

Where the claimant did not have an unemployment claim or request benefits during the period of her medical disability, the issue of her eligibility during this period of time need not be addressed. Where, upon becoming medically cleared to work and notifying the employer of this, no work was available for the claimant, she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0020 1928 00

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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on September 30, 2016. She filed a claim for unemployment benefits with the DUA effective October 2, 2016. In a determination issued on August 29, 2017, the claimant was approved for benefits pursuant to G.L. c. 151A, § 25(e)(2). The employer appealed the determination to the DUA hearings department. The hearing was conducted via telephone over two dates; both parties participated in the first session, and only the employer participated in the second session. Following the hearing, the review examiner issued a decision on January 11, 2018, modifying the agency's initial determination and denying benefits pursuant to G.L. c. 151A, §§ 29 and 1(r) for the period of August 3, 2016 through October 3, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in either total or partial unemployment for the period of August 3, 2016 through October 3, 2016 and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issues before the Board are whether the review examiner's decision, which concludes that the claimant was not in either total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), during the period of her medical leave, is supported by substantial and credible evidence and is free from error of law, and whether the claimant should thereafter be eligible for benefits pursuant to G.L. c. 151A, § 25(e), due to her separation from employment on September 30, 2016.

Findings of Fact

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

1. The claimant worked full time for the employer, a job placement agency, from October 2, 2015.
2. While at work for the employer's client, the claimant sustained an injury on August 3, 2016.
3. As a result, the claimant was medically restricted to work until October 3, 2016.
4. The claimant notified the employer when she was released to return to work.
5. On December 2, 2016, the claimant returned to work at an assignment for the employer's client.

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 is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant was not in either total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), during her medical disability, though we note that the claimant did not seek unemployment benefits during this period of time. Instead, consistent with the original determination, we conclude that the claimant should be eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2), beginning the week ending October 8, 2016.

The review examiner issued her decision pursuant to G.L. c. 151A, § 29, which authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) "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
- (2) "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.

The findings state that the claimant stopped working when she was injured at work on August 3, 2016, and that she was medically unable to work through the week ending October 1, 2016. During this period of time, the claimant did not meet either definition of "unemployment." Pursuant to G.L. c. 151A, § 1(r)(2), "total unemployment" requires a claimant to be "capable and available for work [but] unable to obtain any suitable work." The claimant did not meet any of these

requirements. “Partial unemployment,” pursuant to G.L. c. 151A, § 1(r)(1), is not applicable because the claimant did not work part-time during this period of time. However, the claimant did not have an unemployment claim or request benefits until filing her claim effective October 2, 2016. Therefore, though the claimant would not be eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r), this earlier time period need not be addressed at all.

The undisputed testimony of the parties was that the claimant was medically cleared to return to work effective October 3, 2016, and that, several days before this date, on September 30, 2016, the claimant communicated this information to the employer but was told that no work was available at that time.¹ The original determination was issued pursuant G.L. c. 151A, § 25(e)(2), which is the section of law regarding discharges from employment, and the parties were notified that this section of law was an issue in the case. Despite this, the review examiner failed to address the claimant’s separation in her decision.

G.L. c. 151A, § 25(e)(2) provides, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit’s interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence

The employer made no allegations that the claimant’s discharge was due to alleged misconduct or a policy violation. Rather, the record indicates that the claimant was laid off due to lack of work. We therefore conclude as a matter of law that the claimant’s discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit’s interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed in part and reverse in part. The claimant is entitled to receive benefits for the week ending October 8, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 29, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

JRK/rh