During her medical leave of absence from the employer, the claimant was capable of performing other work on a full-time basis, but she did not make herself available for, or make serious efforts to find, other full-time work. Therefore, she was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during her leave.

Board of Review
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Issue ID: 0081 9760 64

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 went on a medical leave of absence from the employer on January 2, 2024. She filed a claim for unemployment benefits with the DUA, effective January 14, 2024, which was denied in a determination issued on February 9, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 6, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in unemployment while out on a leave of absence and, thus, was not disqualified under G.L. c. 151A, §§ 29(a), 29(b), 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 pertaining to the claimant's capability and availability for work. 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 in unemployment while on a leave of absence, is supported by substantial and credible evidence and is free from error of law, where the claimant was capable of working full-time with restrictions, but was only looking for part-time work.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits on January 16, 2024, with an effective date of January 14, 2024.

2. The claimant has worked per diem as both a bus driver and a bus monitor for the instant employer, a school and student transportation company, since November 1, 2016.

3. The claimant has also worked for another employer, Company A, full-time since 2007. Company A lays the claimant off each year during the winter.

4. The claimant last worked for the instant employer at the end of November or beginning of December, 2023, due to medical conditions.

5. The instant employer is the claimant's subsidiary employer.

6. The claimant did not initially request a leave of absence from the instant employer because she worked per diem and picked up available shifts at her discretion.

7. On January 2, 2024, the claimant asked the instant employer for an official leave of absence, which the employer granted. The leave of absence was unpaid and did not differentiate between the claimant's bus driver position and bus monitor position with the employer.

8. The claimant provided the employer with a doctor's note dated January 2, 2024, that read, "To Whom it May Concern: [Claimant] will require a leave of absence starting from today's date due to medical issues. We will contact you again when she is ready to come back. Sincerely, [Doctor]."

9. The leave of absence was due to the claimant having been diagnosed with migraines and undiagnosed bowel issues.

10. On January 4, 2023, Company A laid the claimant off for the season with a recall date to occur during the beginning of March, 2024.

11. The claimant's recall date was either March 15, 2024, or March 18, 2024, two weeks before Easter.

12. Once the claimant began a leave of absence, the instant employer required a doctor's note indicating the claimant was capable of returning to work before a return to work would be allowed.

13. As of January 2, 2024, the claimant was capable of performing part-time work that was not loud and was in a place close to a bathroom.

14. As of January 2, 2024, the claimant could not work full-time. The number of hours the claimant was capable of working would depend on the type of work the claimant was performing.

15. As of January 2, 2024, the claimant was not willing to accept full-time work.

16. The claimant was seeking part-time work cleaning residences for acquaintances of her mother.

17. On February 28, 2024, the claimant requested a note stating she was released to return to work be faxed to the employer from her doctor's office.

18. On February 28, 2024, the claimant's doctor's office faxed the January 2, 2024, doctor's note to the employer for the second time.

19. As of February 28, 2024, and through the time the claimant returned to work in March, 2024, the employer did not offer the claimant work because the employer had not received a note from the claimant's doctor clearing her to return to work.

20. The employer has ongoing work available for the claimant up to 40 hours per week.

21. On January 16, 2024, the claimant completed 4 hours of paid online training for the instant employer.

22. On February 8, 2024, the claimant attended a paid one-hour meeting and training session for the instant employer.

23. On February 28, 2024, the claimant's physician faxed a communication to the employer stating the claimant was capable of returning to work as a bus monitor as of February 28, 2024.

24. On February 28, 2024, the instant employer called the claimant to see if the claimant could work that day, but the claimant was unavailable due to previous plans.

Credibility Assessment:

All witnesses were found to be credible in their testimony and any discrepancies are concluded to be the result of mistake or lack of accurate memory.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 10, which states that Company A laid off the claimant in 2023, as this appears to be a scrivener's error. The correct year is 2024. We further reject the portions of Consolidated Findings ## 13 and 14, which state that the claimant was capable of working part-time and could not work full-time, respectively, as the totality of the

evidence in the record indicates that the claimant could work full-time with restrictions. Finally, we reject Consolidated Findings ## 18 and 19, which state that the employer did not offer the claimant work and did not receive a note clearing the claimant to work on February 28, 2024, as Consolidated Findings ## 23 and 24 state the contrary. In adopting the remaining findings, we deem 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 eligible for benefits while on leave.

G.L. c. 151A, § 29, authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn 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. . . .

The claimant took a leave of absence from the instant employer on January 2, 2024, due to migraines and a bowel condition. Consolidated Findings ## 7–9. The claimant needed a work environment that was not very loud and had a bathroom close by, which prevented her from performing work as a bus driver or bus monitor for the instant employer. Consolidated Findings ## 7 and 13. Further, although the claimant was cleared by her doctor to work as a bus monitor as of February 28, 2024, the claimant insisted during the initial and remand hearings that took place after February 28, 2024, that she needed to work somewhere with a bathroom nearby due to her bowel condition. Consolidated Findings ## 13 and 23. The claimant did not provide a clear explanation as to how she would be able to work as a monitor on a bus without a bathroom on board.

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, 163–164 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work); *see, also,* Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282–283 (1978) (claimants have the burden to show that their continued unemployment is not due to their own lack of diligence) (citations omitted).

During her leave of absence, the only two restrictions on the claimant's ability to work were the need for an environment that was not loud and accessibility to a bathroom, which prevented her

from working on a bus for the instant employer. Further, despite her assertions to the contrary, the claimant was not restricted from working full-time. This is evidenced by her statement during the remand hearing that she could have worked all day with the employer from which she had been laid off, because that employer had bathrooms and places to sit, and the claimant could have lunch in her car and call her doctor if needed.[1] Thus, as of the start of her leave on January 2, 2024, the claimant was capable of performing full-time work other than on a bus, as long as her two medical restrictions could be accommodated.

However, despite her capability to work full-time work in what would appear to be a wide variety of settings given the somewhat lax nature of her medical restrictions, the claimant limited herself to looking for part-time work cleaning houses and doing odd jobs for her mother's acquaintances during her leave. Consolidated Finding # 16. Such limitations that the claimant placed on her work search were not necessitated by her medical restrictions. For this reason, we cannot conclude that she was making serious efforts to find full-time work while on leave.

We, therefore, conclude as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), during her leave of absence.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 6, 2024, and for subsequent weeks until she meets the requirements of G.L. c. 151A, §§ 29(a) and 1(r).

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2024

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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.

SVL/rh