

While the claimant was put on medical leave due to lifting restrictions, she was capable of, available for, and actively seeking other work that met those restrictions. Therefore, she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and eligible for benefits while on leave.

**Board of Review
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Issue ID: 0081 0797 40

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, effective September 3, 2023, which was approved in a determination issued on October 17, 2024. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on November 30, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment and, thus, was disqualified under G.L. c. 151A, §§ 29 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 information about the claimant's unemployment status during the period at issue. Both parties 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 not in unemployment because she was on a leave of absence and was not capable of 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 worked full time as an EMT for the employer, an ambulance company beginning May 9, 2022.
2. The claimant is still employed by the employer.

3. The claimant's rate of pay was \$26.00 per hour.
4. As of June 19, 2023, due to issues related to her pregnancy, the claimant was medically restricted from lifting more than 25 pounds.
5. The claimant's expected date of delivery was February 12, 2024.
6. The employer did not have light duty work available for the claimant.
7. The employer was not able to accommodate the claimant within her position because of regulations that require EMT employees to be able to lift more than 25 pounds.
8. The employer offers light duty work to EMT employees only in cases where they are injured while at work.
9. The employer informed the claimant that because of her medical restriction she had the option of taking a leave of absence.
10. The employer did not inform the claimant that she had to resign from her current position as an EMT to then apply for another position as a dispatcher.
11. The employer informed the claimant that she could apply to work as a dispatcher but that position would be at a lower pay rate.
12. The claimant did not resign from her position as an EMT.
13. On June 19, 2023, the employer placed the claimant on a leave of absence because of her medical restriction.
14. Since June 19, 2023, the claimant has been on an indefinite leave of absence from the employer.
15. On August 1, 2023, the employer sent an email to the claimant notifying her that she was eligible to apply for a dispatch position.
16. The claimant contacted the staff person responsible for hiring the dispatcher position. The claimant did not receive any reply regarding the dispatch position.
17. The claimant gave birth to her child on January 30, 2024.
18. Aside from the restriction on lifting more than 25 pounds, the claimant did not have any other limitations on her ability to work full-time between September 3, 2023, and January 30, 2024.

19. The claimant did not have any limitations on her availability for full-time work during the period between September 3, 2023, and January 30, 2024.
20. The claimant searched for work during each week between September 3, 2023, and January 30, 2024, at least three days each week. The claimant searched by visiting an online job site, registering with Masshire and potential employers. The claimant applied for multiple jobs and attended multiple job interviews during the period between September 3, 2023, and January 30, 2024.
21. The claimant applied for customer service representative, food service workers and home health aide positions. The jobs that the claimant applied for did not have a weight lifting requirement.

Credibility Assessment:

The employer contends that the employer did give the claimant the option to take a leave of absence or resign to apply for the dispatch position. However, the employer provided inconsistent testimony indicating that they sent an email to the claimant on August 1, 2023, notifying her that she was eligible to apply for a dispatch position.

The claimant denies being informed that she would have to resign and then apply for a dispatch position. She maintains that she was told only that her pay rate would be reduced. She further offered that she did contact the staff person responsible for hiring the dispatch position but did not receive any reply regarding that position.

It is concluded that the claimant's testimony is more credible than the employer's inconsistent testimony.

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 not entitled to benefits.

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.

Beginning June 19, 2023, the claimant became subject to medical restrictions that precluded her from continuing to work as an EMT for the instant employer. Consolidated Findings ## 4 and 7. However, she remained capable of performing other forms of work that met the restriction on her ability to lift more than 25 pounds. Consolidated Finding # 18

An employee is not disqualified from receiving benefits if she is temporarily disabled from doing the employer's work while capable of and available to do other work and making serious efforts to find other work. Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163–64 (1980). While the instant employer did not have other work available to the claimant, she searched for work that accommodated the restriction on her ability to lift more than 25 pounds. Consolidated Findings ## 8, 16, 20, and 21. As the claimant had no other limitations on her availability for work, she is not disqualified from the receipt of benefits.

We, therefore, conclude as a matter of law that the claimant was in total unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), and she is entitled to benefits during her leave of absence.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week of September 3, 2023, and for subsequent weeks if otherwise eligible.

N.B. — The record indicates that the claimant's capability and availability for work may have changed beginning on or around January 30, 2024. 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 January 28, 2024.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 31, 2024



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