

Board of Review
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Issue ID: 0001 1361 33
Claimant ID: 413064

BOARD OF REVIEW DECISION

0001 1361 33 (Sept. 15, 2014) – A claimant, who refused an offer of work from one employer because she was working in other suitable employment, was not disqualified under G.L. c. 151A, §§ 29(a),(b), and 1(r).

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits effective the week of December 29, 2013. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

After separating from a full-time employer, the claimant filed a claim for unemployment benefits with the DUA. On May 2, 2013, the DUA issued a determination denying benefits as of December 29, 2012. The claimant appealed the determination 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 March 3, 2014.

Benefits were awarded after the review examiner determined that the claimant was in unemployment and, thus, was not disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). 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 allow the employer an opportunity to provide evidence. Both parties 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 before the Board is whether the review examiner's original conclusion that the claimant is not disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), is based on substantial and credible evidence and free from error of law, where the review examiner found that the claimant refused work from the employer only if she had a conflict with another job.

Findings of Fact

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

1. The claimant worked full-time as a Registered Dental Hygienist for another employer ([X] Dental) until she was laid-off in September 2012.

2. On 09/30/12 the claimant filed a claim for unemployment benefits based on her separation from her full-time job.
3. The issue start date is 12/29/12.
4. In addition to her full-time position the claimant was also working part-time hours on call as needed as a \$40.00 to \$42.00 per hour Registered Dental Hygienist on assignments for this employer's job placement company from July of 2007 to the present. This employer offers both part-time temporary jobs and full-time permanent jobs.
5. At the time the claimant filed her unemployment claim the claimant was only working part-time and only working for this employer's job placement company.
6. The claimant is available to work any day except Wednesday due to urgent family childcare issues that exist on that one day. The claimant told her supervisor (Owner) that she could not work on Wednesdays. The claimant did not explain to the employer why she could not work on that one day and the employer never requested more information.
7. The claimant had difficulty obtaining one full-time job so she obtained four other part-time jobs to help her reach her goal of full-time hours. The claimant hoped to eventually have full-time hours with just one employer.
8. The claimant worked Tuesdays and some Wednesdays (if no childcare issues) at [A] Dental.
9. The claimant worked Mondays only at [B] Dental.
10. The claimant worked Thursday only at [C] Dental.
11. The claimant worked Fridays only at [D] Dental.
12. After the claimant had four permanent part-time employers the claimant told this employer that she could not accept part-time one day assignments that could jeopardize her employment with her other employer's but she was interested in a full-time permanent job that would allow her to leave all her part-time positions.
13. The claimant never refused any offer of work from this employer unless it conflicted with her emergency childcare issue on Wednesdays or her long term permanent part-time job commitments.
14. This employer never offered the claimant the full-time permanent job she had expressed an interest in obtaining through this 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 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. In adopting the findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant is not disqualified from receiving unemployment benefits.

In his original decision, the review examiner awarded benefits, because the claimant was accepting all suitable work offered to her. Thus, she would be entitled to full benefits in any week in which she works no hours, and partial benefits in any week in which she works some hours. G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week....

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

During the remand hearing, the employer provided evidence that the claimant had been offered various job assignments but had refused them. Based on the claimant's testimony, the review examiner found that the claimant refused job assignments from the employer only if those assignments conflicted with her other work. Indeed, the claimant was working all five weekdays in several part-time jobs. The record indicates that the part-time jobs the claimant had were permanent, whereas the work this employer offered was temporary. It is entirely reasonable for the claimant to have refused temporary work with this employer in order to work at other permanent jobs. A claimant who refuses work with a particular employer because she is working other suitable employment does not suffer a disqualification under G.L. c. 151A, §§ 29(a), 29(b), and 1(r).

Based on the findings of fact made following the remand hearing, the claimant accepted all suitable offers of work from the employer. She refused work only when she had other work to do. Thus, she would have been in total unemployment in any week in which she performed no work and received no remuneration or partial unemployment in any week in which her aggregate remuneration was less than her benefit rate.

We, therefore, conclude as a matter of law that the review examiner's initial conclusion that the claimant is not disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), is based on substantial and credible evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending January 5, 2013,¹ and for subsequent weeks if otherwise eligible.²

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 15, 2014



Paul T. Fitzgerald, Esq.
Chairman



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.

SF/rh

¹ In Part IV of the original decision, the review examiner concluded that the claimant was eligible "for the weeks ending 01/04/13 and thereafter if otherwise eligible." Clearly, the date is a typographical error. The first week of 2013 was the week ending January 5, 2013.

² We note that the DUA's online computer system shows that the claimant has other disqualifications in effect for time periods after the effective date of the issue in this case. These other issues may affect her ability to collect benefits for weeks after the week ending January 5, 2013.