

While the president of a corporation performed only a couple of hours of unpaid work for his business after it was closed due to COVID-19, he was eligible for benefits under G.L. c. 151A, §§ 29 and 1(r). However, once he began working full-time hours, even though unpaid, he was deemed to be unavailable for other, paid full-time work and, thus, he did not meet the availability requirements to be in total or partial unemployment under the statute.

**Board of Review
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Issue ID: 0057 9775 06

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 29, 2020, which was denied in a determination issued on December 12, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 21, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and, thus, he was not eligible for benefits. 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 is disqualified under G.L. c. 151A, §§ 29 and 1(r), because, for a period of time, he was working full-time hours and because throughout his claim, he failed to actively search for new employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant is the President of a corporation organized in Massachusetts for the purpose of running a printing business.

2. The claimant worked fifty to sixty hours per week and earned approximately \$7,000 per week in 2019.
3. The corporation's main client is a university.
4. The corporation had eight employees before shutting down due to the COVID-19 pandemic.
5. The claimant filed an unemployment insurance claim and obtained an effective date of his claim of 3/29/20.
6. The claimant spent approximately two hours per week performing tasks for the corporation from 3/29/20 to 5/2/20, while the business was shut down. He was unable to pay himself during that time.
7. The claimant started working full-time for the corporation on 5/3/20. The corporation secured a PPP loan and the claimant was able to pay himself again.
8. The claimant re-opened his claim effective 11/8/20.
9. The claimant continued to work full-time after re-opening his claim. He brought back three employees, who he pays, but he is unable to pay himself.
10. The claimant has not searched for work elsewhere since he filed the above claim.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits during the entire period of his claim.

To be eligible for unemployment benefits, the claimant must show that he is in a state of unemployment within the meaning of the statute. 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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(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. . . .

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. In this case, because the claimant seeks benefits from March 29, 2020, the effective date of his claim, through the present, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

In March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.¹ The U.S. Department of Labor has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual’s circumstances.²

The review examiner disqualified the claimant for two reasons. He did not actively search for work outside of his own business, and, for a period of time, he was working full-time. *See* Findings of Fact ## 7–10. However, in accordance with the EUISSA and the DOL guidance, the DUA has temporarily waived the work search requirements until the COVID-19 emergency measures have been lifted.³ Under this policy, the work search requirements have been waived for all claimants seeking benefits during the pandemic crisis, as long as such claimants remain ready to return to work once the emergency pandemic measures have been lifted. This policy is effective retroactively to the beginning of the pandemic emergency on March 8, 2020.⁴

Given the temporary work search waiver and the claimant’s demonstrated intent to return to full employment in his business, the claimant may not be disqualified because he did not actively search for new employment since the beginning of his claim. However, we must also consider whether, while devoting efforts to rebuild that business, the claimant satisfied the requirement that he be available for suitable work.

In the first few weeks of his claim, from March 29 through May 2, 2020, the claimant’s business was shut down. During that time, he spent only about two hours per week working on tasks for the company and he was not getting paid for his work. *See* Finding of Fact # 6. Because there is nothing in the record to suggest that the claimant was not available for other full-time, suitable work if it had been offered to him, we are satisfied that the claimant met the requirements for total unemployment under G.L. c. 151A, § 1(r)(2).

¹ *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

² *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

³ *See* DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2.

⁴ *See* UIPPP 2021.02 (Jan. 22, 2021), p. 2.

However, beginning May 3, 2020, the claimant started working full-time again for the corporation. *See* Finding of Fact # 7. This continued when he re-opened his claim on November 8, 2020. *See* Findings of Fact ## 8 and 9. Although he was not getting paid in November, he was working full time for his business. *See* Finding of Fact # 9. A claimant is not considered to be available for other, paid full-time work, if he is devoting a major portion of his time to his own business. *Compare* Board of Review Decision 0018 1355 49 (Aug. 2, 2016) (where claimant devoted a minor portion of her time to self-employment, limited to weekends and evenings, held her self-employment did not interfere with her employability or availability to work full-time elsewhere)⁵; *see also* DUA Adjudication Handbook, Chap. 4, p. 18. At full-time hours, it is fair to say the claimant was devoting a major portion of his time to his own unpaid business and that he was not available for other suitable work.

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 weeks of his claim where he was working only a couple of hours in self-employment. We further conclude that he was neither in total nor partial unemployment under these sections of law, when he was devoting full-time hours to his business.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits during the period March 29 through May 2, 2020, if otherwise eligible. He is denied benefits beginning May 3, 2020, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 31, 2021



Charlene A. Stawicki, Esq.
Chairman



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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)**

⁵ Board of Review Decision 0018 1355 49 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

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.

AB/rh