

The claimant was placed on a leave of absence after sustaining a foot injury that precluded her from working as a cook because she could not stand for eight hours straight. However, she could perform other suitable work that did not require her to be on her feet for eight hours at a time. As she was also searching for full-time work that met these restrictions, she was in total unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0076 6274 02

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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 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 affirmed the agency's initial determination and denied benefits in a decision rendered on August 2, 2022. 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 the law and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 from the instant employer because she was unable perform her duties as a cook due to a foot injury that prevented her from standing for eight hours at a time, 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 works as a cook for the employer, a health care services company. She began work for the employer in the early 2000s. She works full-time and earns \$22.36 per hour.
2. The claimant's duties require her to stand for as many as eight hours daily.

3. On August 14, 2021, the claimant injured her foot in a non-work-related accident.
4. The claimant informed the employer of her injury and remained out of work.
5. The claimant received payments through Paid Family and Medical Leave (PFML) until February 28, 2022.
6. The claimant's physician informed her that she was not ready to return to work because she could not stand for eight hours each day.
7. The claimant provided the employer with notes excusing her from work through September 2022.
8. The claimant is looking for work where she will not have to stand for eight hours daily.
9. The claimant did not inform the employer she was able to work at a job where she would not be required to stand for eight hours each day. She did not request any accommodation from the employer.
10. The employer continues to hold the claimant's job for her.
11. On May 13, 2022, the DUA sent the claimant a Notice of Disqualification under Section 29(a) and 1(r) of the Law for the period beginning October 15, 2021, and indefinitely thereafter. The claimant's appeal is from this Notice.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 9 that states the claimant failed to inform the employer that she was capable of working a job that did not require her to stand for eight hours as inconsistent with both the evidence of record and the other enumerated findings. In adopting the remaining findings, we deem 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 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. 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.

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. They may meet these requirements, even though they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980).

The review examiner concluded that the claimant was not in unemployment, because she had not informed her employer of any medical restrictions on her ability to work and had not requested any accommodation for those restrictions. We believe his decision is both inconsistent with the evidence of record and a misapplication of the law.

Following her injury, the claimant provided her employer with notice from her doctor explaining that she was unable to continue working in her current position. Finding of Fact # 7. Since going on leave, the claimant has been in regular contact with her employer in anticipation of returning to her position as a cook once she receives medical clearance.¹ Based on these communications, the employer has held her position open in anticipation for her return to work. *See* Finding of Fact # 10. Accordingly, the record shows that the review examiner erred in finding that the claimant failed to notify her employer of her physical limitations.

Further, the review examiner misapplied the law by finding the claimant ineligible for benefits on the grounds that she had failed to request any accommodations from her employer. Under these circumstances, such a request is not a prerequisite to establish eligibility for benefits. The law requires only that a claimant be capable of, available for, and actively seeking suitable work. G.L. c. 151A, § 1(r)(2).

While the claimant’s foot injury precluded her from working her job with the instant employer, she did not have any medical restrictions on her ability to work other jobs that did not have the same physical requirements. *See* Findings of Fact ## 6 and 8. The claimant explained that her doctor had cleared her for full-time work so long as she was able to sit down periodically throughout her shift.² Pursuant to this instruction, the claimant was actively seeking work that

¹ The claimant’s uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

² The claimant’s uncontested testimony in this regard is also part of the unchallenged evidence introduced at the hearing and placed in the record.

accommodated her physical limitations. Finding of Fact # 8. As there was no evidence suggesting the claimant was otherwise unavailable for work, we believe the record establishes that the claimant was capable of, available for, and actively seeking suitable work while on a leave of absence from the instant employer.

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 October 15, 2021.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of October 15, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - September [19, 2022]

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