

Because the claimant did not separate from her job, the review examiner improperly disqualified her pursuant to G.L. c. 151A, § 25(e)(1). She was on a leave of absence. However, the claimant is not eligible to receive benefits under §§ 29(a) and 1(r), because she was not able or available to work at all during her leave.

**Board of Review
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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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, effective March 22, 2020. On December 15, 2020, the agency determined that the claimant was eligible to receive unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1). 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 June 15, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 afford the claimant an opportunity to testify. Only the claimant attended the remand hearing. After the review examiner issued her first set of consolidated findings of fact, we remanded the matter again to obtain additional information concerning the claimant's availability and capability of working during a leave of absence. As in the first remand hearing, only the claimant attended the proceeding. Thereafter, the review examiner issued her second set of 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 is not eligible for benefits because she permanently separated from her job for disqualifying reasons pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where, after remand, the evidence shows that the claimant was only on a leave of absence and did not separate from the employer, and that, during that leave, she was unable and unavailable to work.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, issued after the second remand hearing, are set forth below in their entirety:

1. The claimant was employed as a full-time teacher for the employer, an early childcare and education center, beginning on January 9, 2018.
2. The claimant's immediate supervisor was the area manager.
3. The claimant and the area manager communicated through text messages.
4. In March 2020, the employer closed because of the COVID-19 public health emergency.
5. In June 2020, the employer began sending text messages to employees about returning to work on July 6, 2020.
6. The claimant did not want to return to work because she was pregnant and afraid of exposing her unborn child to COVID-19, and did not want to expose her other children, ages 7 and 9.
7. The claimant's children do not have any underlying health conditions placing them at high risk for complications from COVID-19.
8. On July 5, 2020, the claimant emailed a leave of absence form to the area manager. The leave of absence was to end on August 31, 2020, when her children returned to school.
9. The area manager approved the claimant's leave of absence. The leave of absence was unpaid.
10. On August 12, 2020, the claimant texted the area manager that her children would not be returning to in-person school until after the first quarter. The area manager told the claimant she would update the claimant's leave of absence.
11. The claimant was not told by the area manager about a remote learning room provided by the employer for employees' children.
12. On February 4, 2021, the claimant's son was born.
13. After the birth of her son, the claimant needed to rest and recuperate for approximately 2.5 months, or until the end of April 2021.
14. On February 18, 2021, the area manager texted the claimant about her availability to return to work. The claimant told the area manager her children were still remote learning.

15. On March 8, 2021, the claimant texted the area manager about returning to work on April 26, 2021, because her children would be returning to in person school on that date.
16. The claimant returned to work on April 28, 2021.
17. No remote work was available.
18. Between July 5, 2020, and February 4, 2021, the claimant was not capable of work. The claimant was not feeling well and was experiencing palpitations, shortness of breath, and was having trouble sleeping.
19. Between February 4, 2021, and April 28, 2021, the claimant was not capable of work. Although the claimant's doctor did not formally restrict the claimant from working, the claimant was resting and recuperating from the birth of her son.
20. Between July 5, 2020, and April 28, 2021, the claimant was not available for work because she did not have daycare during the summer months, and because her school aged children were learning remotely September 2020 through April 26, 2021, due to the pandemic.

Credibility Assessment:

In this case, it was undisputed that the claimant did not return to work on July 6, 2020, when recalled. The dispute between the parties was whether the claimant requested a leave of absence and whether the claimant was told by the area manager about a remote learning room. The area manager did not testify at either hearing, and the co-administrator provided hearsay testimony at the original hearing that the claimant did not request a leave of absence and that she was offered the opportunity to bring her children to work and use a remote learning room. In contrast, during the remand hearing, the claimant offered direct testimony that she requested and was granted a leave of absence and provided text messages corroborating her request for a leave of absence, as well as a copy of the leave of absence form approved and signed by the area manager. The claimant credibly testified that she was not told by the area manager about a remote learning room. As a result, the review examiner finds the testimony of the claimant more credible than the testimony of the co-administrator.

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

G.L. c. 151A, § 25(e)(1), applies in the circumstances of this case. Rather, because the consolidated findings indicate that the claimant did not permanently separate from her job, G.L. c. 151A, §§ 29 and 1(r), apply.

As noted above, both the agency and the review examiner applied the separation provisions of Chapter 151A to determine the claimant's eligibility for benefits in this case. However, the review examiner's consolidated findings of fact establish that the claimant did not permanently separate from her job. The review examiner found that, on July 5, 2020, the claimant requested a leave of absence with the employer's area manager, who initially approved the request through August 31, 2020. Consolidated Findings ## 8 and 9. The claimant's leave of absence was updated on August 12, 2020, when she reported to the area manager that her children would not be returning to in-person school until after the first quarter. Consolidated Finding # 10. The consolidated findings further show that the claimant contacted the area manager on March 8, 2021, about returning to work, and that she did return to work on April 28, 2021. Consolidated Findings ## 15 and 16.

Rather than a separation, the record shows that the claimant took a leave of absence beginning July 5, 2020. Nothing in the findings suggests that she quit her job. Nothing in the findings indicates that the claimant told the employer that she was not going to return. Nothing in the findings states that the employer told the claimant that she could not work or return to work at any time. Based on the findings, we conclude that the review examiner's original decision, which concluded that the claimant quit her job, is not supported by the record. Because the claimant maintained some kind of employment relationship with the employer after July 5, 2020, the issue to be addressed is whether the claimant was in unemployment within the meaning of the unemployment statute after that date.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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. . . .

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“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

Although the claimant stopped working in March, 2020, the review examiner's decision disqualifies her as of the week beginning July 5, 2020, because that is when she declined the employer's offer to return to work. She did not return to work until April 28, 2021. Since she did not work for several months after July 5, 2020, the question to be addressed is whether the claimant was in total unemployment.

To be in total unemployment, a claimant must be “capable and available for work,” but “unable to obtain any suitable work.” Here, the claimant’s direct testimony was that she was not able or available to work at all from July 5, 2020, through April 28, 2021. *See* Consolidated Findings ## 18–20. Thus, she was not in unemployment during this period.

The record indicates that, on April 28, 2021, the claimant returned to work on a part-time basis.¹ Pursuant to the definition of partial unemployment, she is eligible for benefits during this week and in any subsequent weeks only if she remained able and available for full-time work.²

We, therefore, conclude as a matter of law that the review examiner’s decision to apply G.L. c. 151A, § 25(e), was an error of law, because the claimant had not separated from employment. We further conclude that, pursuant to G.L. c. 151A, §§ 29(a) and 1(r)(2), the claimant was not in unemployment for the period of time she was not able or available to work.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from July 5, 2020, through April 24, 2021. The claimant is entitled to receive benefits beginning April 25, 2021, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 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.

¹ The claimant’s return to work on a part-time basis, while not explicitly incorporated into the review examiner’s findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

² The record does not include sufficient information from which to determine whether the claimant met the definition of partial unemployment thereafter. Because the DUA’s electronic record-keeping system, UI Online, shows that the claimant stopped certifying for benefits after the week ending April 17, 2021, we decline to pursue any further inquiry and have placed a disqualification end date as of the week ending April 24, 2021.

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.

JMO/rh