

A claimant who reduced her availability to work, but then did not try to return to full-time work when she was able and available for full-time work, was not in unemployment, pursuant to G.L. c. 151A, §§ 29 and 1, where the claimant did not show that she was “unable to obtain suitable work.”

**Board of Review
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Issue ID: 0031 3330 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 from April 19, 2019, through September 30, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse in part and affirm in part.

The claimant filed a claim for unemployment benefits, effective March 31, 2019. She then began working for the employer in the benefit year of that claim. On July 24, 2019, the DUA sent the claimant a Notice of Disqualification, informing her that she was not eligible to receive unemployment benefits.¹ The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on October 12, 2019. In her decision, the review examiner modified the period of disqualification to April 19, 2019, through September 30, 2019.

Benefits were denied after the review examiner determined that the claimant was not able and available to work due to her need to care for her ill child, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we accepted the application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s decision to deny benefits from April 19, 2019, through September 30, 2019, because the claimant was not able and available for full-time employment, is supported by substantial and credible evidence and is free from error of law, where the review examiner found that the claimant failed to notify the employer that she was available to work full-time again, after she initially reduced her availability.

¹ Although not specified in the determination itself, the disqualification began June 16, 2019, which was the week in which the claimant reduced her availability for work with the employer.

Findings of Fact

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

1. The claimant filed an initial unemployment claim with an effective date of 3/31/19.
2. On 4/19/19, the claimant was hired to work full-time as a medical assistant/phlebotomist at a medical center. The claimant had a regular weekly schedule of 36 hours and she was paid \$20 per hour.
3. On 6/17/19, the claimant requested the employer remove her from her full-time schedule and allow her to continue working in a per diem capacity. The employer approved the claimant's request. The claimant made this request because her daughter was admitted to the hospital on 6/17/19 and underwent surgery that day. The claimant was required to stay at the hospital with her child. Three days after the first surgery, the child underwent a second surgery. The child was subsequently released from the hospital on 7/5/19 and her health has improved, she has been able to return to school.
4. At the time of changing her status to per diem, the claimant was told by the employer that she would be able to return to her full-time position. The claimant was unaware that the employer would not hold her position indefinitely. The employer did not contact the claimant to offer her any work after she changed her status to per diem.
5. After 6/17/19, the claimant did not inform the employer that she was able to resume working a regular, full-time schedule. The claimant needs to schedule an appointment with the human resources department in order to meet with someone.
6. On 7/24/19, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 29(b) & 1(r) of the law. The claimant appealed the Notice.
7. The claimant recently received written notice from the employer that as of 10/1/19, her position has been terminated and she can reapply for employment when her circumstances change.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not eligible to receive benefits for the

week beginning April 14, 2019. We agree that the claimant is ineligible to receive benefits after that week. However, our reasoning differs from that offered by the review examiner in her decision.

To be eligible for unemployment benefits, the claimant must show that she was in a state of unemployment. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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.

The review examiner disqualified the claimant during the week beginning April 14, 2019. Presumably, she did this because the claimant started full-time work that week, and an individual is not eligible for benefits when working full-time. However, the claimant started work on April 19, 2019, which is a Friday. The claimant did not work a full schedule of hours that week, as she only worked for one day. There is insufficient evidence in the record to show that the claimant had enough earnings from the employer that week to render her ineligible for benefits pursuant to G.L. c. 151A, § 1(r)(1). Therefore, we conclude that the claimant is not disqualified for benefits for the week beginning April 14, 2019.

From the week beginning April 21, 2019, through the week ending June 15, 2019, the claimant worked full-time for the employer. As such, she would not be eligible for benefits. A person who is fully employed cannot, by definition, be in either total or partial unemployment.²

On June 17, 2019, a Monday, the claimant requested that her schedule be reduced from full-time to *per diem*. After this point, the claimant no longer performed any services for the employer. Finding of Fact # 4. Since she did not work any shifts at all, we must decide whether the claimant was in total unemployment, beginning June 16, 2019.

Pursuant to the definition of total unemployment cited above, to carry her burden to show that she is eligible for benefits, the claimant must show that, beginning June 16, 2019, she was “capable and available for work,” but “unable to obtain any suitable work.” The review examiner concluded that, although the employer had full-time work available for the claimant, “she was unable to work a full-time schedule due to the medical needs of her child.” This

² We have reviewed the claimant’s unemployment claim in the DUA’s UI Online computer system. We note that the claimant did not certify for benefits for the period from April 21, 2019 through June 8, 2019.

conclusion is based primarily on Finding of Fact # 3, although that finding also states that the child's health has improved.

As to the week beginning June 16, 2019, the findings show that the claimant was caring for her child, who had undergone two surgeries that week. Because the findings show that claimant was required to stay in the hospital with her daughter, she was not available for full-time work. Moreover, it is reasonable to infer that the claimant was not available for any work, given her daughter's medical issues. Therefore, the claimant was not in total unemployment the week beginning June 16, 2019.³

As to the period beginning June 23, 2019, with regard to whether the claimant was able and available to work, we note that the DUA has already issued a decision pursuant to G.L. c. 151A, § 24(b), concluding that the claimant was able, available, and actively seeking work beginning June 23, 2019.⁴ We must respect that decision.

However, the question still remains as to whether, beginning June 23, 2019, the claimant was "unable to obtain suitable work." We conclude that the claimant has not shown this to be true. If the claimant was able and available to work full-time as of June 23, 2019, as already found by the DUA, she could very easily have told the employer this and returned to work. During the hearing, the claimant testified that she told the employer that she could return to work full-time. She testified that the employer knew this on June 23, 2019, and she reinforced it again on July 5, 2019. Although not explicit, the review examiner did not credit this testimony. *See Swansea Water District v. Dir. of Unemployment Assistance*, No. 15-P-184, 2016 WL 873008 (Mass. App. Ct. Mar. 8, 2016), *summary decision pursuant to rule 1:28* (noting that review examiner's credibility assessment was implicit, given the content of the findings of fact). The review examiner found, instead, that "the claimant did not inform the employer that she was able to resume working a regular, full-time schedule." Finding of Fact # 5. Although the claimant's testimony in this case was not disputed, the review examiner did not have to believe it. *See McDonald v. Dir. of Division of Employment Security*, 396 Mass. 468, 470 (1986). Especially where the claimant admitted during the hearing that she thought that the employer told her that she could return to her full-time job, *see* Finding of Fact # 4, it does not make sense that the claimant notified the employer several times of her full-time availability but received no response at all from the employer regarding a return to work.

Because the claimant was able and available to work and could have returned to her full-time position but for her failure to inform the employer of her ability to return to work full-time, the claimant has not shown that she was unable to obtain suitable work. We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, beginning April 21, 2019, is supported by substantial and credible evidence and free from error of law, because the claimant has not shown that she was in total or partial unemployment beginning that week.

³ We note that, in her appeal to the Board, the claimant is requesting that she be paid benefits "from 6/23/2019 until 10/01/2019." It seems that the claimant agrees that she is not eligible to receive benefits for the week June 16, 2019, through June 22, 2019.

⁴ A decision was issued by the Hearings Department on August 15, 2019, under Issue ID 0031 3858 72. That decision is final. In the decision, the review examiner concluded that the claimant is not eligible to receive benefits for the week beginning June 16, 2019, but is eligible to receive benefits pursuant to G.L. c. 151A, § 24(b), beginning June 23, 2019.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning April 21, 2019, through the week ending September 28, 2019.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 22, 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.

SF/rh