

**Claimant reduced her hours by half due to a medical condition. She is entitled to partial unemployment benefits, where the employer did not have other work available to accommodate her medical restrictions in a way that allowed her to keep her regular schedule, and she searched for other suitable full-time jobs.**

**Board of Review  
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**Issue ID: 0030 0094 06**

## **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 March 14, 2019. On July 4, 2019, the agency issued a notice of disqualification under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), stating that the claimant was not in partial unemployment because, although additional work was available to her, she requested a reduction in hours. The claimant 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 denied benefits in a decision rendered on August 2, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment and, thus, 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 availability and the employer's available work. Both parties participated in 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 original decision, which concluded that the claimant was not in 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.

### **Findings of Fact**

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

1. The claimant worked part-time as a relay operator for the employer, a service provider for individuals with hearing impairments, from 10/28/13 until 06/24/19.
2. When the claimant was hired, the employer offered her full or part-time work. Part-time work was 24 hours per week.
3. The claimant chose to work part-time (24 hours) per week because she wanted to spend other hours during her days investigating on [sic] how to start her own business or looking into other career paths she may want to pursue.
4. Originally, the claimant's job duties involved more typing than speaking.
5. In August 2018, the claimant's job changed and she was required to speak more than she typed.
6. In November 2018, the claimant experienced issues with her throat. The claimant took a leave of absence due to her medical condition.
7. The claimant was diagnosed with Laryngopharyngeal Reflux.
8. On 01/16/19, the claimant obtained a note from her Ear Nose and Throat treating physician's office indicating the following:

[Claimant] was seen in our office on 01/14/19 and due to findings on examination it is recommended that she stay well hydrated, which may cause her to require frequent bathroom breaks at work. I am also recommending vocal rest for her which is needed for recovery, which may require her to work less hours in the near future to avoid voice overuse unless there are other duties that do not require her to converse. Please make the following accommodations to assist in her recovery; she will return to work on Monday, January 21st.
9. Shortly thereafter, the claimant brought the note to her employer's Human Resource Department and spoke with the Human Resource Generalist (HRG). The claimant asked to reduce her hours to 12 per week based upon her physician's recommendation. She also discussed whether other work that did not require her to converse as much was available.
10. The HRG indicated that no other type of work was available, but accommodated the claimant's request to work 12 hours per week.
11. On 03/14/19, the claimant filed a claim for unemployment benefits with an effective date of 03/03/19.
12. As of 03/03/19, the claimant was available for full-time work.

13. As of 03/03/19, the claimant was no longer pursuing her dream of starting her own business.
14. As of 03/03/19, the claimant was looking for full-time work that would not exacerbate her medical condition. The claimant searched for public health research jobs, but discovered that she was not qualified because she did not have her Master's Degree. The claimant searched for jobs conducting patient education in hospitals, but determined she was not qualified because the hospitals wanted employees with a nursing degree. The claimant also searched for work as a Project Manager. The claimant was qualified for this type of work because of her prior work history.
15. On 06/14/19, the claimant notified her employer that she was resigning. The claimant quit her job because she obtained full-time employment with a new employer.
16. The claimant continued to work 12 hours per week until her last day with the employer, 06/24/19.
17. On 07/01/19, the claimant obtained new full-time employment as a Volunteer Coordinator. Among other duties, in her new position, the claimant organizes volunteers and makes site visits.
18. On 07/04/19, the DUA sent the claimant a Notice of Disqualification stating she was disqualified from receiving unemployment benefits under Section 29(a) & 1(r) of the Law because the claimant requested a reduction in her work hours and additional work was available to her.

#### Credibility Assessment:

The claimant's testimony is deemed credible because it is supported by her physician's note in the record and by the HRG's testimony, as well. The claimant testified that she asked the HRG for other type of work that would not affect her medical condition and was told no other type of work was available. Although the HRG did not recall specifically speaking with the claimant about whether other type of work was available, she did recall speaking about the doctor's note and testified that no other type of work would have been available to the claimant at the time if she did ask.

The claimant's testimony that she was available for full-time work as of 03/03/19 is also credible because she was no longer considering starting her own business, and she also provided details of the type of full-time work she was searching for at the time.

#### 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 was not in unemployment. We believe that the consolidated findings of fact support the conclusion that the claimant was in partial unemployment as of the start of her claim.

The issue before the Board is whether the claimant is eligible for benefits under G.L. c. 151A, § 29, which authorizes that 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.

In her original decision, the review examiner concluded that the claimant was neither in total nor partial unemployment, because *she* requested that the employer reduce her hours. We remanded the case to the review examiner to obtain additional evidence pertaining the claimant's availability for work and the type of work that the employer had available at the time the claimant reduced her hours. In light of the returned consolidated findings of fact, we disagree with the review examiner's original conclusion.

After remand, the review examiner found that the claimant was forced to reduce her work schedule from 24 hours per week to 12 hours per week due to a medical condition. Specifically, the claimant's doctor recommended that she reduce her work hours because her job involved a lot of speaking, and this exacerbated her laryngopharyngeal reflux by straining her vocal chords. The claimant tried to avoid the reduction in hours by asking the employer whether it had other work for her, which did not involve as much talking, but none was available at that time. Due to the reduction to her schedule, the claimant filed a claim for unemployment benefits on March 14, 2019. The review examiner found that, as of the effective date of her claim, March 3, 2019, the claimant was available for and looking for full-time work that did not involve as much talking as her job with the instant employer.

The claimant's circumstances are similar to those in Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980). In Fitzgerald, the claimant was a welder who was medically required to cease performing her welding duties due to her pregnancy. Id. at 159–60. She was,

however, able and qualified to perform other light work for the employer and applied for such work. Id. at 160. The employer had no light work available for the claimant and refused the claimant's request for maternity leave. Id. The Supreme Judicial Court held that the claimant was in unemployment and eligible for benefits, because the claimant was able and available for light duty work, sought such work, but was unable to obtain such work. Id. at 163.

We believe that the principle enunciated in Fitzgerald applies to the matter before us. Like the claimant in Fitzgerald, the claimant here was unable to continue working her regular schedule of hours, because the employer did not have other suitable work available to fully accommodate her medical restrictions. The claimant here actively sought other suitable full-time work. The claimant, therefore, has shown that she was in a state of unemployment. However, unlike the claimant in Fitzgerald, the claimant here was not in total unemployment, as she was able to perform some work for the employer and continued that work until she resigned from her position on June 24, 2019. Since the claimant continued to work a reduced 12-hour schedule for the employer, she was eligible for partial unemployment benefits as of the start of her claim, and, until she began full-time employment on July 1, 2019, in any week in which she earned less than her weekly benefit rate plus earnings disregard.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, § 29(b), and 1(r), the claimant is eligible for partial benefits in any week in which she works less than a full-time schedule of hours, and her earnings do not exceed her combined benefit rate and earnings disregard.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the weeks ending March 9, 2019, through June 29, 2019, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 21, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, 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](http://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