

The claimant was not entitled to benefits under G.L. c. 151A, § 25(f), while on a two-week disciplinary suspension because the sole condition imposed upon her right to return to work following that suspension was her completion of mandatory training, a contingency within the claimant's control. Thereafter, the claimant was entitled to benefits under G.L. c. 151A, § 25(f), because she was suspended indefinitely.

**Board of Review
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Issue ID: 0082 3599 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 we affirm in part and reverse in part.

The claimant was suspended from her position with the employer on February 21, 2024. She filed a claim for unemployment benefits with the DUA, effective March 3, 2024, which was approved in a determination issued on March 29, 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 affirmed in part and overturned in part the agency's initial determination and awarded benefits for the period between February 27, 2024, and March 16, 2024, in a decision rendered on May 11, 2024. We accepted the employer's application for review.

Benefits were awarded for this period after the review examiner determined the claimant was entitled to receive unemployment benefits while suspended pursuant to G.L. c. 151A, § 25(f). 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was entitled to benefits because she did not have a right to return to work after completing her disciplinary suspension, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a relief worker for the employer from December 7, 2020.
2. The claimant's last physical day at work was on February 18, 2024.

3. The claimant's rate of pay was \$16.00 per hour.
4. As of February 21, 2024, the employer placed the claimant on administrative leave for failing to complete her mandatory training. The employer notified the claimant that she had 14 days until March 6, 2024, to complete the training or be separated from her position.
5. On March 8, 2024, through March 15, 2024, the employer placed the claimant on administrative leave for cumulative positive discipline for performance.
6. The claimant separated from the employer on March 15, 2024.

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 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 findings of fact and deems 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 is eligible for benefits during the entire period she was suspended.

Because the issue currently before the Board pertains only to the period when the claimant was suspended, her eligibility for benefits is governed by G.L. c. 151A, § 25(f), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter] . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation in 430 CMR 4.04(4), which provides, in pertinent part, as follows:

A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension.

In this case, the claimant was suspended twice prior to the date of her separation. She was first suspended for failing to complete mandatory training and immediately thereafter was suspended for cumulative disciplinary issues. Findings of Fact ## 4 and 5. Because each suspension was a separate disciplinary action, we must consider the claimant's eligibility for benefits during each suspension separately.

The employer first suspended the claimant for a fourteen-day period because she had failed to complete mandatory training by February 21, 2024. Finding of Fact # 4. The employer testified that it notified the claimant of her obligation to complete this mandatory training, which was regularly required in order to continue her employment, both by letter and by telephone.¹ This shows that the training requirement was an established rule. Thus, the employer first suspended the claimant as discipline for her failure to follow an established rule. This first suspension was also both finite and less than ten weeks in duration. *See* Finding of Fact # 4. However, the review examiner concluded the claimant was entitled to benefits during the first suspension because she did not have the right to return to work. We disagree.

The employer's witness testified that the claimant would have been able to return to work following the fourteen-day suspension on the condition that she completed the mandatory training.² In addressing conditions attached to a claimant's return to work from suspension, the Board has previously held that a condition placing the claimant's right return to work that is beyond his or her control renders that right to return speculative. Board of Review Decision 0028 9572 66 (Jan. 30, 2020) (the claimant did not have the right to return work after a fixed period of time because his right was contingent upon receiving medical clearance to return to work, an uncertainty beyond his control). In this case, however, the claimant's right to return to work was contingent solely upon whether she decided to complete the mandatory training by the end of the first suspension. As the claimant had control over the contingency of completing her training, it did not render her right to return to work uncertain.

Because the claimant's first disciplinary suspension was of a finite duration, and she had the right to return to work after serving the suspension, she is disqualified under G.L. c. 151A, § 25(f), for the duration of this suspension. *See* 430 CMR 4.04(4)

The claimant's second suspension, while disciplinary in nature, had no defined duration. *See* Findings of Fact ## 5 and 6. Pursuant to 430 CMR 4.04(4), the claimant may not be disqualified for the duration of this second, indefinite disciplinary suspension, which ran from March 8, 2024, until the date she was finally discharged.

Upon becoming separated from employment on March 15, 2024, her eligibility for benefits after that date is governed by a separate section of law. Finding of Fact # 6. That issue is not an issue currently before the Board.

¹ The employer's uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings, 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 employer's uncontested testimony in this regard is also part of the unchallenged evidence presented at the hearing and admitted into evidence.

We, therefore, conclude as a matter of law that the claimant is disqualified for the period between February 25, 2024, and March 9, 2024, under G.L. c. 151A, § 25(f). We further conclude the claimant may not be disqualified under G.L. c. 151A, § 25(f), between March 10, 2024, and March 16, 2024.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period between February 25, 2024, and March 9, 2024. She is entitled to benefits for the week of March 10, 2024, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 14, 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