Sliker, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with an effective date of March 6, 2011. The claimant separated from her position with the instant part-time employer on or about September 19, 2011. She collected benefits during the weeks ending September 24, 2011 through October 22, 2011. On May 17, 2013, the DUA issued a Notice to Claimant of Disqualification and Constructive Deduction, Redetermination and Overpayment. The Notice indicates that the claimant left her part-time position voluntarily and without good cause attributable to the employer, under G.L. c. 151A, §25(e)(1); and, therefore, she was subject to a constructive deduction as of the week ending September 24, 2011. The Notice also indicates that the claimant was overpaid benefits in the amount of \$1,128.00 during the weeks ending September 24, 2011, through October 22, 2011. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on October 28, 2013. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, the claimant was not 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 employer's appeal, we remanded the case to the review examiner to give the employer an opportunity to testify and present other evidence. Only the employer 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.

The issue on appeal is whether the review examiner's conclusion that the claimant voluntarily left employment for good cause attributable to the employer is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant resigned over a misunderstanding regarding her work schedule.

Findings of Fact

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

1. The claimant worked as a relief worker for the employer, a social services agency. The claimant applied for and was assigned to work at a women's homeless shelter. The claimant began work for the employer on September 15, 2010.
2. The claimant did not attend the remand hearing on December 30, 2013. The claimant presented direct testimony during a hearing on October 15, 2013, which she requested to appeal a determination disqualifying her from benefits. While testifying, the claimant was vague and unable to remember events specifically. The employer did not appear at the October 15, 2013 hearing. The employer was represented at the December 30, 2013 remand hearing by the program director. The claimant did not attend the remand hearing. The program director's testimony was more specific than the claimant's. She also presented documentation in support of her direct testimony. Therefore the program director's testimony regarding the events leading up to the claimant's separation is found to be more credible than the claimant's.
3. When the claimant was hired she met with the program director. The claimant told the program director that she had another job during the week and was only available during the weekends. The program director agreed to schedule her during the weekends.
4. The program director told the claimant her schedule would vary.
5. The program director gave the claimant an offer letter informing her that her schedule would vary.
6. The women who the shelter serves do not stay at the shelter during the day.
7. Program staff work two shifts to care for the women: one shift from 4 pm to 12 am and another shift from 12 am to 8 am.
8. Program staff include direct care staff, relief staff, a day manager (who was responsible for operations and scheduling but not for supervising staff), and the program director.
9. During the holiday season the employer provides gifts for the women.
10. Program staff were not stealing the gifts.
11. The claimant did not complain to the program director about program staff stealing gifts.

12. During the months of April, 2011 through July, 2011, the claimant worked approximately 20 to 25 hours per week.
13. The program director restricted the claimant's hours to working only the 4 pm to 12 am shift because of reports from clients and staff she was sleeping during the overnight shift.
14. Due to staffing changes the claimant's hours were further reduced.
15. The claimant never informed the employer she was interested in a permanent schedule.
16. In August, 2011, and September, 2011, there were weeks when the claimant was not scheduled and weeks when the claimant worked 8 hours. There were no weeks when she worked more than 8 hours.
17. The claimant missed scheduled shifts in September, 2011, because she was unsure of her schedule and because she switched shifts with other employees.
18. The claimant last worked on or about September 19, 2011.
19. On a day just after September 19, 2011, the claimant called the program director on the telephone. The claimant told her that she could not do it anymore. She complained that she was dissatisfied with not knowing what shift she was working. The program director suggested she write her schedule down. The claimant disagreed and told the program director she was giving her two weeks' notice.
20. The program director told the claimant it was not necessary she work her two weeks' notice.
21. At no time did the program director tell the claimant: "We don't need you here anymore."
22. The claimant earned an average weekly wage of \$205.03 per week during her employment.
23. On May 17, 2013, the DUA issued the claimant a redetermination denying her benefits under Section 25(e)(1) of the Law and 430 CMR 4.71–4.78. Her benefits were determined to be subject to a constructive deduction. She was found to be overpaid in the amount of \$1,128.00 for the five weeks ending September 24, 2011 through October 22, 2011, in accordance with Section 71 of the law.
24. The overpayment was attributed to error.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the ultimate conclusion that the claimant is entitled to benefits is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 16 (that the claimant worked no more than 8 hours per week in August and September of 2011) is modified, based upon the employer's testimony at the remand hearing, that, in September, 2011, the claimant informed the employer she was only available on weekends due to her other job. We note that the DUA's UI Online system shows the claimant began a new job on August 1, 2011. We also clarify the portion of Consolidated Finding # 19 which states that, at the time the claimant resigned, she complained she was dissatisfied with not knowing what shift she was working, and the program director suggested she write her schedule down. Based upon the employer's specific testimony at the remand hearing, Finding # 19 is modified to state that the claimant complained because the day manager scheduled the claimant on days the claimant stated she was not available, and the program director suggested the claimant submit her availability to the employer in writing. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

To the extent the claimant quit her job, this case is governed by 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 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

To the extent the claimant was discharged, this case is governed by G.L. c. 151A, § 25(e)(2), 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 for . . . [T]he period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

In his original decision, the review examiner concluded that the claimant voluntarily left her employment for good cause attributable to the employer, as the employer had reduced her hours. The review examiner came to this conclusion despite his finding that the program director informed the claimant the employer did not need her anymore after the claimant complained about the reduction to her hours, and despite the claimant's testimony at the initial hearing that she believed the program director had discharged her. After hearing the employer's testimony at the remand hearing, the review examiner found that the program director did not tell the claimant

she was no longer needed, and that the claimant resigned on or about September 19, 2011, due to confusion regarding her work schedule. However, the employer also effectively told the claimant not to work out her two weeks' notice.

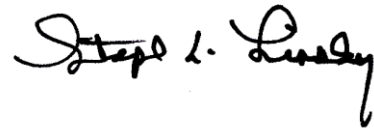
In light of these consolidated findings of fact, we will analyze the claimant's separation as a discharge (governed by G.L. c. 151A, § 25(e)(2)) as of the week ending September 24, 2011, and as a quit (governed by G.L. c. 151A, § 25(e)(1)) as of the week ending October 8, 2011, which is the week the claimant's resignation would have taken effect had she been allowed to work out her notice period.

The record before us reflects that the claimant gave her two weeks' notice at the same time that she complained to the employer that the day manager was scheduling her on days she stated she was not available. The claimant resigned even though the program director suggested that she submit her availability in writing going forward to avoid any confusion. It is unclear from the record who was at fault for the confusion with the claimant's schedule; but, even if it were the employer's fault, the claimant has failed to establish good cause for quitting because she did not take reasonable steps to preserve her employment or show that such efforts would have been futile. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93-94 (1984).

However, since the claimant worked part-time for the instant employer and quit during her benefit year, a disqualifying separation does not render her totally ineligible for benefits. Rather, the claimant is subject to a constructive deduction from her weekly benefit rate in the amount of \$205.03, her average weekly wage for this employer. *See* 430 CMR 4.76(1)(a)(2); 430 CMR 4.78(1)(b).

Finally, since the employer did not allow the claimant to work out her two weeks' notice, the employer effectively discharged her for the two weeks the claimant would have worked during her notice period. As the employer has not met its burden, under G. L. c. 151A, § 25(e)(2), of proving that the claimant's termination was for deliberate misconduct or a knowing violation of employer policy, the claimant is not subject to either disqualification or a constructive deduction for the weeks ending September 24, 2011 and October 1, 2011. Consequently, the constructive deduction resulting from claimant quitting her employment shall begin the week ending October 8, 2011.

The review examiner's decision is reversed. The claimant's separation from the instant employer is disqualifying, under G.L. c. 151A, § 25(e)(1), and she is subject to a constructive deduction beginning the week ending October 8, 2011, and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount. The claimant was overpaid benefits during the weeks ending October 8, 2011, through October 22, 2011. The DUA must recalculate the overpayment amount.



Stephen M. Linsky, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 20, 2014



Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SVL/rh