

During the period that the claimant was out of work on an informal leave, she was not in unemployment pursuant to G.L. c. 151A, §§ 29(a), (b), and 1(r), while working full-time or when receiving her full-time wages.

**Board of Review
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Issue ID: 0066 8845 34

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA with an effective date of March 29, 2020. On April 1, 2021, the agency determined that the claimant was not entitled to benefits under G.L. c. 151A, § 29(a) and 1(r). The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 4, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29(a), (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 remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's schedule after returning to work. 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, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that the claimant was either working full-time or received vacation pay during the weeks at issue.

Findings of Fact

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

1. The claimant opened a claim for benefits with an effective date of March 29, 2020.

2. The claimant was employed by the employer from 2014 until she separated from the employer in [sic] September 16, 2020.
3. The claimant was furloughed from the employer on or about April 20 or April 23, 2020.
4. On June 12, 2020, the employer recalled the claimant to return to work on June 22, 2020.
5. The claimant did not return to work because she was travelling to California to visit her sister and brother-in law who was ill. The claimant travelled by car to California on June 4, 2020.
6. Prior to June 12, 2020, the claimant did not notify the employer that she was traveling out-of-state.
7. The claimant's brother-in-law passed away in California on June 11, 2020.
8. The claimant returned to Massachusetts at 1:00 a.m. on June 29, 2020.
9. On July 3, 2020, the claimant met with the employer. The employer issued a final written warning to the claimant for failing to return to work when recalled after the furlough.
10. On July 6, 2020, the claimant returned to full-time work for the employer.
11. August 30, 2020, was the claimant's last physical day at work.
12. August 30, 2020, was the claimant's last physical day at work because she had to drive her daughter to school in Rhode Island on September 1, 2020.
13. On August 1, 2020, Massachusetts required those who travelled out of state to quarantine for 14 days upon return or produce a negative result for a [COVID]-19 test administered up to 72 hours prior to arrival to [sic] Massachusetts.
14. The claimant requested time off from the employer from August 31, 2020, through September 2, 2020, in order to bring her daughter to school. The employer extended the claimant's leave request to September 6, 2020, to allow the claimant time to conform to the travel restrictions.
15. The employer expected the claimant to return to work on September 7, 2020.
16. On September 1, 2020, the claimant drove her daughter to college in Rhode Island. She returned to her home on the same day.

17. The employer would not allow the claimant to return to work until she was tested for COVID-19.
18. On September 2, 2020, the claimant was tested for COVID-19. The testing site informed the claimant that they would email or call her with the result.
19. On September 2, 2020, the claimant notified the employer that the testing site did not give her the result.
20. On September 4, 2020, the claimant drove to the testing site for her result. The site did not have the claimant's test result.
21. On September 4, 2020, the claimant asked the employer whether she could use her PTO time since the testing site did not yet provide her COVID-19 test result.
22. On September 5, 2020, the staff at the test site informed the claimant that she was negative for COVID-19 but would have to wait for an email. The claimant requested a medical note because the employer required a note indicating the result of the test.
23. The claimant notified the employer that her test was negative. The employer informed the claimant that she was still required to provide a written note of her result.
24. On September 9, 2020, September 10, 2020, and September 11, 2020, the employer asked [the] claimant to get another test.
25. A new test would cost \$175.00. The claimant did not have the funds to pay for retesting.
26. On September 11, 2020, the claimant informed the employer that she did not have money to pay for a test because she paid for her daughter's college expenses.
27. The claimant requested to wait until her quarantine period ended on September 15, 2020, to return to work. The employer granted the claimant's request.
28. The employer informed the claimant to report to a meeting at 10:30 a.m. on September 16, 2020, instead of her regular start time.
29. On September 16, 2020, at 10:30 a.m., the employer met with the claimant. The employer discharged the claimant at the meeting. The effective date of the discharge is September 17, 2020.

30. From September 3, 2020, through September 16, 2020, the claimant was available to work.
31. From August 31, 2020, through September 16, 2020, the claimant received vacation pay from the employer.
32. The claimant's rate of pay was \$16.89 per hour. The claimant worked about 40 hours per week for the employer.
33. The claimant does not recall what her exact earnings were for the weeks ending September 5, 2020, September 12, 2020, and September 19, 2020.

Credibility Assessment:

The employer did not attend the remand hearing. The claimant provided direct testimony regarding her dates of employment that was corroborated by the documentation on the record. The claimant's testimony was direct and consistent. It is concluded that the claimant's testimony is credible.

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.

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.

Because the review examiner found that the claimant was working full-time for the employer between July 6, 2020, and August 30, 2020, she was neither in total nor partial unemployment during the weeks ending July 11, 2020, through August 29, 2020. *See Consolidated Findings ## 10–11.*

The only remaining question is whether the claimant was in unemployment and eligible for benefits during the two weeks ending September 5, 2020, and September 12, 2020. The review examiner found that, although the claimant was not reporting to work for the employer after August 30, 2020, her employment was not terminated until September 17, 2020. *See Consolidated Findings ## 11 and 29.* The record shows that the claimant was on what appears to be an informal leave from work between August 30th and September 16th, while she took care of some personal matters related to her daughter's college enrollment and COVID-19 travel restrictions. *See Consolidated Findings ## 14–27.*

The claimant testified that she requested to be paid vacation time for the days in which she was off from work between August 31, 2020, and September 17, 2020, and the employer granted this request. *See Consolidated Findings ## 21 and 31.* Because the claimant was still employed during this period, any vacation pay received for these weeks was during a period of regular employment and is considered remuneration and disqualifying under G.L. c. 151A, § 1(r)(3). *See DUA Adjudication Handbook, Chapter 9, § 3(B)(5).* The claimant testified that she did not know the exact amount of vacation pay that she received during these weeks, and the employer was not in attendance at the remand hearing to help clarify the claimant's confusion on the matter. *See Consolidated Finding # 33.* It is the claimant's burden to show that she was not paid disqualifying remuneration, and she has failed to show that this was the case, even though she had ample notice and opportunity to produce documentation, such as bank statements and pay stubs, showing her earnings from this employer. *See 430 CMR 4.41(4).* Because the claimant is telling us that she was paid wages during the weeks ending September 5, 2020, and September 12, 2020, but she has not met her burden of showing the exact amount, we must assume that she received her full-time wages during this period, which disqualifies her completely under G.L. c. 151A, §§ 29(a), (b), and 1(r).

We, therefore, conclude as a matter of law that the claimant was not in unemployment during the period at issue, as meant under G.L. c. 151A, §§ 29(a), (b), and 1(r).

The review examiner's decision is affirmed. The claimant is denied benefits for the weeks ending July 11, 2020, through September 12, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 19, 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.

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