

Summer sailing school director was not disqualified by G.L. c. 151A, § 25(e), because his employment ended due to lack of work. His claim for benefits is not affected by the employer's seasonal employer designation under G.L. c. 151A, § 24A, because the claim is calculated based upon nonseasonal wages earned in his base period. The employer's 11-week summer sailing program is not an educational employer within the meaning of G.L. c. 151A, § 28A.

**Board of Review
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BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his seasonal position with the employer on August 26, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 16, 2017. The employer 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 awarded benefits in a decision rendered on October 18, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). 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 employer's appeal.

The issues before the Board are: (1) whether the review examiner's conclusion that the claimant's separation from his seasonal sailing instructor position does not disqualify him from receiving benefits under G.L. c. 151A, § 25(e), is supported by substantial and credible evidence and is free from error of law; (2) whether the claimant's employment during the employer's 2016 summer program rendered him ineligible for benefits under his 2016-01 claim due to the employer's seasonal designation under G.L. c. 151A, § 24A; and (3) whether the claimant is disqualified by G.L. c. 151A, § 28A.

Findings of Fact

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

1. Since 2013, the claimant has worked for an unrelated employer school as the sailing coach.
2. The claimant began working as the sailing director for the employer, a sailing instructional program, in 2015.
3. The employer operates for eleven weeks from June to August each year.
4. The employer pays the claimant for the weeks worked between June and August each year.
5. Each year around November, the employer's Treasurer (the Treasurer) contacts the claimant and invites him to return to work the following June.
6. Around January 1st of each year, the employer offers the claimant a contract for the following June to August season including the terms and conditions of his employment.
7. On April 19, 2016, the Department of Unemployment Assistance (the Department) issued the Notice of Seasonal Determination finding the employer a seasonal employer for the June 20, 2016 through August 25, 2016 time period.
8. The claimant worked from June 20, 2016 through August 26, 2016. The employer's season ended on August 26, 2016.
9. On September 8, 2016, the claimant filed a claim for unemployment with an effective date of September 4, 2016.
10. The Department determined the base period of the claimant's claim to be July 1, 2015, through June 30, 2016.
11. On January 5, 2017, the claimant signed the employment contract to work for the employer from June 19, 2017, through August 23, 2017.
12. The claimant last requested benefits for the weeks ending March 25, 2017.
13. On April 20, 2017, the employer contacted the Department regarding the claimant's receipt of benefits despite the seasonal determination.
14. The claimant worked as the sailing director from June 19, 2017 through August 23, 2017.

15. The claimant did not perform any services for the employer or receive any remuneration from the employer between August 26, 2016 and June 19, 2017.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We note that the claimant's employment start date is listed as June 20, 2016, a Monday, in Finding of Fact # 8 and June 19, 2016, a Sunday, in Finding of Fact # 14. However, this minor error in the findings does not affect the outcome of our decision. In adopting the remaining findings, we deem 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's separation from this 2016 seasonal employment does not render the claimant ineligible for benefits under G.L. c. 151A, § 25(e)(2).

The facts in this case are not in dispute. As the findings show, the claimant was hired to run the employer's summer sailing school program. His employment ended because the sailing program was over for the season. Because his employment ended due to lack of work, the review examiner correctly concluded that there is no basis for disqualifying the claimant from receiving benefits under G.L. c. 151A, § 25(e), which states, 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

In its appeal, the employer argues that the claimant is not entitled to receive unemployment benefits because this was determined to be seasonal employment under G.L. c. 151A, § 24A. This provision states, in relevant part, as follows;

(a) No waiting period shall be allowed and no benefits shall be paid to an individual on the basis of service performed in seasonal employment as defined by subsection (aa) of section one unless the claim is filed within the operating period of seasonal employment. If the claim is filed outside the operating period of the seasonal employment, *benefits may be paid on the basis of nonseasonal wages only.*

(d) Whenever an employer is determined to be a seasonal employer, the following provisions apply:

(2) The seasonal determination does not affect any benefit rights of seasonal workers with respect to the employment before the effective date of the seasonal determination.

(Emphasis added.)

There is no question that the DUA issued a Notice of Seasonal Determination to the employer in April, 2016, that designated the employer to be a seasonal employer for the 2016 summer sailing program. Finding of Fact # 7. Pursuant to G.L. c. 151A, § 24A, this meant that the claimant could not file a claim for benefits based upon the wages he earned during this 2016 summer program. However, the 2016 summer program wages were not used to meet the minimum monetary eligibility requirements for unemployment benefits¹ under the claim that the claimant opened in September, 2016 (2016-01 claim). The claimant's monetary eligibility for this claim derived from wages paid to him during the base period of this 2016-01 claim, July, 2015–June 30, 2016. *See* Finding of Fact # 10.

These base period wages for the claimant's 2016-01 claim included the wages from a Rhode Island employer in the fourth quarter of 2015 and wages from the employer in the third quarter of 2015.² Presumably, the latter reflected the wages paid for the claimant's sailing school employment during the summer of 2015. Because the employer had not been determined to be a seasonal employer during the summer of 2015, they were *non-seasonal* wages. Pursuant to the express terms of G.L. c. 151A, § 24A(a), those 2015 wages may not be excluded from his monetary eligibility for the 2016-01 claim.³

In its appeal, the employer also argues that the claimant is disqualified from receiving benefits under G.L. c. 151A, § 28A. This provision carves out an exclusion to the payment of unemployment benefits for services performed in an instructional or principal administrative capacity for an educational institution, where an individual has been provided with reasonable assurance of returning to an educational employer in a similar capacity in the subsequent academic year or term. On appeal, the employer asserts that its sailing school is a non-profit educational institution with an extensive sailing curriculum, lesson plans, and comprehensive evaluations, and which provided the claimant with reasonable assurance of returning to his same principal administrative position during the following summer. We need not analyze whether the employer's offer to return to the same position in 2017 amounted to reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, because the employer is not an educational employer within the meaning of this provision.

As a condition of obtaining a credit against the full unemployment tax rate imposed under the Federal Unemployment Tax Act (FUTA), state unemployment laws must meet the approval of the U.S. Secretary of Labor (DOL). One of the requirements necessary for DOL approval is set forth under 26 U.S.C. § 3304(a)(6)(A), which states, in relevant part:

¹ *See* G.L. c. 151A, § 24(a).

² We take administrative notice of the reported wages for the claimant listed in the DUA's electronic record-keeping system, UI Online.

³ As a designated seasonal employer for the 2016 summer program, the employer's 2016 wages could not be used for monetary eligibility for a new claim. However, the claimant did not open a new claim once his 2016-01 claim expired.

[C]ompensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—

(i) with respect to services in an instructional, . . . or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on such services for any week commencing during the period between two successive academic years or terms (or, when an agreement provides instead for a similar period between two regular but not successive terms, during such period) to any individual if such individual preforms such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic year or terms, . . .

This exemption for educational services appears in the Massachusetts unemployment statute under G.L. c. 151A, § 28A, and it must be administered in accordance with the federal law.

By its terms, the federal exclusion of instructional or principal administrative services is limited to those services performed for an educational institution “to which section 3309(a)(1) applies.” 26 U.S.C. § 3309(a)(1) includes only those nonprofit organizations that employ four or more individuals on each of some 20 days during a calendar year, each day being in a different calendar week. *See* 26 U.S.C. § 3309(c). The record before us shows that the employer’s sailing school operated for 11 weeks each summer. Finding of Fact # 3. The claimant was employed for 10 of those weeks, and we see nothing in the record to suggest that the employer maintained a workforce of at least four individuals during any part of at least 20 weeks during the year. *See* Finding of Fact # 8. The employer’s sailing program could not have been certified as seasonal employment under G.L. c. 151A, § 24A(a), if it did operate 20 weeks in the year.⁴

We, therefore, conclude as a matter of law that (1) the claimant’s separation from the employer on August 26, 2016, was not disqualifying under G.L. c. 151A, § 25(e), (2) the claimant’s monetary eligibility for benefits under his 2016-01 claim is not affected by the employer’s 2016 seasonal employer designation pursuant to G.L. c. 151A, § 24A; and (3) the claimant is not disqualified from receiving benefits by G.L. c. 151A, § 28A, because the employer does not meet the definition of an educational employer.

⁴ “Seasonal employment,” under G.L. c. 151A, § 24A(a), is defined under G.L. c. 151A, § 1(aa), to include services for a seasonal employer. “Seasonal employer” is defined under G.L. c. 151A, § 1(z), as an employer that operates for periods of less than 20 weeks during a calendar year.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning September 4, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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.

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