

The claimant was in total unemployment while out on an unpaid leave of absence, because the employer determined when the claimant would take the leave based on its operational needs, and it approved the leave during a month in which there was no work available for the claimant.

**Board of Review
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Issue ID: 0047 6734 29

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 on July 1, 2020, when she began a one-month leave of absence from work. The claim was denied in a determination issued on July 28, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits in which only the claimant participated, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 28, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while on a leave of absence from work and, thus, was disqualified under G.L. c. 151A, §§ 29 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 obtain additional evidence pertaining to the work available to the claimant. Only the claimant participated in 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 not in unemployment while on a leave of absence from work, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the employer did not have work available for the claimant during the month in which she was on the leave of absence.

Findings of Fact

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

1. The claimant worked in Sales for the employer, an airline, from 10/7/14 through 6/30/20, when she last performed work before filing a new claim for unemployment benefits on 7/1/20.
2. The claimant was hired to work full time, earning an annual base salary of \$79,000.
3. The claimant was approved for a voluntary leave of absence from 7/1/20 through 7/30/20. She was expected to return to work and did return to work on 8/3/20.
4. The employer had offered all employees an unpaid leave through their leave of absence program in an attempt to save jobs and due to a lack of work during the economic crisis resulting from the pandemic. The claimant received a letter from the employer to this effect.
5. The claimant and other employees who volunteered for the leave of absence being offered were told when to take the leave based on operational needs of the business. The claimant performed necessary work from 4/1/20 to the end of June. Her leave of absence began on 7/1/20, when the claimant had no work available to her.

Credibility Assessment:

The claimant's testimony that she took the leave of absence during July 2020, because there was no work for her, is deemed credible based on the weight of the evidence, in particular the letter she received from the employer regarding the leave, which indicated the leave was necessary 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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment during her leave of absence, as the employer decided when the claimant was to take the leave, and it chose a month during which it had no work available for the claimant.

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.

The review examiner originally concluded that the claimant was not in unemployment while out of work on a leave of absence during July of 2020. The review examiner arrived at this conclusion after finding that the claimant took a voluntary leave of absence when there was work available for her. Because there was evidence in the record that the employer possibly did not have work available for the claimant when she took the leave of absence, we remanded the case to the review examiner to obtain clarification on this matter. After hearing the claimant’s testimony during the remand hearing and reviewing the documentary evidence in the record that corroborated the claimant’s assertions, the review examiner found credible the claimant’s testimony that there was no work available for her when she took her leave in July of 2020. Since such a determination on a party’s credibility is within the scope of the review examiner’s role as a fact finder, and because her assessment is reasonable in relation to the evidence presented, we will not disturb it on appeal. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

The review examiner specifically found after remand that, due to the lack of work resulting from the pandemic, and in an attempt to save jobs, the employer offered its employees the opportunity to take an unpaid leave of absence. The review examiner also found that although the claimant volunteered to take the leave of absence, the employer alone decided when the claimant would go on the leave, and its decision was based on its operational needs. The employer ultimately chose to have the claimant take her unpaid leave in July of 2020, as it did not have any work available for her at that time. Because the claimant was capable of working and available for work in July of 2020, and the only reason why she took an unpaid leave of absence that month was due to a lack of work, the claimant has met her burden under the statute.

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during the relevant period.

The review examiner's decision is reversed. The claimant is entitled to receive benefits between the weeks ending July 4, 2020, and August 1, 2020, if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - November 24, 2020

Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

SVL/rh