

0015 4145 42 (Nov. 23, 2015) – Claimant, who chose to take FMLA rather than quit when sudden child care issues forced him to stop working his regular full-time truck-driving shift, was eligible for benefits under G.L. c. 151A, §§ 29 and 1(r), because child care continued to limit his availability during his leave of absence, but his availability was not so limited as to remove him from the labor force.

Board of Review
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Issue ID: 0015 4145 42
Claimant ID: 1926655

BOARD OF REVIEW DECISION

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 claimant took a leave of absence from his position with the employer on January 19, 2015. He filed a claim for unemployment benefits with the DUA, which was denied indefinitely in a determination issued on March 13, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant and his employer¹, the review examiner affirmed the agency's initial determination, but denied benefits only during the period January 18, 2015 through March 28, 2015, in a decision rendered on July 16, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for full-time work and, thus, he was disqualified, pursuant to G.L. c. 151A, §§ 29 and 1(r). 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 further evidence about the claimant's communications with his employer and his availability for work. Only the claimant participated in 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 conclusion that the claimant was disqualified during his leave of absence because he was not available for full-time work is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant could not work his regular full-time truck-driving shift due to child-care issues, but he remained able and available to perform up to 35 hours of other forms of work.

¹ The employer participated in the hearing as a witness only.

Findings of Fact

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

1. The claimant applied for benefits on January 22, 2015.
2. Prior to applying for benefits, the claimant worked for the instant employer as a full time driver. The claimant began work at 3:00 a.m. and worked until he finished his route.
3. The claimant gained sole custody of his two children, ages 10 and 6 on December 5, 2014. The claimant took two weeks off from work.
4. The claimant returned to work and continued work for the employer until January 18, 2015. The claimant had the availability to work, because his aunt helped him.
5. Prior to January 18, 2015, the claimant informed his supervisor that he needed to adjust his schedule due to his childcare needs. The claimant requested to work in the warehouse full time or become a part time driver. The employer denied the claimant's requests.
6. Further, the employer informed the claimant that if he could not drive at 3:00 a.m. he would have to wait until springtime in order to obtain local runs when business picked-up.
7. The claimant began a leave of absence on January 19, 2015, because his aunt could no longer help him watch the children.
8. The claimant expected to move to a warehouse when work picked up. The employer has up to three shifts at the warehouse.
9. The employer had work for the claimant to perform as a driver.
10. Between January 18, 2015 and April 30, 2015, the claimant was available for work while his children attended school from 8:45 a.m. to 3:45 p.m. Monday through Friday.
11. The claimant returned to work part time as a driver with the employer in March 2015.
12. The claimant quit this part time work in order to enter self-employment in April 2015.

13. The Department disqualified the claimant on March 13, 2015 under provisions of s. 29(a) & 1(r) concerning total unemployment. The Department disqualified the claimant for the week beginning January 18, 2015 and for an indefinite period of time thereafter. The claimant appealed timely.

Ruling of the Board

In accordance with our statutory obligation, we review 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Although Consolidated Finding # 12 states that the claimant entered self-employment in April, 2015, it is not clear from the record whether the claimant worked for himself or for another employer. Additionally, we note that the claimant testified that he began this work in May, not April, 2015.² In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was disqualified pursuant to G.L. c. 151A, §§ 29 and 1(r).

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.

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....

The review examiner disqualified the claimant because beginning January 19, 2015, he could no longer work full-time hours. It is true that a claimant does not generally qualify for total or partial unemployment benefits unless he is available for full-time time work. However, this rule is not absolute. The DUA's regulations provide conditions under which an individual may limit his or her availability to part-time work. Thus, 430 CMR 4.45 provides, in relevant part, as follows:

² Since the only issue before us is whether the claimant was in unemployment between January 18, 2015, and March 28, 2015, it is immaterial to our decision whether the claimant returned to work in April or May and whether or not this new work was self-employment. We further note that according to the DUA's electronic record-keeping system, UI On-line, the claimant did not certify for benefits after March 8, 2015.

(1) An individual otherwise eligible for benefits may limit his/her availability for work during the benefit year to part-time employment provided, that the individual: . . .

(b) establishes to the satisfaction of the commissioner that the reasons for leaving his or her employment were for such an urgent, compelling, and necessitous nature as to make his or her separation involuntary; and establishes to the satisfaction of the commissioner that the same or related urgent, compelling, and necessitous reasons require the individual to limit availability for work during the benefit year to part-time employment; and such limitation does not effectively remove the individual from the labor force, . . .

The facts before us show that the claimant's need to care for his ten and six year old children was the reason he had to stop working his regular full-time truck-driving shift and also the reason he had to limit his availability during the relevant benefit year period. In Conlon v. Dir. of Division of Employment Security, the Supreme Judicial Court noted that domestic responsibilities, such as childcare, may constitute good cause to restrict availability for suitable work. 382 Mass. 19, 22-23 (1980). The Court went a step further in Manias v. Dir. of Division of Employment Security, 388 Mass. 201 (1983). "Since domestic responsibilities can entitle a claimant to reject certain employment situations as unacceptable and restrict her work availability under § 24(b), we conclude that these same responsibilities also may constitute urgent and compelling reasons which make a resignation involuntary under G.L. c. 151A, § 25(e)(1)." Id. at 204 (citations omitted).

Here, the claimant did not formally separate from employment; he was on a leave of absence. We believe the same principles apply to a claimant who opts for a leave of absence rather than severing his employment relationship, provided he can satisfy his burden, under G.L. c. 151A, § 1(r)(2), to show that he is able and available for as much work as he can possibly do and that he is genuinely available for sufficient work to remain attached to the labor force. *See* Board of Review Decision 0013 6162 28 (May 6, 2015) (although 430 CMR 4.45 contemplates a permanent separation from full-time work, the same principles applied to a claimant who had to reduce her hours due to the onset of medical restrictions).³ Consolidated Findings ## 10 and 11 state that during the claimant's leave of absence, he remained able and available to work Monday through Friday up to 35 hours a week between 8:45 AM and 3:45 PM, and that he did in fact return to work part-time during March.

Since the claimant went on a leave of absence due to urgent, compelling, and necessitous circumstances that prevented him from being available for full time work, since the same circumstances caused him to limit his availability for work during his leave of absence, and since he has established that his limited availability did not effectively remove him from the labor force, the claimant has met his burden under the statute.

We, therefore, conclude as a matter of law that the claimant was in unemployment, within the meaning of G.L. c. 151A, §§ 29 and 1(r), during the relevant period.

³ Board of Review Decision 0013 6162 28 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning January 18, 2015, through March 28, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 23, 2015



Paul T. Fitzgerald, Esq.
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.

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.

AB/rh