

After having her hours reduced from around 30 per week to about 2 per week, the claimant sought work elsewhere and found work with a different employer at more pay and hours per week. Although the claimant took a leave of absence with the employer to work elsewhere, she is still in unemployment during weeks she earned less than her benefit rate.

**Board of Review
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Issue ID: 0019 1105 20

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Richard Conway, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits from June 12, 2016 through July 30, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

After the claimant's hours of work were reduced by the employer in May of 2016, she filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective May 1, 2016. On September 17, 2016, the DUA sent the claimant a Notice of Disqualification, which informed her that she was not eligible for benefits for the period from June 12, 2016, through July 30, 2016. 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 for the period noted in the determination in a decision rendered on October 7, 2016.

Benefits were denied after the review examiner determined that the claimant was on a leave of absence from her job with the employer from June 12, 2016 through July 30, 2016 and, thus, was disqualified, under G.L. c. 151A, §§ 29 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the work the claimant did for the employer after her hours were reduced and the work she did for another entity while on her leave of absence. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and returned the case to the Board. 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 not in unemployment from June 12, 2016, through July 30, 2016, is supported by substantial and credible evidence and is free from error of law, where the claimant sought work after she was

furloughed by this employer and performed other work, part-time initially and then full-time, while on leave from this employer.

Findings of Fact

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

1. The claimant lived and worked in Massachusetts until July 2015 when she relocated to California.
2. After relocating to California the claimant worked 30–35 hours per week at a rate of \$30.00 per hour as a Graphic Designer for this employer's design company beginning in August of 2015.
3. In May of 2016 the employer and the claimant agreed to a work furlough schedule (due to a slowdown in work) where the claimant would be working a minimum of two hours of work per day. The claimant during her furlough performed two hours of work for the instant employer and was paid for those two hours of work. The claimant wanted to maintain a relationship with this employer so that she could return to a full schedule of work when business improved.
4. The claimant filed a new claim for unemployment benefits in Massachusetts in June of 2016 and this was predated to have an effective date of 05/01/16.
5. The claimant chose to file for benefits due to the reduction of her hours due to the work furlough. The claimant's weekly benefit rate was determined to be \$590.00 plus a \$25.00 per week child dependency allowance. The weekly earnings disregard amount was \$196.67.
6. In addition to seeking work as an employee, the claimant also continuously investigated other work projects that she could accept as freelance (tax form 1099) self-employment.
7. The claimant requested a personal leave of absence from her job with this employer to preserve her relationship with this employer and to perform a full-time freelance self-employment job to earn more money.
8. The claimant requested, and the employer approved, a personal leave of absence from 06/14/16 with a return to work date of 08/15/16. The claimant was supposed to begin full-time hours with [Employer A] on 06/20/16 but the full-time did not start until 07/18/16.
9. The claimant's last day on the job working for the instant employer was 06/13/16.

10. When the claimant began her leave from work, the instant employer hired a college girl to fill-in for the claimant's position. The claimant did not attempt to return to work when the start of her freelance work was delayed because she knew the college girl replacement was already working covering any additional available work. The claimant continued to work and be paid by the instant employer for the two hours of work promised at the time of the furlough.
11. The claimant began work with [Employer A] C.S.G. initially as part-time work at a rate of \$40.00 per hour. The claimant's weekly hours and wages from [Employer A] C.S.G. were based on a Monday to Sunday pay period. The part-time work with [Employer A] was as follows: for period from 06/20/16 to 06/26/16 [sic] 3 hours and paid \$120.00; for the period 06/27/16 to 07/03/16 [sic] 11.5 hours and paid \$460.00; for the period 07/04/16 to 07/10/16 [sic] 8.5 hours and paid \$340.00; for the period 07/11/16 to 07/17/16 [sic] 12.75 hours and paid \$510.00. While working part time for [Employer A], the claimant was also seeking any other suitable employment.
12. The claimant next began a variable schedule of near full-time hours with [Employer A] on 07/18/16. The claimant was paid at a rate of \$40.00 per hour by [Employer A]. The claimant ended her employment with [Employer A] on 08/27/16.
13. The claimant's weekly hours and wages from [Employer A] C.S.G. based on a Monday to Sunday pay period were as follows: for the week beginning 07/18/16 to 07/24/16 the claimant worked 37 hours and was paid \$1,480.00; for the week beginning 07/25/16 to 07/31/16 the claimant worked 46.75 hours and was paid \$1,870.00; for the week from 08/01/16 to 08/07/16 [sic] 54 hours and paid \$2,160.00; for the week from 08/08/16 to 08/14/16 [sic] 46 hours and paid \$1,840.00; for the week 08/15/16 to 08/21/16 [sic] 49.25 hours and paid \$1,970.00; for the week 08/22/16 to 08/27/16 [sic] 42.75 hours and paid \$1,710.00.
14. Due to delays in the start of the freelance work, the claimant, during the week ending 07/30/16, requested a new return to work date of 08/29/16. The employer had a lot of new work and they told the claimant that they could not hold her position open beyond 08/15/16 due to the employer's business needs.
15. The claimant was committed to the freelance self-employment project and separated from employment with this employer the week ending 07/30/16 when her request for an extended leave beyond 08/15/16 was denied by the employer.
16. The claimant was out on an approved personal leave of absence granted by this employer from 06/14/16 until she separated from employment the week ending 07/30/16.

17. On 09/17/16, the claimant was sent a Notice of Disqualification. This Notice informed the claimant that she was on an employer approved personal leave of absence from the period beginning 06/12/16 through the week ending 07/30/16 and not in unemployment during this period. The claimant requested a hearing.

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 ultimate 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. The final sentence of Consolidated Finding of Fact # 10 is not supported by the record. During the remand hearing, the claimant testified that she did not work for this employer after she went on her leave of absence. Moreover, this sentence is contradicted by Consolidated Finding of Fact # 9 which states that the claimant last performed work for the employer on June 13, 2016. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that, while the claimant was in partial unemployment from June 12, 2016, through July 16, 2016, she was not in unemployment at all beginning July 17, 2016.

The issue to be considered here, as noted above, is whether, from June 12, 2016 through July 30, 2016, the claimant was in either total or partial unemployment. 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....

In his decision, the review examiner concluded that the claimant was on a leave of absence from the employer for the period of time at issue, and therefore, was not in unemployment. The conclusion equates an “approved leave of absence” with not being in unemployment. However, as the Board has said before, that is a legal error. A person on an approved leave of absence may still be eligible to receive unemployment benefits under certain circumstances. *See Director of Div. of Employment Security v. Fitzgerald*, 382 Mass. 159, 163 (1980).

In this case, the claimant was thrown into a state of unemployment due to the employer's decision to furlough her in May of 2016. During the furlough period, the claimant was still allowed to work two hours per day, at \$30.00 per hour. *See* Consolidated Findings of Fact ## 2 and 3. Due to this reduction in her hours, the claimant filed a claim for unemployment benefits, *see* Consolidated Finding of Fact # 5, and sought other work to make up for the loss of income. She ended up finding work with [Employer A]. Rather than totally sever her employment relationship with this employer, the claimant decided to take a leave of absence so that she could return to the employer after her finite period of employment with [Employer A] was completed. Seeking work elsewhere, while trying to maintain her relationship with this employer who had dramatically reduced her hours, was a reasonable and laudable effort to work and stay attached to the labor force.

We recognize that the claimant chose to work for [Employer A], rather than continue to work for this employer. In so doing, she effectively turned down some work with the instant employer to take the [Employer A] work. However, we have previously held that such a situation does not result in a disqualification or penalty. In Board of Review Decision 0001 1361 33 (September 15, 2014), the Board held that “[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).” Here, the claimant chose to work more hours at a better rate of pay with [Employer A], beginning June 20, 2016. This was entirely reasonable and permissible to do under the law.

Consolidated Finding of Fact # 11 shows the claimant's weekly earnings beginning June 20, 2016. Those earnings are less than the claimant's benefit rate of \$590.00 per week, after taking into account the earnings disregard provided for in G.L. c. 151A, § 29(b). Therefore, the claimant was in partial unemployment as of June 20, 2016. Beginning July 18, 2016, however, the claimant was working full-time hours and earning far over her benefit rate. As of that time, she was not in unemployment at all.¹

One more week remains unaccounted for, however. The week beginning June 12, 2016 was a week in which the claimant worked for this employer two hours, earning \$60.00. She performed no work for [Employer A] yet. However, this employer was still offering the claimant at least two hours of work per day. The claimant did not work the rest of the week, possibly in anticipation of working for [Employer A]. G.L. c. 151A, § 1(r)(1), the statute defining partial unemployment, also states the following:

For purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the

¹ After reviewing the claimant's weekly certifications on her unemployment claim, *see* Remand Exhibits ## 13 through 28, we note that the claimant stopped claiming benefits after the week ending July 16, 2016. Indeed, the only weeks in which the claimant is currently being denied benefits is for the weeks from June 12, 2016, through July 16, 2016. The claimant later re-opened her claim after her employment with Jack Morton ended in late August of 2016. *See* Consolidated Finding of Fact # 12. Although the claimant was not certifying for benefits beginning July 18, 2016, for the sake of completeness, we note here that she would not have been eligible for benefits if she had chosen to certify.

director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

In this case, the claimant lost eight hours of work (four days times two hours per day), at a rate of \$30.00 per hour with the employer. Therefore, she is subject to a lost time charge of \$240.00 for the week beginning June 12, 2016.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits from June 12, 2016, through July 30, 2016, was not supported by substantial and credible evidence or free from error of law, because, from June 12, 2016, through July 17, 2016, the claimant was in partial unemployment after this employer reduced her hours and she sought and found work with an employer at which she could work more hours and earn more per hour.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the weeks beginning July 17, 2016 and July 24, 2016. The claimant is eligible for benefits, subject to the provisions of G.L. c. 151A, §§ 1(r)(1) and 29(b), for the period from June 12, 2016, through July 16, 2016. The earnings contained within Consolidated Findings of Fact # 11 shall be applied to her claim, and the benefits for each week shall be calculated after taking into account the earnings disregard. The claimant is also subject to a lost time charge of \$240.00 for the week beginning June 12, 2016.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 21, 2017



Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

Chairman Paul T. Fitzgerald, 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.

SF/rh