

The employer is an LLC owned by the claimant's husband. Because it had not elected to be treated as an s-corp for federal tax purposes, it is considered to be the same taxable entity as the claimant's husband. As such, the claimant's base period wages are exempt under G.L. c. 151A, § 6(d).

**Board of Review
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Issue ID: 0035 6051 67

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 affirm.

The claimant separated from her position with the employer on March 20, 2020. She filed a claim for unemployment benefits with the DUA (2020-01 claim), which was denied in a determination issued on April 9, 2020. 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 July 10, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not have sufficient base period wages under G.L. c. 151A, § 24(a), because she worked in the employ of her husband and thus her wages were exempt under G.L. c. 151A, § 6(d). 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 information on the employer's tax filing status. Only the claimant 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 did not have sufficient qualifying base period wages to be eligible for benefits, 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 are set forth below in their entirety:

1. The claimant's husband has operated a residential painting company since in or about 2013.

2. The employer is a limited liability company.
3. The employer did not file tax form 8832 with the IRS.
4. The employer did not file tax form 2553 with the IRS as an s-corporation.
5. The employer is not an s-corporation.
6. The claimant's husband employed the claimant as a bookkeeper and secretary from January 1, 2014 through March 20, 2020, when the husband laid off the claimant due to the business temporarily closing because of the COVID-19 pandemic.
7. The claimant initiated a new claim for unemployment benefits effective for March 22, 2020.
8. The base period of the claim extended from January 1, 2019 to December 31, 2019.

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 ultimate 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 decision is based on substantial evidence and is free from any error of law affecting substantive rights.

In order to be eligible for unemployment benefits, the claimant must have earned wages of at least \$5,100.00 in her base period. G.L. c. 151A, § 24(a).¹ Wages are defined under G.L. c. 151A, § 2(s), which provides, in relevant part, as follows:

- (A) "Wages", every form of remuneration of an employee subject to this chapter for employment by an employer

The consolidated findings establish that the claimant was not an owner or a member the employer company; she was an employee. Consolidated Findings ## 1 and 6. However, because the claimant's husband owned the company, we must also consider whether the wages he earned were for services that are exempt under G.L. c. 151A, § 6(d). In relevant part, G.L. c. 151A, § 6, provides as follows:

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount changes periodically, as required under the statute, based on changes to the minimum wage. The minimum amount of wages needed for a valid unemployment claim at the time the claimant filed her 2020 claim was \$5,100.00.

The term “employment” shall not include: . . . (d) Service performed by an individual in the employ of his son, daughter or spouse

Because the employer company is owned by the claimant’s husband, the review examiner correctly concluded that the claimant’s services were exempt under G.L. c. 151A, § 6(d).²

On appeal, the claimant argued that she was entitled to benefits because her husband’s company was lawfully organized as a limited liability company (LLC) under Massachusetts law. Finding of Fact # 2. Federal regulations provide that a single-member LLC will not be considered a separate entity from its sole proprietor for federal tax purposes unless the LLC files IRS tax form 8832 and checks the box indicating it is electing to be treated as a corporation.³ Alternatively, we have accepted evidence of other federal income tax filings, which demonstrate that the company is treated as a corporation for federal tax purposes. On remand, we afforded both parties the opportunity to present proof that the employer filed a Form 8832 and elected to be treated as a corporation for federal tax purposes or to present other tax filings. However, neither party provided this information. As such, we treat the employer as a sole proprietorship. Since the claimant’s spouse owns this company, we must apply G.L. c. 151A, § 6(d), to the claimant’s base period wages.

We, therefore, conclude as a matter of law that the claimant is ineligible for benefits because the wages earned in the employ of her husband were exempt pursuant to G.L. c. 151A, § 6(d), and she does not have sufficient non-exempt wages during her base period to satisfy the monetary requirements of G.L. c. 151A, § 24(a).

The review examiner’s decision is affirmed. The claimant is ineligible for benefits under her 2020-01 claim.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - September 11, 2020



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

² See also the Federal Unemployment Tax Act (FUTA), which contains the same language as G.L. c. 151A, § 6(d). 26 U.S.C. § 3306(c)(5).

³ 26 C.F.R. § 301.7701-3 (the “check-the-box” regulation); Unemployment Insurance Program Letter No. 26-08 (Sept. 8, 2008), p. 1.

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.

LSW/rh