

The claimant, who was on a leave of absence, was in total unemployment under G.L. c. 151A, §§ 29 and 1(r), after she took reasonable steps to notify the employer of her capability and availability, but no work was offered to her.

**Board of Review
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Issue ID: 0051 9195 88

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 took a leave of absence from her position with the employer on November 19, 2019. On March 23, 2021, the DUA issued a Notice of Disqualification denying benefits to the claimant, because she was on an indefinite medical leave of absence. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and denied benefits through September 12, 2020. The review examiner rendered her decision on April 22, 2021. 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 and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

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, is supported by substantial and credible evidence and is free from error of law, where the claimant mailed her medical release to the employer during the week ending March 21, 2020, but the employer did not offer work to the claimant until September, 2020.

Findings of Fact

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

1. The claimant worked as a Bus Monitor for the employer, a transportation agency, from 4/13/19 through 11/19/19, when she last performed work before going out on a medical leave of absence.
2. The claimant was approved for a medical leave of absence from 11/19/19 and thereafter. There was no agreed date to return. The claimant was having carpal tunnel surgery on her right hand.
3. The surgery took place on 11/20/19. Her doctor kept her out of work until 3/20/20, due to complications.
4. The claimant mailed medical documentation from her doctor to the employer and attempted to contact the employer to return to work on 3/17/20, 3/18/20 and 3/20/20, to no avail. She made no further attempt to return to work thereafter.
5. Human Resource was still working during this time. The employer never received any medical documentation indicating she was capable of returning.
6. The Dispatcher contacted the claimant at the start of the new school year in September of 2020 to see if she planned on returning to work. The claimant returned to work during the week of 9/13/20.
7. The employer would have had continuing work available as of 7/1/20 and thereafter to the claimant had the claimant returned from the leave.
8. Between 4/26/20 and 7/1/20, the employer had no work and employees were furloughed. Because the employer did not receive any information that the claimant could return, she remained on a medical leave status during the time of the furlough.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 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 after she mailed her medical release to the employer during the week ending March 21, 2020.

The issue before the Board is whether the claimant is eligible for benefits under G.L. c. 151A, § 29, which authorizes that 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 denied benefits to the claimant, reasoning that, because the claimant never contacted the employer again after attempting to return to work on March 20, 2020, she continued to be on a leave of absence and unavailable for work. We disagree with the review examiner’s conclusion that the claimant was not available for work after March 20, 2020.

The review examiner found that the employer medically cleared the claimant to return to work on March 20, 2020, and the claimant mailed her medical documentation to the employer. The review examiner further found that the claimant attempted to contact the employer to return to work on March 17, 2020, March 18, 2020, and March 20, 2020. The claimant specifically testified that she called the employer on the three days above, but she was unable to get through to anyone.¹ The claimant also testified that, because schools had closed due to the pandemic, she assumed that the employer had also closed and, therefore, did not take further steps to contact the employer.

The review examiner found that the employer did not receive the medical documentation the claimant mailed to its office. It is unknown why the claimant’s letter was not received by the employer, but, regardless of how it was lost, we will not penalize the claimant for that unfortunate circumstance. Based on the totality of the evidence in the record, we believe the claimant took reasonable steps to notify the employer that she was capable of working and available for work as of March 20, 2020, as she not only promptly mailed her medical release to the employer, but she also followed up that step by calling the employer over the course of several days.

Although the better course of action might have been for the claimant to continue attempting to reach the employer after March 20th, given that Massachusetts students had been sent home that month, it was not unreasonable for the claimant to assume that the employer, a transportation company, had closed, and that was the reason she could not get through to them on the phone. The reasonability of the claimant’s belief is further supported by the fact that, on or about March 13, 2020, the employer furloughed many of its employees, and the claimant would have been included in that group had she not been on a leave of absence.

Because the claimant was able and available for work as of March 20, 2020, and she took reasonable steps to notify the employer of her availability at that time but was unable to obtain

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

work from the employer until September 13, 2020, she was in total unemployment during this portion of her leave of absence, as meant under G.L. c. 151A, §§ 29(a) and 1(r). See Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980).

The review examiner's decision is reversed. The claimant is entitled to receive benefits between the weeks ending March 28, 2020, and September 12, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2021



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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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