

Claimant barista who lived with her 89-year old grandmother with leukemia was in unemployment while on a leave of absence. Although the employer had work available to the claimant, the employer's failure to maintain adequate safety standards and the severe health conditions of the claimant's grandmother rendered the available work unsuitable to the claimant during the COVID-19 pandemic.

**Board of Review
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Issue ID: 0044 5185 40

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. We affirm the denial of benefits from May 17 through May 27, 2020. We reverse and find the claimant eligible for benefits from May 28, 2020, through her separation on June 14, 2020. The claimant's eligibility for benefits after June 14, 2020, will be adjudicated separately.

The claimant filed a claim for unemployment benefits with the DUA on May 30, 2020, which was denied in a determination issued on June 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 September 19, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not "in unemployment" because the employer had work available for her, but she was not available to work due to her concerns about COVID-19, and, thus, was disqualified under G.L. c. 151A, §§ 29(a) 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 take additional evidence. 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 claimant was not in unemployment because she declined available work due to concerns about becoming exposed to COVID-19 and bringing it home to her 89-year-old grandmother, 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 worked as a Shift Manager/Barista for the employer, a coffee shop, from 4/8/17 until 5/27/20, when she last performed work before going out on a personal leave of absence and filing a new claim for unemployment benefits on 5/30/20.
2. The claimant worked 38 hours a week, earning \$15.50 at the time of her leave.
3. The claimant reduced her role as a Shift Manager to a Barista on 3/23/20 and transferred to another location because she was being bullied by another employee.
4. The claimant requested a leave of absence on 5/28/20 because of her concerns with [COVID-19] and the steps the employer was taking towards the pandemic. The claimant was concerned with the employer reducing labor allowance and cutting cost [sic] leading to an inadequate scheduling of employees to serve the same number of customers. Instead of having four employees working, only three employees would work each shift. There would be two employees working the drinks while the third employee would make the food, leaving no one to clean and sanitize as they worked. They would need to wait until there was down time to clean and sanitize.
5. The claimant did not request a leave of absence sooner than 5/28/20 because she was waiting to see if things would improve with the health and safety conditions at work. Also, the leave was unpaid and she was not sure if she would be able to receive unemployment benefits so financially she needed to work.
6. The claimant expressed her concerns on 5/18/20 to her Store Manager who told the claimant to speak to the District Manager. The claimant spoke to the District Manager on 5/19/20 who redirected her back to the Store Manager. The claimant reached out to the Partner Resource Manager on 5/20/20 who told the claimant she would speak to the Store and District Manager. The claimant gave the Partner Resource Manager time to see change [sic]. On 5/28/20, when the claimant did not see any change to address her concerns, she requested a leave [sic] of absence. The Partner Resource Manager told the claimant she would help her transfer to another location. The claimant remained on a leave until 6/14/20 when she was laid off.
7. The claimant was afraid of bringing the virus home to her 89-year-old grandmother with who [sic] she lived because her grandmother had underlying health conditions. She is being treated for Chronic Lymphocytic Leukemia and Dementia. (Remand Exhibit 5 - Medical Documentation)
8. The claimant has resided with her grandmother since 8/13/19.

9. The employer would have had continuing work available to the claimant had the claimant not requested the leave.
10. The claimant separated from the employer as of 6/14/20 when she was discharge [sic] due to a lack of work.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not "in unemployment," and thus not entitled to benefits, while she was on her leave of absence.

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.

Where the review examiner found the employer had work available and that the claimant failed to work, the review examiner disqualified her from benefits because she was not in total or partial unemployment. The review examiner's conclusion, however, failed to acknowledge that the claimant took this leave of absence due to her concerns about COVID-19, the employer's allegedly inadequate steps to mitigate exposure to the virus, and the possibility that she could transmit the virus to her 89-year old grandmother, with whom she lives and who has underlying health conditions. We remanded this case for the review examiner to take additional evidence regarding the timing of, and the reason for, the claimant's leave of absence. After remand, we conclude that the claimant is entitled to benefits while on her leave of absence.

To alleviate hardships caused by COVID-19, the DUA has promulgated emergency regulations. The DUA's emergency regulations articulate conditions under which a claimant impacted by the COVID-19 pandemic may be eligible for benefits even if they would not otherwise be eligible under G.L. c. 151A, § 29. The relevant portions of these regulations are under 430 CMR 22.03(1), and 23.03(1) which provide, in pertinent part, as follows:

- (a) “Standby” refers to a claimant who is temporarily unemployed because of a lack of work due to COVID 19, with an expected return-to-work date.
- (b) The requirement to search for work is fulfilled so long as the claimant is on standby¹ and takes reasonable measures to maintain contact with the employer.
- (c) The claimant must be available for all hours of suitable work offered by the claimant’s employer.

The emergency regulations also temporarily modified the definition of suitable work²:

In determining whether work is suitable the department will consider whether a claimant has a condition that prevents the claimant from performing the essential functions of the job without a substantial risk to the claimant’s health or safety. . . .

Standby status was initially limited to four weeks automatically and eight weeks at the employer’s request. However, the DUA has waived the standby period, and has determined, as a matter of policy, that a claimant could potentially remain on standby status for the entire period from March 16, 2020, through November 2, 2020. *See* DUA UI Policy and Performance Memorandum 2020.13 (November 2, 2020). Additionally, the DUA has, as a matter of policy, clarified that claimants who attest that they are unemployed due to having been impacted by COVID-19 and intend to return to their former employer are automatically considered to be on standby status. *See id.*

After remand, we believe the consolidated findings show that the claimant was on standby status while on her leave of absence, because she was out of work due to COVID-19. The review examiner found that the claimant requested her leave of absence because she believed the employer had not maintained the staffing levels necessary to clean and sanitize the restaurant where she worked. *See* Consolidated Finding # 4. The claimant raised her concerns with her store manager, the district manager, and the partner resource manager over a period of ten days. When she did not see any results from her complaints, the claimant requested — and was granted — a leave of absence on May 28, 2020. *See* Consolidated Finding # 6.

The claimant’s concerns about possible exposure to COVID-19 at the workplace were driven by the fact that she resides with her 89-year-old grandmother, who is being treated for chronic lymphocytic leukemia and dementia. *See* Consolidated Findings ## 7–8. Moreover, during her leave, she maintained contact with her employer and, apparently, intended to return, but the employer laid her off on June 14, 2020. *See* Consolidated Findings ## 6 and 10.

The review examiner credited the claimant’s testimony that the employer failed to adhere to reasonable safety standards during the pandemic, and a member of the claimant’s household was

¹ The emergency regulations enacted on August 4, 2020 under 430 CMR 23.03(1) included the words “standby status” instead of “standby” in subsection (1)(b) but are otherwise identical to the emergency regulations enacted on March 16, 2020 under 430 CMR 22.03(1).

² COVID-19 Emergency Regulations (Mar. 16 – June 14, 2020), 430 CMR 22.04 and COVID-19 Emergency Regulations (Aug. 4 – Nov. 4, 2020), 430 CMR 23.05.

at increased risk for severe illness from COVID-19 exposure. Pursuant to the emergency regulations and DUA policy, the claimant was relieved of the requirement to accept this work, because she was on standby status, and, under these circumstances, the available work was not suitable.

We, therefore, conclude as a matter of law that the claimant was in unemployment while on a leave of absence from May 28, 2020, through her separation on June 14, 2020, pursuant to G.L. c. 151A, §§ 29(a), 29(b), and 1(r), as well as 430 CMR 22.04 and 23.05.

The review examiner's decision is affirmed in part and reversed in part. The claimant is ineligible for benefits from May 17 through May 27, 2020. The claimant is entitled to receive benefits from May 28, 2020, through June 14, 2020. As noted in the review examiner's initial decision, the claimant's eligibility for benefits after her separation from employment on June 14, 2020, will be adjudicated separately under G.L. c. 151A, §§ 25(e)(1) and 25(e)(2). See Issue ID # 0053 8540 01.



BOSTON, MASSACHUSETTS

DATE OF DECISION - November 24, 2020

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

JPCA/rh