0027 6968 52 (May 20, 2019) – Part-time substitute teacher did not accept all work offered by the employer, because she was taking classes at the Career Center and interviewing for full-time jobs. Held the claimant was in partial unemployment and will not be penalized for failing to accept shifts in order to engage in work-search activities designed to return to full-time employment.

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

Issue ID: 0027 6968 52

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA on November 2, 2018, and was approved for benefits in a determination issued on November 29, 2018.[1] The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 19, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment, as she was not accepting all available work, and, thus, she was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). 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 additional evidence pertaining to the claimant's other employers and the instant employer's work offers. 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 decision, which concluded that the claimant was neither in partial nor total unemployment, as meant under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the instant employer was not the claimant's primary employer during the base period, and the claimant was refusing some of the part-time work offered by the instant employer in order to engage in work-search activities.

[1] We take judicial notice of the date the claimant filed her claim, as shown in the DUA's UI Online system.

Findings of Fact

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

1. The claimant has worked as a Substitute Teacher for the employer, a regional school district, from 8/27/17 through the present time. The claimant has not separated from the employer.

2. The claimant had been hired to work as needed.

3. During her base period of 10/1/17 to 9/30/18, the claimant worked full-time, 40 hours a week, earning gross weekly pay of $625 for [Employer A] Country Club from 4/2/18 to 10/26/18. She also worked full-time, 40 hours a week, earning $13 an hour for [Employer B] in a temporary position from 1/2/18 until 3/30/18.

4. [Employer A] Country Club was the claimant's primary employer during the base period of her claim.

5. The instant employer had a notification system for substitute teachers. The claimant could call in to the system for work or wait for a robo call from the system with work that was available.

6. The claimant was not accepting all available work as offered by the employer from the effective date of her claim through the present time. She turned down work with the instant employer because part of the time she was working full-time with her primary employer, and because she was interviewing for other positions and taking classes at the career center.

7. The employer's notification system offers the same shifts to various substitute teachers, so that the first teacher to accept the offer would be guaranteed the shift. The claimant could call in and choose the assignments she wants if she did not want to wait for the robo call.

8. Between 9/19/18 to (sic) 12/19/18, the claimant worked only 3 full days and two ½ days for the instant employer. There were 40 days of assignments the claimant could have accepted but did not. Between 1/2/19 and 3/14/19, the claimant worked 7 full days and nine ½ days and there were 21 unfilled assignments the claimant could have accepted.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 6, which states that the

claimant turned down work with the instant employer because part of the time she was working full-time with her primary employer, as Consolidated Finding # 3 states that the claimant separated from her primary employer on October 26, 2018, and the claim at issue here has an effective date of October 28, 2018. We also clarify Consolidated Finding # 7, by adding that the employer's notification system calls the employees one at a time when offering work, rather than simultaneously notifying all employees about the available shifts.[2] Finally, we clarify Consolidated Finding # 8, by adding that the employer testified that none of its substitute teachers accepted the 40 assignments the claimant failed to accept between September 19, 2018, and December 19, 2018, so those assignments were available to the claimant. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment during the period at issue.

G.L. c. 151A, § 29 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.

After remand, the review examiner found that the claimant's primary employer during her base period of October 1, 2017, through September 30, 2018, was [Employer A] Country Club. The claimant worked full-time for that employer from April 2, 2018, to October 26, 2018. The review examiner also found that the claimant had been working as a substitute teacher for the instant employer since August 27, 2017, on an as-needed basis. Since the DUA's UI Online system shows that the claimant was laid off from her primary employer on October 26, 2018, that separation from employment was qualifying under G.L. c. 151A, § 25(e)(2). Thus, the only question before us is whether the claimant was in total or partial unemployment while working as needed for the instant subsidiary employer during the benefit year.

The review examiner found that the employer offered work to the claimant and other substitute teachers via its notification system. That system called the substitutes one by one until someone accepted the shift being offered. The employer testified that, from September 19, 2018, to December 19, 2018, and from January 2, 2019, to March 14, 2019, the claimant did not accept numerous assignments offered to her via the employer's notification system. The consolidated findings further show that the reason why the claimant did not accept the assignments was

[2] 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).

because she was engaging in work-search activities, such as interviewing for jobs and taking classes at a career center.

After remand, the review examiner found that the claimant only worked approximately 16 days for the instant subsidiary employer during the period at issue, which spans several months, so it is clear that the claimant was only working on a part-time basis, if at all, during the weeks at issue. In determining whether the claimant was in partial or total unemployment during these weeks, we must look at whether the employer offered suitable work to the claimant, and what her reasons were for declining the work. *See* DUA Service Representative Handbook, § 1115. Given the employer's work notification system, which randomly calls employees to offer assignments, it is not clear from the record before us that the particular substitute teaching assignments offered by the employer constituted suitable offers of work to the claimant.

However, even if we assume that the offers were for suitable work, the claimant in this case is not disqualified for turning some of these offers down. The statutory provisions cited above under G.L. c. 151A, §§ 1(r) and 29, read together, reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time employment. Here, the review examiner found that the reason that the claimant did not accept all the work offered by the employer during the period at issue was because she was interviewing for other jobs and taking classes at the Career Center. *See* Finding of Fact # 6. Although technically, by fulfilling her "actively seeking" statutory obligation, the claimant has put herself in a situation where part of the time she is unable to satisfy her "availability" statutory obligation, we decline to penalize her under these circumstances. To do so would frustrate the Legislative goal of returning her to full-time employment.

We, therefore, conclude as a matter of law the claimant may not be disqualified under G.L. c. 151A, §§ 29(a), (b), and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 3, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 20, 2019

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.

SVL/rh