

A claimant who stopped working due to a medical issue, informed the employer that she could not work for 4 to 6 weeks, and then went back to the employer when she was able to work again, did not permanently separate. She was on an implied leave of absence for the period of time that she was not able to work and disqualified from receiving benefits for that period of time only.

**Board of Review
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Issue ID: 0021 7771 34

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Margaret Blakely, 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 we affirm in part and reverse in part the conclusion that the claimant is eligible to receive benefits.

The claimant filed a new claim for unemployment benefits on January 20, 2017, and thereafter worked for the employer. She stopped working on February 15, 2017. On May 27, 2017, the DUA sent the claimant a Notice of Disqualification, informing her that she was not eligible to receive benefits, beginning December 11, 2016, pursuant to G.L. c. 151A, § 25(e)(1). The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 14, 2017.

Benefits were awarded after the review examiner determined that the claimant permanently separated from her employment with the employer on February 15, 2017, for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner with instructions to send notice to the parties that G.L. c. 151A, §§ 29 and 1, may be applicable in this matter. Both parties 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 permanently separated from her job on February 15, 2017, for non-disqualifying reasons, pursuant to G.L. c. 151A, § 25(e), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a staffing agency, on several occasions since 2014. The employer assigns the claimant to work for a client company as a packer.
2. The claimant filed a new claim for unemployment benefits on 01/20/2017.
3. The claimant began another assignment with the client company on 02/14/2017. The claimant left the assignment on 02/15/2017 because she was sick. The claimant was experiencing "lots of pain and bleeding." The claimant needed surgery.
4. The employer's manager informs employees that whenever they cannot work, to contact the employer once they can do so.
5. On 02/17/2017, the claimant had surgery.
6. The claimant notified the manager of her surgery and that she could not work for four (4) to six (6) weeks.
7. Between 02/15/2017 and 04/11/2017, the claimant was not capable of performing any work.
8. On 04/11/2017, the claimant was medically cleared to return to work by her doctor.
9. The claimant provided medical documentation to the employer of her clearance to return to work. The employer did not have any assignments available with the client for the claimant until 06/12/2017.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that G.L. c. 151A, § 25(e) applies in the circumstances of this case. Rather, because the findings of fact indicate that the claimant did not permanently separate from her job, G.L. c. 151A, §§ 29 and 1, apply, and the claimant is ineligible to receive benefits for the period of time that she was not able to work.

As noted above, both the agency and the review examiner applied the separation provisions of Chapter 151A to determine the claimant's eligibility for benefits in this case. However, the review examiner's findings of fact did not suggest that the claimant permanently separated from

her job. The review examiner found that the claimant was working at an assignment, she left the assignment on February 15, 2017, due to a medical issue she was having, she informed the employer that she needed four to six weeks off, and then she notified the employer when she could work again. The findings have not changed significantly following the remand hearing.

Rather than a separation, it appears that the claimant took an implied medical leave of absence when she stopped working on February 15, 2017. Nothing in the findings suggests that she quit her job. Nothing in the findings indicates that the claimant told the employer that she was not going to return. Nothing in the findings states that the employer told the claimant that she could not work or return to work on February 15, 2017. Based on the findings, we conclude that the review examiner's conclusion that the "claimant separated from employment on 02/15/2017" is not supported by the record. Because the claimant maintained some kind of employment relationship with the employer following February 15, 2017, the issue to be addressed is whether the claimant was in unemployment after that date.

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

The claimant stopped working on February 15, 2017. She did not return to work until June 12, 2017. Since she did not work for several months after February 15, the question to be addressed is whether the claimant was in total unemployment.

In order to be in total unemployment, per the terms of the statute, a claimant must be "capable and available for work," but "unable to obtain any suitable work." Here, the claimant's direct testimony was that she was not able to work at all from February 15 through April 11, 2017. On April 11, the claimant was medically cleared to return to work. Therefore, she was not in unemployment from February 15 through April 11, 2017.

We, therefore, conclude as a matter of law that the review examiner's decision to apply G.L. c. 151A, § 25(e), was an error of law, because the claimant went out of work, told the employer of a finite period of time she could not work, and then returned to the employer when she could work again. Pursuant to G.L. c. 151A, §§ 29(a) and 1(r)(2), the claimant is denied benefits for the period of time she could not work.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from February 12, 2017, through April 8, 2017. The claimant is entitled to receive benefits beginning April 9, 2017, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 6, 2017



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.

SF/rh