

Board of Review
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Issue ID: 0002 5434 83

BOARD OF REVIEW DECISION

0002 5434 83 (May 13, 2014) – During a period of temporary layoff, the claimant was in total unemployment. In full harmony with the purposes of the statute, she sought new employment during the layoff and found it. Therefore, resigning from the employer prior to her recall date did not render her ineligible for benefits.

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 reverse.

The agency initially determined that the claimant was entitled to unemployment benefits. The claimant obtained part-time employment with this employer and collected partial benefits before separating from her position on June 28, 2012. On October 12, 2012, the DUA issued a redetermination that disqualified the claimant as of the week ending July 7, 2012. The DUA then notified the claimant of an overpayment and imposed a constructive deduction in the amount of the claimant's wages. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination, after recalculating the sums due, in a decision dated April 29, 2013. 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, thereby triggering the overpayment and constructive deduction. 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 on appeal is whether the review examiner's conclusion that the claimant had voluntarily quit her employment without good cause attributable to the employer is supported by substantial and credible evidence and free from error of law, where the employer imposed a temporary layoff on the claimant, during which period the claimant found and accepted other suitable work.

Findings of Fact

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

1. On October 12, 2012, the Department of Unemployment Assistance ("DUA") sent a Notice of Redetermination and Overpayment, Form 3727-JA, to the claimant citing disqualification under Section 25(e)(1) of the applicable Law from the week ending July 7, 2012. As a result, a constructive deduction reflecting an average weekly wage of \$431.53 was applied. And as a result of that, the claimant was overpaid \$1,657.00 representing benefits already received for the six consecutive weeks ending August 11, 2012. The overpayment was not addressed in the determination
2. The claimant worked part-time at \$20.00 per hour for the employer, a community college, from March 20, 2012 to June 28, 2012 as a Trainer/Instructor I with an average weekly wage of \$431.53.
3. The employer is newly obtained in the benefit year.
4. When the claimant started, the location, the hours and the pay were acceptable.
5. The claimant desired to be a permanent, full-time employee and she discussed her desire with the employer; the employer made no promises.
6. When the claimant started, the claimant understood that the hours in the summer were uncertain due to budgetary restraints.
7. The employer classified the claimant as a "wage employee," which is considered seasonal or temporary.
8. On May 8, 2012, the employer informed the claimant that her last day will be at the end of June and until the new budget on August 6, 2012, and that full-time employment is unlikely at that time as well.
9. The claimant began a work search.
10. The claimant last worked on June 28, 2012.
11. The employer expected her to return to work on August 6, 2012 as discussed in May of 2012.
12. On July 11, 2012, the claimant emailed the employer her resignation with immediate effect.
13. It was the employer's understanding based on prior conversations with the claimant that the claimant's reason for resignation was that she desired full-

time and the commuting distance of seventy miles from her residence in Maryland to the workplace in Virginia was a strain.

14. On July 16, 2012, the claimant interviewed with a prospective employer.
15. On July 18, 2012, the claimant received an offer for a part-time job, which began on July 30, 2012 and changed to full-time on October 1, 2012.
16. On August 8, 2012, the claim was reopened with an effective date of July 7, 2012.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, as discussed below, we conclude that the examiner reached an incorrect conclusion of law when he decided that the claimant had quit her employment rather than having been laid off and then securing new work during her layoff.

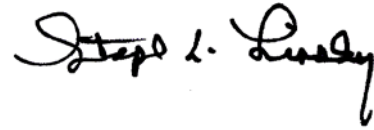
The findings establish that the employer temporarily suspended the claimant's employment on June 28, 2012, but accompanied this layoff with a recall date of August 6, 2012. The critical finding is No. 8: "On May 8, 2012, the employer informed the claimant that her last day will be at the end of June and until the new budget on August 6, 2012, and that full time employment is unlikely at that time as well." While not elaborated further in the findings, the undisputed evidence in the record is that the claimant's job in the employer's Veterinary Department was project-based. The employer's funds for this project under the 2011-12 budget, at least as to claimant's work, would run out at the end of June, prompting the employer's May 8 letter. The employer anticipated having project funds under the new budget sufficient to rehire the claimant on or about August 8, 2012. Thus, it is clear from both the findings and the record that claimant's June 28, 2012, separation from employment was initiated solely by the employer and was a layoff due to lack of funds and work, albeit a temporary one. Temporary layoffs of this type clearly render the claimant in "total unemployment," within the meaning of G. L. c. 151A, § 1(r), and eligible for benefits.

The findings further show that, on July 11, 2012, while on layoff, the claimant submitted a resignation letter, because she had decided to seek alternative employment that would have the potential to become full-time rather than part-time and would avoid the onerous 70-mile commute that was involved in her job with the instant employer. Within a week, i.e., by July 18, 2012, the claimant had obtained a new part-time job, one that began on July 30 (obviously earlier than August 8, when she would be reemployed by the instant employer). The new job became full time on October 1, 2012.

Although the claimant submitted her resignation before she had actually secured alternative employment, the effective date of any such "quit" must be viewed as August 8, 2012, the date on which she would next be expected to report for work. Since one cannot be considered to have quit employment one does not actually have, the claimant remained unemployed for purposes of the statute as long as no remunerative work was available. G. L. c. 151A, § 1(r). Thus, the examiner's focus on whether the claimant's quit was justified because the instant job had become

unsuitable was misplaced. Rather the claimant, in full harmony with the purposes of the statute, sought new employment during her period of layoff and found it, prior to her anticipated recall by the instant employer.¹

The review examiner's decision is reversed. The claimant is not overpaid and no constructive deduction need be calculated.



BOSTON, MASSACHUSETTS
DATE OF DECISION - May 13, 2014

Stephen M. Linsky, Esq.
Member



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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.

LH/rh

¹ The examiner referred to the possibility that claimant's eligibility may have been subject to the restrictions of G.L. c. 151A, § 28A, pertaining to employees of educational institutions. We take note of Department records that reflect that this issue was resolved in the claimant's favor on May 23, 2013 (Issue identification number 0002 10207 18-02).