

The claimant was not in unemployment under G.L. c. 151A, §§ 29 and 1(r), during the week of May 28, 2023, because she received remuneration in the form of vacation pay during a period of regular employment for that week. Nor was she eligible the following week, the week of June 4, 2023, because she was not capable of or available for work while seeking treatment at an inpatient detoxification facility.

**Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0080 8486 90

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 separated from her position with the employer on June 9, 2023. She filed a claim for unemployment benefits with the DUA, effective May 28, 2023, which was denied in a determination issued on July 29, 2023. 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 August 19, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). 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 and eligibility for benefits under G.L. c. 151A, §§ 29 and 1(r), prior to the date of her separation. 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 resigned for urgent, compelling, and necessitous reasons because she separated from her employment in order to attend a residential treatment program for alcoholism, 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. In December of 2022, the claimant's father passed away. The claimant began drinking alcohol after her father passed away.
2. The claimant opened a claim for benefits with an effective date of May 28, 2023.
3. The claimant was employed by the employer from September 12, 2018, until she separated from the employer on June 9, 2023.
4. The claimant's last position with the employer was foreman.
5. The claimant was employed full-time and earned \$37.42 per hour.
6. The employer's Owner was the claimant's direct supervisor. While on job sites, the claimant reports to a superintendent.
7. May 25, 2023, was the claimant's last physical day at work.
8. On May 26, 2023, the claimant was scheduled to report to work late due to a prescheduled medical appointment.
9. On May 26, 2023, the superintendent sent several text messages throughout the day to meet with the claimant. During at least three attempts to meet the claimant at her stated work location, the claimant replied that she had just left the work location. The superintendent could never find the claimant at a work location on May 26, 2023.
10. On May 30, 2023, the superintendent emailed the employer's Director of People and Culture (Director) that he did not believe the claimant reported to work at any time on May 26, 2023.
11. On May 30, 2023, the claimant called out sick from work due to her son's illness.
12. On May 30, 2023, the Director asked the claimant's co-worker whether the claimant was at the work locations on May 26, 2023. The co-worker replied that the claimant did not report to work on May 26, 2023.
13. On May 31, 2023, the Director contacted the claimant and asked her about her work on May 26, 2023. The claimant replied that she did work on May 26, 2023, moving signs and closing down a site. The Director informed the claimant that her co-worker stated that she did not report to work on May 26, 2023. At that point, the claimant admitted that she might not have worked on that day. The claimant requested to use vacation time for May 26, 2023.
14. The Director informed the Owner that the claimant had lied about her whereabouts on May 26, 2023.

15. The claimant had the employer's vehicle and business phone in her possession.
16. On May 31, 2023, the Owner informed the claimant that he would be retrieving the employer's vehicle and phone from her possession. The Owner informed the claimant that the Director would inform her of the next steps.
17. On or about June 1, 2023, the employer retrieved the employer's vehicle and phone from the claimant's home.
18. On June 1, 2023, the claimant sent an email to the Director asking about the next steps. The director replied that she would contact the claimant.
19. On June 4, 2023, the claimant informed the Director that she had [been] "falling off the wagon," that she did not remember anything before May 31, and would be reporting to a detox facility.
20. On June 9, 2023, the Director contacted the claimant while she was in a detox facility. The claimant informed the Director that she did not recall anything that happened prior to May 31, 2023. The claimant indicated that she did not recall conversations with her supervisor on May 26, 2023. The claimant indicated that she did not think she would return to work for the employer.
21. Neither on June 9, 2023, nor on any other occasion in May or June of 2023, did the claimant request a leave of absence from the employer.
22. In April 2023, on at least three occasions, the employer offered the claimant a leave of absence due to a domestic violence incident. The claimant declined each offer.
23. From May 28, 2023, through June 9, 2023, the claimant was still employed with the employer, even though she performed no services.
24. The claimant received vacation pay from May 29, 2023, through June 2, 2023.
25. On June 9, 2023, the employer discharged the claimant for lying and falsifying her time.

Credibility Assessment:

The claimant did not attend the remand hearing. The claimant testified in the original hearing that as of May 26, 2023, she had entered treatment for alcohol and resigned from her position. During the remand hearing, the Director testified that the claimant was still employed full-time from May 26, 2023, until June 9, 2023. She gave detailed testimony about conversations she had with the claimant in late May and early June of 2023, including one conversation on June 4, 2023, in which the claimant told the Director that she would be reporting to a detox facility.

Although the exact date the claimant entered the facility is unclear, the credible testimony of the Director establishes that the claimant was not in treatment for alcohol in May, but that she began treatment sometime between June 4 and June 9, 2023.

In that the Director's testimony is corroborated by contemporaneous documentation, it is concluded that it is more credible and reliable than the claimant's testimony on the disputed points of fact regarding whether the claimant separated from work in May of 2023 and when the claimant reported to a treatment facility.

Although the claimant performed no work for the employer after May 25, 2023, she was still technically employed through June 9, 2023, when the employer discharged the claimant for lying and falsifying her time.

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 is entitled to benefits beginning May 28, 2023, and indefinitely thereafter.

The review examiner initially concluded the claimant had separated for urgent, compelling, and necessitous reasons under G.L. c. 151A, § 25(e)(1), when she resigned on May 26, 2023, to attend a residential alcohol detoxification and treatment facility. On appeal to the Board, the employer provided evidence indicating that the claimant remained employed with the instant employer after the effective date of her claim and until she was discharged. *See Consolidated Findings ## 23 and 25.* Accordingly, we remanded the case to obtain additional evidence pertaining to the claimant's unemployment status in the weeks prior to her separation.

After assessing the entirety of the record on remand, the review examiner accepted as credible the employer's contention that the claimant was discharged on June 9, 2023, for lying about her attendance at work and falsifying her timesheets. Consolidated Finding # 25. 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). As the employer presented text message between the claimant and her supervisor corroborating its contentions about the claimant's actions leading up to her separation, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Consistent with this credibility assessment, we must consider whether she was in unemployment during the two-week period between May 28, 2023, the effective date of her claim, and the date of her separation. *See Consolidated Finding # 23.* 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

(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.

Read together, 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.

Following remand, the review examiner found that the employer paid the claimant vacation pay for the 5-day period between May 29, 2023, and June 2, 2023. Consolidated Finding # 23. If the claimant received this vacation payment during a period of regular employment, it would constitute remuneration that would disqualify her from also receiving unemployment benefits. *See* G.L. c. 151A, § 1(r)(3) (defining remuneration to include “payment for vacation allowance during a period of regular employment”). Thus, the claimant’s eligibility for the week of May 28, 2023, is contingent upon whether she was in a period of regular employment during that week.

As discussed above, the review examiner found that the claimant did not separate from her position with the instant employer until June 9, 2023. Consolidated Finding # 25. Absent evidence of a change in the claimant’s employment status prior to that date, the claimant is considered to have been in a period of regular employment during the week of May 28, 2023. Therefore, her receipt of vacation pay during that week means she was not in total or partial unemployment under G.L. c. 151A, §§ 29(a), (b), and 1(r).

Thereafter, the claimant reported to an inpatient alcohol detoxification facility. She remained in that facility until the date of her discharge. Consolidated Findings ## 19 and 20. As the claimant had been admitted to an inpatient treatment facility, we conclude that she was not capable of or available for work while participating in the alcohol detoxification program. She was, therefore, not in unemployment during the week of June 4, 2023, pursuant to G.L. c. 151A, §§ 29 and 1(r) between May 28, 2023, and June 10, 2023.

Since the claimant was discharged from her employment on June 9, 2023, her eligibility based on her separation from employment must be analyzed under a different section of law. That issue is not currently before the Board. The claimant’s absence from the remand hearing also precluded the review examiner from obtaining evidence about the claimant’s capability and availability for work following her separation. Accordingly, we address only the period between May 28, 2023, and June 10, 2023, in this decision.

We, therefore, conclude as a matter of law that the claimant was not entitled to benefits between May 28, 2023, and June 10, 2023, because she was not in total or partial unemployment under G.L. c. 151A, § 1(r)(3).

The review examiner's decision is reversed. The claimant is denied benefits for the weeks of May 28, 2023, through June 10, 2023.

N.B. - The record indicates that the claimant may have continued to limit her availability for work after separating from the instant employer. For this reason, we are asking the agency to investigate the claimant's eligibility for benefits under the provisions of G.L. c. 151A, § 24(b) beginning the week of June 11, 2023.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 29, 2024



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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