

**The claimant separated from a full-time employer, filed her unemployment claim, and informed the instant part-time employer of her increased availability. Since she is accepting all available work from the instant employer in her benefit year, she is eligible for partial unemployment benefits.**

**Board of Review  
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Member  
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**Issue ID: 0033 6038 33**

### 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, effective January 19, 2020. On February 19, 2020, the agency issued a determination approving benefits under G.L. c. 151A, §§ 29(b) and 1(r). 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 14, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in partial nor total 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 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, which concluded that the claimant was not in partial or total unemployment within the meaning of 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 findings of fact are set forth below in their entirety:

1. The claimant was initially hired by the employer to work in the capacity of a part-time cashier at its retail store. The employer schedules part-time cashiers for approximately 25-26 hours per week. The claimant began work with the employer [on] 8/18/18.

2. The claimant notified the employer that she accepted full-time work and was scheduled to begin working full-time on 12/9/19. The claimant requested the employer schedule her only for weekend hours beginning that week.
3. On 1/14/20, the claimant requested the employer increase her schedule. The employer is scheduling the claimant for more hours.
4. The claimant filed an initial unemployment claim, effective 1/26/20. The claimant informed the DUA that there was a lack of work with the employer. The claimant did not respond to the DUA's request for additional information.
5. On 1/28/20, the employer completed a DUA Lack of Work Notification form, confirming that the claimant had a full-time job and the employer schedules her only for weekends, to avoid interference with her full-time job.
6. On 2/19/20, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 29(b)&1(r) of the law.
7. On 2/19/20, the employer appealed the Notice of Approval.

### Ruling of the Board

In accordance with our statutory obligation, we review 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We set aside the portion of Consolidated Finding # 4, which states that the claimant's claim was effective on January 26, 2020, as the records in the DUA's UI Online system show that the claim was effective as of January 19, 2020. 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 is neither in partial nor total unemployment. We believe that the review examiner's findings of fact support the conclusion that the claimant is in partial unemployment and entitled to benefits.

Because the claimant was working part-time when she filed her claim, applicable here is G.L. c. 151A, § 29, which 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.

The review examiner concluded that the claimant was neither in total nor partial unemployment, as defined in the above sections of the unemployment statute. Because the claimant was still working for the instant employer when she filed her claim, we agree that the claimant was not in total unemployment. However, we disagree with the review examiner's conclusion that the claimant was not in partial unemployment.

While reviewing the claimant's records in the DUA's UI Online system, we found that she separated from her full-time employer on January 14, 2020, and the agency determined that this separation was qualifying on February 18, 2020. *See* DUA Issue ID # 0033 5929 90. Since the claimant separated from her full-time employer prior to filing for benefits, and there is no indication in the record that she was working more than a part-time schedule at the time she filed her claim, she may be eligible for unemployment benefits if she was accepting all of the work offered by the instant employer.

In determining that the claimant was not in partial unemployment, the review examiner relied on the claimant's request in December, 2019, that the employer reduce her hours so that she could work full-time with a second employer, concluding that such a request restricted the claimant's availability. We do not agree that this request affects the current claim for benefits. First, the period of time in which the claimant had restricted her availability with the present employer is not before us, as the claimant filed her claim in January, after she had separated from her full-time employer. Second, prior to filing her claim, she asked the present employer for increased hours. *See* Consolidated Finding # 3. Since the claimant was only working part-time during her benefit year, it was possible for her to qualify for partial unemployment benefits.

During the hearing, the employer indicated that the claimant has been working as many hours as is typically offered to part-time employees, 25–26 per week, and that the employer does not schedule people for more than 30 hours per week.<sup>1</sup> *See* Finding of Fact # 1. Since nothing in the record indicates that the claimant has turned down any hours since filing her claim, she satisfies the requirements for being in partial unemployment under G.L. c. 151A, §§ 29(b) and 1(r)(1).

We, therefore, conclude as a matter of law that the claimant is in partial unemployment within the meaning of G.L. c. 151A, §§ 29(b) and 1(r)(1).

Inasmuch as the present employer was the claimant's subsidiary employer during the base period, as long as it continues to employ the claimant during the weeks of her claim to the same extent that it previously employed her, its account will not be charged. *See* 430 CMR 5.05(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 19, 2020, and for subsequent weeks if otherwise eligible.

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<sup>1</sup> 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).

**BOSTON, MASSACHUSETTS**

**DATE OF DECISION - June 29, 2020**



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  
(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>2</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.

SVL/rh

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<sup>2</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.