

A per diem medical assistant was in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r)(2), from the last date she worked for the employer, until the employer contacted her about her availability for more per diem shifts. But she was not in unemployment thereafter, when she failed to respond to the employer's inquiry about picking up shifts once she was collecting unemployment benefits.

Board of Review  
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Issue ID: 0032 4242 84

#### 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 reverse in part and affirm in part.

The claimant filed a claim for unemployment benefits with the DUA on October 3, 2019, which was approved in a determination issued on February 5, 2020. 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 March 11, 2020. We accepted the claimant's application for review.

Benefits were denied when the review examiner determined that the claimant was neither in total nor in partial unemployment after she changed her employment status from full-time to *per diem*, and then stopped accepting *per diem* shifts from the employer. Thus, he concluded that 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 allow the claimant an opportunity to present testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 claimant was not in total or partial unemployment after she stopped accepting *per diem* work from the employer, 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 began working for the employer as a full-time Medical Assistant/Clinical Office Coordinator on 12/3/2018.
2. Effective 4/8/2019, the employer suggested that the claimant can go *per diem* due to the claimant's being overwhelmed with her full-time position employer to change her employment from full-time to *per diem* [sic].
3. The claimant elected to change from full-time [sic] *per diem* as offered by the employer and such change took effect in April 2019.
4. The employer requested the change in writing and the claimant emailed the employer on 3/28/2019 indicating that she would change to per-diem effective 4/8/2019.
5. For the months of April, May and June, the employer's scheduler would request the claimant's availability and she would indicate availability and the scheduler would then schedule the claimant based upon her availability.
6. The claimant worked approximately 20 hours each week as scheduled by the employer.
7. After last working on 6/24/2019, the claimant was not scheduled for any future shifts.
8. The claimant could see on the employer's schedule that there were no shift openings for July, 2019, and assumed the employer did not have any work available since the scheduler had not contacted her as she did in the past.
9. The employer's Practice Manager does not know if any work was available for the claimant from July, 2019, through October, 2019, since the employer is typically slower in the summer months.
10. The employer's scheduler did not ask the claimant for her availability for the month of July, 2019, as she had done for previous months.
11. On 7/27/2019, a co-worker texted the claimant how it was going. The claimant responded to let her know of any open shifts.
12. During the months of July through October, 2019, the scheduler did not contact the claimant to work.
13. If contacted by the scheduler, the claimant was available for shifts if the employer had them available.
14. After not receiving work from the employer for months, the claimant filed an unemployment claim on 10/3/2019.

15. On 10/28/2019, the Practice Manager emailed the claimant stating the employer had not heard from the claimant in a [sic] some time and asked if she was looking to remain *per diem*.
16. The claimant emailed back stating that she asked for shifts on 7/27/2019 and has not heard back.
17. The Practice Manager emailed back on 10/29/2019 stating that she did not get that text and asked the claimant if she was looking to pick up shifts.
18. The claimant did not respond back to the email from the Practice Manager.
19. The Practice Manager emailed the claimant again on 11/4/2019 asking the claimant if she wanted to pick up shifts and to let her know.
20. The claimant never responded back to the email from the Practice Manager.
21. The claimant decided not to contact the Practice Manager back since she had already filed an unemployment claim and assumed the Practice Manager was covering her tracks for unemployment by asking her if she was available for work.
22. On 1/21/2020, the employer mailed the claimant a termination letter informing her that the employer was ending her employment for missing 5 consecutive shifts which they considered voluntary resignation.

#### Credibility Assessment:

The claimant's testimony regarding her scheduling is accepted as credible in this contested area since the claimant was forthright in giving firsthand testimony and her version of the events made more logical sense. The Practice Manager's testimony lacked recollection of scheduling or if work was available, in addition to being speculative at times when questioned, thus causing the claimant's testimony to be considered more credible in this contested area.

#### 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 consolidated 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 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.

To be eligible for unemployment benefits, the claimant must show that she was in a state of unemployment as defined in the unemployment statute. 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.

Based on the employer’s undisputed testimony, the review examiner initially found the claimant stopped accepting available *per diem* work from the employer after June 24, 2019. Since he found the employer had available work and the claimant stopped accepting shifts, the review examiner disqualified her from benefits indefinitely because she was not in total or partial unemployment.

After remand, however, the review examiner found that when the claimant changed her status from full-time to *per diem* in April of 2020, the employer’s scheduler reached out to her for her availability, and scheduled her accordingly for April, May, and June. *See Consolidated Finding # 5.* But after the claimant last worked for the employer on June 24, 2019, the scheduler did not call for her availability in July and stopped scheduling her for any future shifts. *See Consolidated Findings ## 10 and 12.* The employer’s witness testified that she did not know if there were any shifts available for the claimant from July through October of 2019, since the employer’s business is generally slower during the summer months. *See Consolidated Finding # 9.*

The review examiner found that the claimant responded to a coworker’s text inquiry on July 27, 2019, by inquiring if the employer had any open shifts. *See Consolidated Finding # 11; Hearings Exhibit # 10, p. 4.* The review examiner also found that, if the employer had contacted the claimant, she would have been available for shifts. *See Consolidated Finding # 13.* After not receiving any work from the employer in months, the claimant filed a claim for unemployment benefits on October 3, 2019. *See Consolidated Finding # 14.*

On October 28, 2019, after the claimant filed for unemployment benefits, the employer emailed the claimant, asking if she were looking to remain a *per diem* employee. *See Consolidated Finding # 15; Hearings Exhibit # 10, p. 5.* Without responding to the employer’s direct question, the claimant merely replied that she had asked for shifts on July 27 and had not heard back. *See Consolidated Finding # 16; Hearings Exhibit # 10, p. 5.*

On October 29, 2019, the employer emailed to tell the claimant that she had not received her July text message and again asked if the claimant was looking to pick up shifts. *See Consolidated Finding # 17; Hearings Exhibit # 10, p. 5.* The claimant did not reply to that text message.

The employer reached out to the claimant again by email on November 4, 2019, asking if she wanted to pick up shifts, but again, the claimant did not respond. *See Consolidated Findings ## 19–20; Hearings Exhibit # 10, p. 7.*

The review examiner found that the claimant did not respond to the employer’s inquiries about her availability for shifts because she had already filed a claim for unemployment benefits and assumed the employer was “covering her tracks for unemployment by asking her if she was available for work.” *See Consolidated Finding # 21.* Finally, the review examiner found that, on January 21, 2020, the employer mailed the claimant a letter confirming that her employment had ended. *See Consolidated Finding # 22.*

After June 24, 2019, the claimant no longer performed any services for the employer. *See Consolidated Finding #7.* Since she did not work any shifts at all, we must decide whether the claimant was in total or partial unemployment after June 24, 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 24, 2019, she was “capable and available for work,” but “unable to obtain any suitable work.”

The review examiner’s consolidated findings show that, while the claimant was available for work after June 24, 2019, the employer did not ask her availability for any open shifts. Indeed, the record indicates that the employer’s witness was uncertain whether the employer had any available work for the claimant during the summer of 2019. Consequently, we conclude that the claimant was in total unemployment beginning on June 25, 2019.

However, since the review examiner found that the employer reached out to the claimant about her availability for future shifts on October 28, October 29, and November 4, 2019, the question becomes whether, as of October 28, 2019, the claimant was “unable to obtain suitable work.” We conclude that the claimant has not shown this to be true.

While the employer did not contact the claimant about her availability to work *per diem* shifts from July through September of 2019, the employer reached out to her about her availability to pick up shifts three times between October 28 and November 4, 2019. Despite the fact that the claimant remained a *per diem* employee of the employer, she ignored the employer’s inquiries. By refusing to respond to the employer’s inquiries about suitable work, the claimant effectively rendered herself unavailable to work as of October 28, 2019. Consequently, the claimant has not shown that she was unable to obtain suitable work after October 28, 2019.

We, therefore, conclude as a matter of law that the claimant was in total unemployment from June 25, 2019, to October 26, 2019, but she was not in total or partial unemployment from October 27, 2019, through January 21, 2020.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from September 29, 2019, through the week ending October 26, 2019. The claimant is denied benefits from October 27, 2019, through January 21, 2020.

The DUA will separately investigate and adjudicate the claimant's eligibility for benefits after of January 21, 2020, pursuant to G.L. c. 151A, §§ 25(e)(1) and 25(e)(2).



Paul T.

**BOSTON, MASSACHUSETTS**

Fitzgerald, Esq.

**DATE OF DECISION - June 18, 2020**

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  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020<sup>1</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

JPC/rh

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<sup>1</sup> See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.