Because the claimant did not provide information regarding her capability and availability for work during her leave of absence, she has not established that she was in unemployment, as meant under G.L. c. 151A, §§ 29(a), (b) and 1(r). The claimant is not disqualified pursuant to G.L. c. 151A, § 25(e)(2), as the employer terminated her for failing to return to work from her leave or communicate with the employer, but the claimant was never informed that she was expected to return on a certain date or that she was to maintain a certain level of communication with employer to remain employed.

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Issue ID: 0043 6490 88

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant separated from her position with the employer on August 19, 2020, after a leave of absence. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 12, 2021. The claimant appealed the determination to the DUA hearings department. Following two hearing sessions on the merits, which were attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 3, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in total unemployment while on a leave of absence, and her subsequent separation was not due to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not disqualified under G.L. c. 151A, §§ 29 and 1(r), or G.L. c. 151A, § 25(e)(2), respectively. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's availability for work and separation from the employer in August, 2020. Only the employer 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 was in total unemployment while on leave, and that her subsequent separation was not due to deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, is supported by substantial and credible evidence and is free from error of law, where the claimant did not provide evidence of her capability and availability for work, and the employer did not establish that the claimant

was given clear instructions on the type of communication she was to maintain with the employer while on leave.

Findings of Fact

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

1. In 2014, the claimant began working for a fast-food restaurant. When the claimant started with this business, she worked both weekdays and weekends. After the business was purchased by the present employer, in 2015 or 2016, she only worked two 8-hour shifts a week, on the weekends. In 2020, her hourly rate of pay was $12.75.

2. In February, 2015, the claimant began working for a coffee shop. In 2020, this employer paid her $13.50 an hour.

3. In March, 2020, in reaction to the [COVID]-19 pandemic, the employer moved to a "take out only" format.

4. The claimant called out for her March 15, 2020, shift with the present employer. She later informed the store manager, that she did not feel comfortable returning to work at that time due to having underlying medical conditions.

5. The claimant has not provided any medical documentation for the record establishing that she was diabetic and/or that she was for [sic] any other medical condition which would have made it unsafe for her to return to work as of March 15, 2020.

6. The claimant did not attend the remand hearing. She, therefore, provided no testimony or evidence regarding her ability to work remotely between March 15, 2020, and August 19, 2020.

7. The supervisor for the claimant's store (who had more authority than the store manager) called the claimant's contact number, which was for the claimant's husband's cell phone. The claimant's husband answered the phone and translated the conversation between the supervisor and the claimant. He told the supervisor that due to her underlying conditions, his wife was not comfortable returning to work at that time. When asked when she would return, he spoke to the claimant and then gave an answer indicating that if the [COVID] situation improved by August, the claimant might return to work at that time, but that she was going to wait and see how things went. Based on this response, the supervisor reported that the claimant was expected to return in August. She did not note the caveat that the claimant would only return if the [COVID] situation was sufficiently less dangerous by that time. The claimant never intended to communicate that she would be returning by or in August, only that she would do so if the [COVID]-19 situation had improved by that time.

8. On May 13, 2020, the employer's human resource department sent a letter to all employees who had indicated that they, as a precautionary measure, did not want to work due to [COVID]-19. The employer included in this category employees who, to the best of the employer's knowledge, were otherwise able to come to work, asymptomatic, were not advised by a health provider to stay home, did not need to take care for someone impacted by [COVID]-19 and did not have childcare obligations as a result of school closures and/or childcare closures. The employer indicated that it respected the decision of such employees not to return to work, but also wanted them to understand that their leave time would not be paid and that when the[y] decided to return to work, they were not guaranteed the same schedule or number of hours. The employees were asked to return the form with an explanation as to the reason they were requesting leave, the first day of the leave, and when the[y] anticipated returning to work, if they knew.

9. On or about March 18, 2020, the claimant responded to the above-described letter, stating that she was requesting leave because she was diabetic and was staying home because of[COVID]-19. She requested that May 25, 2020, be her first day of leave and did not provide a return-to-work date.

10. As the claimant had indicated an intention to return to work, the employer held her position for her.

11. The claimant had no contact with the employer after sending in the paperwork in May, 2020.

12. On April 12, 2020, the claimant filed a claim effective the same day. Her benefit rate on this claim is $306.

13. The claimant's wages during the base period of the 2020-01 claim were as follows:

    a. 2nd quarter 2019, present employer $2,200.18, other employer $5,585.89
    b. 3rd quarter 2019, present employer $1,293.00, other employer $2,734.46
    c. 4th quarter 2019, present employer $2,420.19, other employer $5,711.63
    d. 1st quarter 2020, present employer, $2,145.18, other employer $5,175.78

14. In August, 2020, the supervisor made one attempt to call the claimant to inquire if she was returning to work. She called the same phone number she had used previously, which was the number of [sic] for the claimant's husband's cell phone. No one answered the phone. She did not leave a message. She did not create any record of the call.

15. As the employer's records indicated that the claimant had stated she would return in August, not that she would return in August **if** the [COVID]-19 situation had improved, the employer recorded her employment as voluntarily terminated effective August 19, 2020. The employer did not send the claimant

any letter or other communication informing her that her employment was going to terminate if she did not contact them, or that it was terminated.

16. The employer reported to DUA that the claimant had been offered the opportunity to return to work and failed to do so.

17. DUA informed the claimant that the employer had reported that she had quit her job. As the claimant had not communicated an intent to resign or provide an end date to her request for a leave of absence, she did not understand why the employer reported that she had quit. She chose not to return to work for the present employer until and unless this misunderstanding was satisfactorily resolved.

18. The claimant got vaccinated and noticed that the situation with [COVID]-19 seemed to have improved. In addition, her son got a car and agreed to drive the claimant to work, so she would not have to take public transportation. Given these changes, and her need for income, the claimant decided that, as of February, 2021, it was safe enough for her to return to working with the public.

19. The manager from the claimant's other employment had called her every month or two asking if she was ready to return to work.

20. The claimant returned to her other employment in early February, 2021. She began working 36-38 hours a week at the rate of $14.50.

21. On July 12, 2021, DUA issued Notice of Disqualification 0043 6490 88-01, stating that under MGL 151A, Section 25(e)(1), she was subject to disqualification for the period starting May 17, 2020.

22. The claimant did not attend the [remand] hearing and thus was unable to provide testimony regarding whether she was able and available to perform work remotely between March 15, 2020, and August 19, 2020.

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 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was in unemployment while on a leave of absence.

G.L. c. 151A, § 29, 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.

Because the claimant was terminated from her employment while on a leave of absence, also relevant to this appeal is G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence . . . .

The review examiner originally concluded that the claimant was in total unemployment while on a leave of absence between March 15, 2020, and August 18, 2020, because she was temporarily unable to work due to COVID-19 and her underlying medical condition. Because the statute requires that claimants be capable and available for some type of work in order to qualify for benefits, we remanded the case to obtain additional evidence on these matters.[1] The claimant did not participate in the remand hearing and has, therefore, failed to provide evidence that she was capable and available for work during the period of her leave. Absent this information, we cannot conclude that the claimant was in unemployment and eligible for benefits during the period of her leave of absence.

However, the evidence in the record establishes that the claimant's separation from the employer on August 19, 2020, was qualifying. The employer contended during the hearing that the claimant had abandoned her employment when she failed to contact the employer or return to work in August, 2020. The review examiner found that the claimant informed the employer that she might return to work in August, 2020, *only if* the COVID-19 situation improved, but the employer mistakenly entered into its records that the claimant would definitely return in August, 2020. *See* Consolidated Findings ## 7 and 15. The review examiner's findings further indicate that the employer did not instruct the claimant on what type of communication that she was to maintain with the employer in order to preserve her employment. *See* Consolidated Findings ## 14–15.

[1] We note that, during the period at issue in this case and in response to U.S. Department of Labor guidance, the DUA had adopted policies relaxing its definition of suitable work and expanding the circumstances under which claimants may limit their availability to part-time work, including for COVID-19 related reasons. *See* DUA UI Policy and Performance Memo (UIPP) 2020.14, (Nov. 25, 2020), p. 2-3; UIPP 2021.02, (Jan. 22, 2021) p. 2; UIPP 2021.08 (Sept. 9, 2021).

Because the claimant intended to return to work with the employer, and she was not informed that she was expected to contact the employer in August, 2020, in order to remain employed, we agree with the review examiner's conclusion that the claimant did not quit her employment. *See* Consolidated Finding # 10. Rather, the employer discharged the claimant when she did not return to work or contact the employer in August. Since the claimant was not aware of the expectation to do so, this was not deliberate misconduct. Because nothing in the record suggests that her failure to return in August violated any employer policy, it also does not constitute a knowing policy violation.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, §§ 29(a), 29(b) and 1(r), the claimant was not in total unemployment during her leave of absence. We further conclude that the claimant's discharge was neither for deliberate misconduct in wilful disregard of the employer's interest nor for a knowing violation of a uniformly enforced rule or policy of the employer, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed in part and reversed in part. We affirm the part of the decision awarding benefits to the claimant as of the week ending August 22, 2020. However, we reverse the part of the decision awarding benefits to the claimant between May 17, 2020, and August 15, 2022.

The claimant is not entitled to benefits as of the start of her claim, April 12, 2020, and through August 15, 2020. The claimant is entitled to benefits, beginning the week ending August 22, 2020, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 26, 2022

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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)

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.

SVL/rh