

As of the effective date of his claim, the claimant could not work for his employer in Massachusetts, because he had to go to Puerto Rico to help take care of his child. Since he still could do the type of work he was doing for this employer (although he had to do it in Puerto Rico) and was actively looking for that work, he meets the definition of total unemployment provided in G.L. c. 151A, § 1(r)(2).

Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, 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.

After going on a leave of absence from his employer, the claimant filed a claim for unemployment benefits with the DUA. On January 14, 2017, the DUA sent the claimant a Notice of Disqualification, which informed him that he was not eligible to receive unemployment benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 15, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant took a leave of absence from the employer although work remained available to him, and, thus, he was not in unemployment, 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 remanded the case to the review examiner to take additional evidence regarding the claimant's efforts to obtain other suitable work while he was on a leave of absence from this employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 is supported by substantial and credible evidence and is free from error of law, where the claimant needed to take a leave of absence to help care for his child in Puerto Rico, but he continues to look for work and is available to work in Puerto Rico.

Findings of Fact

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

1. The claimant works as a Stocker, for the employer, a Retail Store.
2. The claimant's wife and child live in Puerto Rico.
3. The claimant's mother-in-law used to provide childcare for the claimant's child in Puerto Rico.
4. In November 2016, the claimant's mother-in-law moved and was no longer able to take care of the claimant's child before school and pick the child up after school.
5. The claimant decided that he was going to temporarily go back to Puerto Rico to help his wife find alternate childcare arrangements for their child.
6. The claimant spoke with the district manager and told the district manager that he needed to take a leave so he could take care of issues with his child in Puerto Rico. The claimant told the district manager that he was not sure of exactly when he would be back, but he hoped he would be back within six months.
7. The employer approved the claimant's request to go on an unofficial leave of absence.
8. The claimant worked through December 16, 2016.
9. Shortly thereafter, the claimant flew to Puerto Rico.
10. As of the date of the hearing (February 10, 2017), the claimant is still in Puerto Rico.
11. The employer did not force the claimant to take the leave.
12. The claimant filed for unemployment benefits and received an effective date of December 25, 2016.
13. When the claimant certified for weekly benefits, the claimant indicated that he was able, available, and actively seeking work.
14. While on leave from the employer, the claimant has searched for part-time or full-time work in Puerto Rico.
15. The claimant has been looking for retail work.

16. The claimant looks for work three to four days per week.
17. The claimant looks for work by utilizing the internet and submitting job applications.
18. The claimant has no restrictions on his availability to work on the weekends because he does not take care of his son during that time.
19. Because the claimant helps to take care of his son during the week, the claimant is available to work both while his son is in school, from 8:30am until 2pm, and then in the evenings after he picks his son up from school, from 4pm and on into the night.
20. The claimant has not kept a work search log.

CREDIBILITY ASSESSMENT

The claimant's assertion that he has been actively seeking work while in Puerto Rico is credible because he gave specific time frames during which he would and would not be available to work. The claimant also explained how he would be able to both provide childcare for his son while working a part-time or full-time job.

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, except for the introductory clause of Consolidated Finding of Fact # 10, and deems them supported by substantial and credible evidence. As discussed more fully below, we conclude, contrary to the review examiner, that the claimant was in unemployment as of the start of his unemployment claim.

To be eligible for unemployment benefits, the claimant must show that he was in a state of unemployment, whether total or partial. 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 this case, the review examiner made no findings that the claimant performed any services after December 16, 2016. Therefore, the applicable provisions here are G.L. c. 151A, §§ 29(a) and 1(r)(2).

The consolidated findings reflect that, as of December 17, 2016, the claimant needed to go to Puerto Rico to help care for his child, who lived there with his wife. Prior to this time, the claimant’s mother-in-law helped to take care of the child. However, she moved and was no longer able to take the child to school or pick up the child from school. Thus, it became necessary for the claimant to go to Puerto Rico to help his wife make childcare arrangements. *See Consolidated Findings of Fact ## 2–5.*

The review examiner’s discussion in Part III of her decision, prior to remand, focuses on the claimant’s choice to take a leave of absence from this employer and the ongoing availability of work from this employer. However, this analysis fails to account for the fact that the claimant needed to go to Puerto Rico for a certain period of time, thus preventing him from performing work during that period of time in Massachusetts. As the Board has noted many times, it is well-established that “an employee is not shorn of unemployment benefits while out of work and seeking a suitable job, although . . . he has a good or even a perfect prospect of returning to his regular job when conditions change and there is work to do.” Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980). In Fitzgerald, a pregnant welder stopped working due to concerns that the welding work could negatively affect her pregnancy. She planned to return to work after the child was born. Since she was temporarily out of work for a reason beyond her control, and she could have done and was looking for other suitable work, the court determined that she was in unemployment, even though she was on what could be considered to have been a leave of absence from her welding work.

The Fitzgerald case stands for the general proposition that a person who temporarily cannot do his work due to a circumstance beyond his control may still be eligible for unemployment benefits. In this case, we conclude that the claimant was in unemployment as of December 17, 2016. The claimant needed to go to Puerto Rico to assist his wife with caring for their child. The sudden lack of childcare was an unexpected circumstance beyond the claimant’s control that forced him to go to Puerto Rico. As of December 17, he was able and available to do regular retail work in Puerto Rico. *See Consolidated Findings of Fact ## 15, 18, and 19.* That type of work is suitable for the claimant, as his regular and normal work with this employer had been retail/stocking work. *See Consolidated Finding of Fact # 1.* He was also actively searching for suitable work but had not yet obtained any. *See Consolidated Findings of Fact ## 14–17.* Based on these considerations, the claimant has met the definition of total unemployment laid out in

G.L. c. 151A, § 1(r)(2), regardless of whether the claimant may have been on a “leave of absence” from the instant employer.¹

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits, based on her findings and conclusions that the claimant was on a leave of absence from this employer, is not supported by substantial and credible evidence or free from error of law. The claimant has carried his burden to show that, even though he could not work for this employer in Massachusetts, he could do similar work while he was in Puerto Rico helping to take care of his child.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week beginning December 25, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 16, 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

¹ We note that the legal question is not whether the claimant was on a “leave of absence.” This term is not defined in Chapter 151A, and nowhere in the statute does it say that a person on a leave of absence from their job cannot receive unemployment benefits. Rather than ask whether the claimant was on a leave of absence, a better way to approach these types of cases is simply to inquire whether a person actually meets the literal definition of “total unemployment,” as provided by G.L. c. 151A, § 1(r)(2). If they do, then the person will be in unemployment.

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.

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