

Where the claimant has shown that she was capable of, available for, and actively searching for 3 to 6 jobs a week, she may not be disqualified under G.L. c. 151A, § 24(b) during those weeks that she certified for benefits. She is disqualified in weeks that her work search log shows that she actively searched for 1 or no jobs that week.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0022 5350 08

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 was discharged from employment on July 31, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 16, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination, but denied benefits only from July 17, 2017, through April 7, 2018, in a decision rendered on May 12, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had not established that she was actively searching for work and, thus, she was disqualified under G.L. c. 151A, § 24(b). 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 obtain further evidence about the claimant's availability for work and work search activities during the period that she certified for benefits. The claimant attended the remand hearing and, 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 decision, which denied benefits due to lack of evidence showing an active search for new work, is supported by substantial and credible evidence and is free from error of law in light of evidence presented at the remand hearing establishing that, in most weeks, the claimant satisfied DUA's active work search criteria.

Findings of Fact

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

1. The claimant started working full time at a bank on February 26, 2016. This position required her to be at work from either 9 a.m.–5 p.m. or 10 a.m. to 6 p.m., Monday through Friday.
2. On February 26, 2016, the claimant began working for a human services agency. She worked an asleep overnight shift on Thursdays, Fridays and Saturdays, 11 p.m. to 8 a.m.
3. In January, 2017, the claimant started attending a MBA program at Cambridge College full-time. She attended classes between 6 p.m. and 10 p.m. Monday through Thursday. The claimant could take online classes to avoid having her class times conflict with her work hours.
4. In June 2017, the claimant resigned from her human services job in order to concentrate her energies on her bank job and her studies.
5. On July 31, 2017, the claimant was discharged from her bank job.
6. The claimant filed her 2017-01 claim for unemployment benefits on July 31, 2017, effective July 30, 2017.
7. As of July 18, 2018, the has [sic] claimant requested unemployment benefits for the weeks ending: December 23, 2017, through January 13, 2018; February 17, 2018, through April 21, 2018; May 19, 2018, through July 14, 2018. She has been paid benefits for all the weeks she has claimed after April 20, 2018.
8. The claimant continued with her MBA program after separating from her employment on July 31, 2017.
9. On August 16, 2017, DUA issued a Notice of Disqualification, with Issue Identification Number 0022 5350 08-01, stating that the claimant was disqualified under Section 24(b) for the period starting July 30, 2017, and for an indefinite number or weeks thereafter.
10. The claimant was sick from approximately July 17, 2017, to approximately August 16, 2017.
11. The claimant's Fall 2017 classes started on September 12, 2017.
12. In the Fall of 2017, the claimant took four classes. Online she took Project Management (three credits). On alternating Tuesdays, she took Leadership Seminar (2 credits) and Research Management (3 credits) 6 p.m. to 10 p.m. She also took a Human [Resource] Management intensive course (3 credits)

all day October 7th and 8th and all day November 10th, 11th and 12th of 2017.

13. The claimant's Fall 2017 classes ended on December 12, 2017.
14. The claimant's Spring 2017 classes began on January 23, 2018.
15. In the Spring of 2018, the claimant took four classes. Online she took Grant Writing (3 credits) and Resource Development (3 credits). On Monday, she took Financial Accounting (3 credits) 6 p.m. to 10 p.m. On alternating Tuesdays, she took Leadership Seminar (2 credits) and Marketing Management (3 credits) 6 p.m. to 10 p.m.
16. The claimant's Spring 2018 semester ended on April 30, 2018.
17. The claimant's online classes required her to listen to approximately five, 45 minute, lectures a semester, read text books, participate in a chat room type class discussions in response to questions put forth by the professor, and do other class assignments. In general, the work for one 3 credit class took her about 8 hours a week.
18. The claimant was willing to rearrange her schedule, take online courses, or drop classes if a potential job interfered with her class schedule. She could withdraw from a class during the first 4 weeks of class and receive a full refund of her tuition. After four weeks, the school would return a decreasing percentage of her tuition as the semester continued. If the claimant dropped a class she would be allowed to resume the same class in a later semester at the point she had dropped the first one.
19. Since December 17, 2017, the claimant has been looking for various types of work including: administrative, human resources, residential counseling, program management, sales, banking and business analysis.
20. Since December 17, 2017, the claimant has been willing to accept part time or full-time work.
21. Since December 17, [2017], the claimant has been willing to accept employment with a commute of up to 90 minutes.
22. Since December 17, 2017, the claimant has not had any childcare, eldercare, religious or other obligations that would affect her availability to work. She also has had no health or other issues that would affect her ability to work.
23. Since December 17, 2017, the claimant has been willing to accept any job that she is capable of doing that pays at least minimum wage.
24. Since December 17, 2017, the claimant has been seeking work by:

- a. Using online platforms designed to connect people with potential employers, such as Indeed and Glass door;
 - b. Making use of Linked in contacts and job listings;
 - c. Networking with friends, family and professional colleagues;
 - d. Using resources made available through professional organizations; and
 - e. Attending two school run conferences in 2018.
25. The week ending December 23, 2017, the claimant engaged in a total of one work search activity: December 17, 2017.
 26. The week ending December 29, 2017, the claimant engaged in a total of four work search activities, on three different days: December 26, 2017, December 28, 2017, December 29, 2017 (x2).
 27. The week ending January 6, 2018, the claimant engaged in a total of six work search activities, on three different days: December 31, 2017, January 2, 2018, January 3, 2018, January 4, 2018, January 5, 2018, and January 6, 2018.
 28. The week ending January 13, 2018, the claimant engaged in no work search activities.
 29. The week ending February 17, 2018, the claimant engaged in no work search activities.
 30. The week ending February 24, 2018, the claimant engaged in three work search activities, on three different days: February 19, 2018, February 20, 2018 and February 22, 2018.
 31. The week ending March 3, 2018, the claimant engaged in one work search [activity]: March 2, 2018.
 32. The week ending March 10, 2018, the claimant engaged in three work search activities, on three different days: March 5, 2018, March 6, 2018 and March 7, 2018.
 33. The week ending March 17, 2018, the claimant engaged in four work search activities, on four different days: March 12, 2018, March 13, 2018, March 14, 2018, and March 16, 2018.
 34. The week ending March 24, 2018, the claimant engaged in three work search activities, on three different days: March 19, 2018, March 20, 2018, and March 22, 2018.
 35. The week ending March 31, 2018, the claimant engaged in three work search activities, on three different days: March 26, 2018, March 27, 2018, and March 29, 2018.

36. The week ending April 7, 2018, the claimant engaged in three work search activities, on three different days: April 2, 2018, April 3, 2018, and April 6, 2018.
37. The week ending April 14, 2018, the claimant engaged in three work search activities, on three different days: April 9, 2018, April 10, 2018, and April 11, 2018.

Credibility Assessment:

On the work search log for the week ending April 14, 2018, one of the dates of a work search activity was unclear. It appeared that the claimant had originally written April 10, 2018 and changed the date to April 11, 2018. The position, employer, contact, and manner of contact are the same for this entry and the prior entry made for April 10, 2011. As the claimant was not specifically asked to explain why she changed the date and why the entries are otherwise identical, the review examiner has given her the benefit of the doubt that she did actually call the same employer on consecutive days regarding two different administrative positions.

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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits under G.L. c. 151A, § 24(b), in each week that she certified for benefits.

As a threshold matter, a claimant will only be considered eligible for benefits during weeks that she satisfies the DUA's filing and registration requirements. *See* G.L. c. 151A, § 25(a). In the present appeal, the claimant asks us to reverse the review examiner's decision to disqualify her from July 17, 2017 through April 7, 2018. However, Consolidated Finding # 7 provides that, within that period, she claimed benefits during the following weeks:

Weeks ending December 23, 2017 through January 13, 2018; and
Weeks ending February 17, 2018 through April 21, 2018.¹

¹ Because the review examiner's decision extended the disqualification period only through the week ending April 7, 2018, and the DUA's electronic record-keeping system, UI Online, shows that the claimant was eligible for benefits thereafter, we decline to extend our analysis beyond the week ending April 7, 2018.

Therefore, the issue before us is whether, during such weeks, the claimant was capable of, available for, and actively seeking work in her usual occupation or any other occupation for which she is reasonably fitted, as required under G.L. c. 151A, § 24(b).

The review examiner has found that the claimant did not have any health or other issues that rendered her incapable of working. She further found that there were no personal commitments, which restricted her availability for work. *See Consolidated Finding # 22.* Although in school from January 23, 2018, until April 30, 2018, the time constraints imposed by her school schedule were minimal. She had to be physically present in class only from 6:00 p.m. to 10:00 p.m. on Mondays and Tuesdays. The other credits were online classes, which the claimant explained could be done on her own time. *See Consolidated Finding # 15.*² Moreover, the claimant was willing to rearrange her schedule or withdraw from classes if she found a job. *See Consolidated Finding # 18.* These findings establish that the claimant was capable of and available for full-time work.

Because the review examiner's original decision disqualified the claimant on the ground that she failed to show that she was actively seeking work, we focus particular attention on whether the additional evidence after remand shows otherwise. Pursuant to G.L. 151A, § 24(b), an individual seeking unemployment benefits is required to show that she has made a reasonable good faith effort to find new employment. Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282 (1978). The Massachusetts Supreme Judicial Court has long held that whether an unemployed person is unable to obtain work is "largely a question of fact as to which the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence" *Id.* at 282-283. To meet this burden, claimants must engage in an "active", as opposed to a "token" work search. *Id.* at 283; *see also Conley v. Dir. of Division of Employment Security*, 340 Mass. 315, 319 (1960) (six applications for work over approximately five month period not an active work search). The DUA expects a claimant to "follow a course of action which is reasonably designed to result in prompt re-employment in suitable work." DUA Service Representative Handbook, § 1005(C).

Consolidated Finding # 19 shows that the claimant sought a variety of jobs for which she was suited based upon her education and work experience. However, her effort to find these jobs was inconsistent. It varied from week to week. The DUA guideline is that a worker is expected to search for different jobs on three different days per week. *See DUA Service Representative Handbook*, § 1050(A). Although this is not a rigid rule, it is a reasonable "rule of thumb" for showing an active effort to find employment. The claimant demonstrated her work search activities through her work search log, Remand Exhibit # 7. This log shows that in most weeks during the relevant period, the claimant engaged in three to six work search activities per week. This includes the weeks ending: December 29, 2017, January 6, 2018, February 24, 2018, March 10, 17, 24, and 31, 2018, and April 7, 2018. *See Consolidated Findings ## 26, 27, 30, and 32-36.* Thus, we are satisfied that the claimant actively sought work during these eight weeks.

² While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

However, in other weeks, the claimant's efforts were not as robust. Her log shows only one work search activity during weeks ending December 23, 2017, and March 3, 2018, and none at all during the weeks ending January 13, 2018, and February 17, 2018. *See Consolidated Finding ## 25, 28, 29, and 31.* In our view, her effort during these four weeks was not reasonably designed to result in prompt re-employment. We, therefore, conclude as a matter of law that for these particular weeks, she is disqualified pursuant to G.L. c. 151A, § 24(b).

The portion of the review examiner's decision that disqualified the claimant during the four weeks ending December 23, 2017, January 13, 2018, February 17, 2018, and March 3, 2018 is affirmed. The claimant is denied benefits for those weeks. The portion of the review examiner's decision that disqualified the claimant during the remainder of weeks that she certified for benefits is reversed. The claimant is entitled to receive benefits during the eight weeks ending December 29, 2017, January 6, 2018, February 24, 2018, March 10, 17, 24, and 31, 2018, and April 7, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – September 12, 2018



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
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

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.

AB/rh