

Following remand, the review examiner found that the claimant was not capable of, or available for, work during the period between October 1, 2021, and December 18, 2021, because she was on a medical leave of absence and seeking medical treatment outside of the country. She was, therefore, not entitled to benefits during that period because she was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0074 2935 91

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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, which was denied in a determination issued on June 11, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 2, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in total unemployment during the period between September 29, 2021, and December 18, 2021, and, thus, was not disqualified under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence about the claimant's unemployment status during the period on appeal. Only the employer attended the remand hearing. Thereafter, the review examiner issued his 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 in total unemployment during the period on appeal because the employer did not have work available for the claimant even though she was capable of and available for full-time work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant was a full-time delivery associate with the employer, a delivery service, from April 7, 2021, through December 18, 2021, when she separated from her employment.
2. The claimant's direct supervisor was the chief executive officer (CEO).
3. The claimant's last physical day of employment was September 30, 2021.
4. The claimant took an unpaid medical leave of absence from the employer beginning October 1, 2021, due to medical issues.
5. The claimant was unable to seek assistance in the United States with regards to her medical issues, so she travelled to the Dominican Republic for medical assistance.
6. There was no date by which the claimant was expected to return to work.
7. The claimant's brother, who was also an employee of the employer, requested and was approved [sic] an unpaid leave of absence to accompany the claimant to the Dominican Republic.
8. On October 31, 2021, at 12:33 p.m., the CEO sent the claimant a message on a phone messaging application stating, "How are you? I hope you are getting the help you need in the DR (Dominican Republic). Do let me know how things are come along for you."
9. On October 31, 2021, at 3:50 p.m., the claimant sent a response to the CEO stating, "Thank you some much everything is going ok feeling better thanks god."
10. The claimant and employer did not have further communication following October 31, 2021.
11. The claimant did not return to her employment.
12. The claimant's brother did not return to his employment.
13. Between October 1, 2021, and December 18, 2021, the claimant was not available to work shifts for the employer.
14. Between October 1, 2021, and December 18, 2021, the claimant was not medically able to work.
15. On December 18, 2021, the employer discharged the claimant from her employment due to not returning from her leave of absence.

Credibility Assessment:

Though the claimant asserted during the original hearing that she did not take a leave of absence, did not leave the country, did not have a medical illness, and was informed work was not available as of September 1, 2021, due to the lack of a delivery truck, this is not credible. The CEO offered specific and detailed testimony that the claimant requested and was approved for an unpaid medical leave of absence to travel to the Dominican Republic to seek medical assistance. The CEO was also clear during the remand hearing that the claimant's brother, who was also an employee, requested and was granted an unpaid leave of absence to accompany the claimant to the Dominican Republic. The CEO's testimony is deemed more credible than that of the claimant given that it was corroborated by the October 31, 2021, message confirming the claimant was in the Dominican Republic seeking help. The CEO's testimony and documentation surrounding the claimant's last physical day of employment is more credible than that of the claimant.

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 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 entitled to benefits during the period on appeal.

To be eligible for unemployment benefits, the claimant must show that she 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. Partial unemployment is defined by 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....

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.

In order to be eligible for benefits while on a leave of absence, a claimant must still be physically capable of, available for, and actively seeking full-time work. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980).

The claimant testified that the employer did not offer her any work between October 1, 2021, and December 18, 2021, even though she was capable of and available for full-time work. The review examiner rejected the claimant’s testimony as not credible, because the employer provided text messages between the claimant and her supervisor corroborating the employer’s contention that the claimant was seeking medical treatment outside of the country during that same period. *See Consolidated Findings ## 8 and 9.* Such assessments are within the scope of the fact finder’s role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Upon review of the record, we have accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

The claimant requested and was granted a medical leave of absence beginning October 1, 2021, to seek treatment for a medical condition outside of the United States. Consolidated Findings ## 4–5. While the claimant was seeking treatment outside of the country, she was not capable of or available to work with the instant employer while on medical leave. Consolidated Findings ## 13–15. Absent any evidence that the claimant completed her treatment and returned to the United States prior to December 18, 2021, we do not believe that the record supports a conclusion that the claimant’s capability or availability for work changed prior to the date she was discharged. *See Consolidated Findings ## 11 and 15.*

We, therefore, conclude as a matter of law that the claimant was not unemployed within the meaning of G.L. c. 151A, §§ 29 and 1(r), between October 3, 2021, and December 18, 2021, because she was not capable of or available for work.

The review examiner’s decision is reversed. The claimant is denied benefits for the weeks of October 3, 2021, through December 18, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 21, 2023



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

LSW/rh