

After a claimant was laid off from her primary job, and she continued to work part-time in her benefit year for her subsidiary job, she was in partial unemployment. Even though the part-time employer had full-time hours available, full-time work for the subsidiary employer would not have been suitable for the claimant due to the health effects of her pregnancy.

**Board of Review
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Issue ID: 0019 9158 79

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Peter Sliker, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits beginning October 2, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41. We affirm the claimant's disqualification from the receipt of benefits; however, the disqualification should begin December 4, 2016, rather than on October 2, 2016.

The claimant filed a claim for unemployment benefits with the DUA after she separated from her full-time employer in late September of 2016. On October 25, 2016, the DUA issued a Notice of Approval, which found the claimant to be in unemployment since the start of her claim. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on December 21, 2016.

Benefits were denied after the review examiner determined that the claimant was not accepting all suitable work 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 allow the claimant 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 conclusion that the claimant is not in unemployment, beginning October 2, 2016, is supported by substantial and credible evidence and is free from error of law, where the claimant was laid off from her full-time employer in September of 2016, she filed a claim thereafter while continuing to work part-time for this employer, and the claimant did not accept full-time work from this employer due to the health effects of her pregnancy.

Findings of Fact

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

1. The claimant is from India. She has a master's degree in accounting. She moved to the United States in 2013. Since moving she has not pursued a career in accounting.
2. The claimant works as a shift manager for the employer, a fast food restaurant. The claimant began work for the employer in 2014.
3. The claimant's job duties include managing staff, waiting on customers and preparing food.
4. The claimant was hired as a part-time employee. She works weekends only, usually two shifts for 14 to 15 hours. She earns \$11 per hour.
5. The claimant also worked full-time as a machine operator for a staffing agency. She was placed at a manufacturer. She began her assignment in May 2013. She earned \$13.65 per hour.
6. The claimant does not consider her career to be that of a machine operator.
7. In March 2016 the claimant learned she was pregnant with a due date of December 3, 2016.
8. The claimant was laid off from her full-time job for the staffing agency on September 30, 2016.
9. The claimant filed for unemployment benefits and was determined to have a benefit year beginning October 2, 2016.
10. The claimant would have continued to work as a machine operator after she was laid-off because was allowed to sit down at the machine while she worked.
11. The employer had full-time hours available at the restaurant.
12. The claimant became tired during the last months of her pregnancy. The claimant's physician recommended she rest. He recommended she work two hours and then take a break until she felt better.
13. Because her job at the employer required her to work on her feet, the claimant told the employer she wanted to continue working part-time only. She told them she was tired.

14. The claimant worked until December 2, 2016, when she began a leave of absence.
15. The claimant delivered her baby on December 4, 2016.
16. The employer continues to hold the claimant's job for her.
17. The claimant is not yet able to return to work because she is required to care for her child. She is still breast feeding her child and the child is upset when she is not there.
18. The claimant has begun looking for work in anticipation of a time when her child will not need her to be present. She is also considering returning to school.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment at the start of her unemployment claim. Since the claimant continued to work part-time for this employer, and full-time work with the employer would not have been suitable for her, she was in unemployment.

In his decision, the review examiner concluded that the claimant was not in unemployment beginning October 2, 2016, because she was not accepting full-time work from this employer even though it was available to her. The review examiner found that, after the claimant filed her unemployment claim, she continued to perform some services for the employer until December 2, 2016. Since the claimant continued to perform some services for the employer, the question is whether the claimant is in partial unemployment.

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 claimant has the burden to show that she is in partial unemployment and, thus, entitled to benefits. We have held that the overall purpose of Chapter 151A requires us to interpret G.L. c.

151A, § 1(r)(1), to incorporate a requirement that the work potentially available to the claimant be “suitable.” See Board of Review Decision 0014 4540 16 (March 27, 2015).¹ Thus, if a claimant has ongoing, part-time work (and thus could be in partial unemployment) but rejects other unsuitable work, the claimant may still be in partial unemployment. This is so, in part, because “an individual need only be available for suitable employment which he has no good cause to refuse.” See Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 21 n. 1 (1980) (discussing the relationship between G.L. c. 151A, §§ 24(b) and 25(c), with regard to when a person can refuse work). Here, the claimant can still be in partial unemployment if the full-time work at the employer’s fast food restaurant was or became unsuitable for her in October of 2016. See Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948) (noting that work can become unsuitable over a period of time if circumstances change).

With these principles in mind, we must decide whether the claimant’s desire to work only part-time for this employer means that she is not in unemployment. The review examiner concluded that it did. However, we disagree. In short, we conclude that full-time work with the employer would not have been suitable for her in October and November of 2016. Suitability itself “is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances.” *Id.* The Legislature has specifically provided that the suitability of employment shall be determined by considering several factors, including whether the work is detrimental to the health of the worker. See G.L. c. 151A, § 25(c). The review examiner found that the claimant did not want to work full-time due to the effects of her late-stage pregnancy. She was often tired, and her medical provider told her that she should take frequent breaks while working. As noted by the review examiner in Consolidated Finding of Fact # 13, “[b]ecause her job at the employer required her to work on her feet, the claimant told the employer she wanted to continue working part-time only.” This was certainly reasonable for her to do, given her health condition. We conclude that the part-time work was suitable for the claimant in October and November of 2016, but not full-time hours.

Moreover, the DUA’s own policies contemplate this conclusion. The review examiner’s consolidated findings of fact indicate that the claimant’s job for this employer was subsidiary in nature to that of her other base period employer. It was subsidiary, because the claimant worked longer for her other employer, was paid more, earned more over time in her base period, and was working a full-time schedule of hours. See 430 CMR 4.74 (noting criteria for determining full-time work in the context of a constructive deduction). The DUA’s Service Representative Handbook addresses this very situation in Section 1220(B). There, the Handbook provides the following:

A claimant works part-time in a subsidiary job or a part-time job in the benefit year which would be considered unsuitable on a full-time basis. Later, when full-time work of the same type is available, the claimant refuses to accept it because he or she does not consider it suitable on a full-time basis . . . Separation under these circumstances is not subject to disqualification. . . .

¹ Board of Review Decision 0014 4540 16 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

Note: If the claimant continues to work part-time after refusing the full-time work, *i.e.*, he or she was not separated from work, cite § 29(b) and 1(r).

Here, as noted above, the claimant worked part-time for this employer while she worked full-time for her other, base period employer. When she was laid off from the full-time job, she had the opportunity to work full-time for this employer. However, she was not required to do so, because full-time work was not suitable given her medical condition. Thus, she is not subject to disqualification, beginning October 2, 2016.

Although not disqualified at the beginning of her claim, this does not mean that the claimant may not be subject to disqualification at a later point in time. The claimant testified that, in December of 2016, she gave birth to her child. After that time, she needed to stay home with the baby and continues to do so. These circumstances indicate that the claimant was not able or available for any work after the birth. In order to be eligible for unemployment benefits, a person must be able to work and available for work. *See* G.L. c. 151A, §§ 1(r)(2) and 24(b). Therefore, beginning December 4, 2016, the claimant is not in unemployment, because she was not able or available to work.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant is disqualified from receiving benefits, beginning October 2, 2016, is not supported by substantial evidence or free from error of law, because as of that date, the claimant was working part-time for the employer and full-time work would not have been suitable for her. However, the claimant is subject to disqualification, beginning December 4, 2016, when she was not able and available to work due to the birth of her child.

The review examiner's decision is affirmed in part and reversed in part. The claimant is eligible for benefits beginning October 2, 2016, and continuing through December 3, 2016. However, she is denied benefits beginning December 4, 2016, and until such time as she meets the requirements of G.L. c. 151A, §§ 1(r), 24(b), and 29.

N.B.: Because the employer in this case was a subsidiary employer, and because it continued to employ the claimant part-time after she filed her claim for benefits, the employer may be eligible to be relieved of charges on the claim, pursuant to 430 CMR 5.05(1). Indeed, the agency initially noted this when it first adjudicated the claim. *See* Exhibit # 5. The employer may want to contact the Employer Charge Unit to inquire about the charges on this claim at (617) 626-6350.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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