

As the claimant was medically cleared for work prior to the effective date of her claim and had begun searching for full-time work when she was laid off from her second employer, the record indicates she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r). However, there is insufficient evidence in the record to show the claimant was no longer in partial unemployment after accepting new work in early May 2022. Therefore, the review examiner erred in disqualifying the claimant as of April 30, 2022.

**Board of Review
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Issue ID: 0075 7030 83

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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, effective January 30, 2022. She was denied benefits beginning February 27, 2022, in a determination issued on April 13, 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 modified the agency's initial determination and awarded benefits only for the period between February 27, 2022, and April 30, 2022, in a decision rendered on August 9, 2022. We accepted the employer's application for review.

Benefits were awarded for the period between February 27, 2022, and April 30, 2022, after the review examiner determined that the claimant was in total unemployment during that nine-week period 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 information about the claimant's employment status during the period at issue. Only the employer attended 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 in total unemployment during the period between February 27, 2022, and April 30, 2022, because she was capable of work but was not allowed to return to her position with the instant employer, 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 worked full-time as a Personal Care Assistant (PCA) for employer A beginning on December 20, 2020. She typically worked 4 days a week, from 6:00 p.m. to 6:00 a.m.
2. The claimant also worked part-time as a washer for employer B.
3. Employer A's office manager ("office manager") knew the claimant had other employment.
4. On July 7, 2021, the claimant scheduled a knee surgery for September 10, 2021, that would require her to take 12 to 16 weeks off from work.
5. On July 7, 2021, the claimant reached out to the office manager and requested an unpaid leave of absence which was approved. The claimant was scheduled to start her leave of absence on September 10, 2021 and return to work on December 10, 2021.
6. The claimant was medically cleared to return to work on December 10, 2021.
7. The claimant was not laid off and no separation from employment occurred with employer A on December 10, 2021. The claimant remained employed by employer A and could have continued to request work.
8. At 1:35 p.m. on December 11, 2021, the claimant called the office manager and left a voicemail stating that she was cleared to return to work.
9. On December 13, 2021, the office manager reached out to the claimant's previous client to schedule care. The client told the office manager that they did not want to continue working with the claimant.
10. On or around December 13, 2021, the claimant returned to work part time for employer B, as they made accommodations and allowed her to sit down throughout her work shift so that she could rest her knee. Each shift for employer B was 6-8 hours.
11. On December 14, 2021, the office manager sent the claimant a text message to offer her work with a new client in Boxford, MA. The schedule would be Monday through Thursday from 7:30 a.m. to 5:00 p.m. The claimant did not respond to or accept the work offer.
12. On January 20, 2022, the claimant called the office manager to request her W-2 form. The claimant did not request or inquire about available work.
13. On an unknown date in early February 2022, employer B laid off the claimant due to lack of work.

14. The claimant filed an unemployment claim on February 11, 2022, with an effective date of January 30, 2022.
15. The claimant did not search for work between December 10, 2021 and early February 2022.
16. After the claimant was laid off by employer B in early February 2022, the claimant began searching for full time work.
17. On March 22, 2022, the claimant sent a text message to the office manager asking to speak about her unemployment claim. The claimant did not request or inquire about available work.
18. In early May 2022, the claimant started working as a PCA for a new employer with a schedule of 25 hours per week.

Credibility Assessment:

After the conclusion of the hearings, the office manager's testimony is deemed more credible than that of the claimant regarding the claimant's employment with employer A. The claimant's testimony during the original hearing regarding her employment with Employer A was vague and uncorroborated. In the original hearing, the claimant alleged that she was laid off by employer A on December 10, 2021, yet she provided no details or supporting documentation. When asked when she was laid off by employer A, she stated she did not "remember the exact date." During the initial hearing, the claimant also failed to provide detailed information regarding her communication with employer A during the relevant time. On the contrary, the office manager provided specific details pertaining to her conversations with the claimant and read multiple text messages into the record which support her testimony that the claimant's employment did not end on December 10, 2021; that the claimant contacted the office manager on December 11, 2021 regarding clearance to return to work; that work was offered to the claimant on December 14, 2021; and that the claimant continued to contact the employer but never inquired about available work. It is not reasonable that an individual whose employment ended on 12/10/2021 would continue to be in contact with their former employer about returning to work.

Since the claimant maintained that the employer never offered her work and the office manager did not have knowledge or information as to why the claimant did not accept or respond to the work offer, no finding of fact was made regarding the reason for the claimant's refusal to accept or respond to employer A's offer.

The claimant's testimony regarding her employment with employer B remains unrefuted and thus, is deemed credible. The office manager testified that she was aware that the claimant had other employment but did not have any further information regarding that employment.

Given that the claimant did not participate in the remand hearing, findings of fact could not be made about the specific dates the claimant worked for employer B between December 13, 2021 and her layoff in early February 2022; the claimant's gross wages each week she worked for employer B; or how frequently she was searching for work after the layoff from employer B, because the office manager did not have that information to provide.

Ruling of the Board

In accordance with our statutory obligation, we review 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. As discussed more fully below, while we agree with the review examiner's legal conclusion that the claimant was in unemployment as of February 27, 2022, we do not believe the record supports a conclusion that the claimant was no longer in unemployment as of April 30, 2022.

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. 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.

Thus, 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.

The claimant was medically cleared to return to work on December 10, 2021, after recovering from surgery on her knee. Consolidated Findings ## 4–6. As the claimant was laid off from her part-time position with her other employer in the beginning of February, 2022, and subsequently began searching for full-time work, we can reasonably infer that she no longer had any restrictions on her capability or availability for full-time work as of February 27, 2022. Consolidated Findings ## 13 and 16. Accordingly, we believe the record supports a conclusion that the claimant was capable of, available for, and actively seeking work within the meaning of the above provisions as of February 27, 2022. *See* Consolidated Finding # 16.

As the claimant accepted new part-time employment with a different employer at the beginning of May, 2022, the record indicates that her unemployment status may have changed. *See* Consolidated Finding # 13. However, there is insufficient evidence in the record to conclude that the claimant was not capable of, available for, and actively seeking full-time work after April 30, 2022. Accordingly, we believe the record does not support the review examiner's conclusion that the claimant was no longer in partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), as of April 30, 2022.

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), beginning February 27, 2022, and indefinitely thereafter.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week of February 27, 2022, and for subsequent weeks if otherwise eligible.

N.B.: The record indicates that the claimant's unemployment status may have changed on or after April 30, 2022. For this reason, we are asking the agency to investigate the claimant's unemployment status under the provisions of G.L. c. 151A, §§ 29 and 1(r), as of that date.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 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