

The claimant was in partial unemployment under G.L. c. 151A, §§ 29 and 1(r), during the first two weeks of his benefit year because he worked less than a full-time schedule, earned less than his weekly benefit amount, and the employer was not able to provide him with additional work. Thereafter, the claimant stopped accepting any work even though ongoing suitable work was available without showing show good cause for doing so. Held the claimant was not in total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), at this point because he regularly declined offers of suitable work.

**Board of Review
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Issue ID: 0082 9919 30

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 filed a claim for unemployment benefits with the DUA, effective June 9, 2024, which was denied in a determination issued on July 5, 2024. 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 9, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in total unemployment and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's unemployment status. 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 was in total unemployment because the employer did not provide the claimant with any offers of work even though he was capable of and available for 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. On 1/31/2022, the claimant started working as a full-time emergency triage clinician for the employer, a behavioral health provider.
2. The claimant directly reported to the Director of Mobile Crisis Intervention Services (Director).
3. The claimant's pay rate was \$19.23 per hour.
4. Upon hire, the claimant's work schedule was Sunday, Monday, and Tuesday nights from 7:00 p.m. to 7:00 a.m.
5. The employer listed available shifts through email messages that were sent to all employees, including full-time and per-diem employees, by the Director on a weekly or biweekly basis. The Director sent available shifts in group text messages for urgent coverage. The available shifts were assigned on a first come, first served basis.
6. On 1/6/2024, the claimant sent the Director a text message informing her that he was returning to school, and he requested a change in his work schedule.
7. On 1/8/2024, the claimant sent the Director an email message with a proposed work schedule of Saturday and Monday from 7:00 a.m. to 7:00 p.m., and Wednesday from 7:00 p.m. to 7:00 a.m.
8. The Director agreed to allow the claimant to switch his work schedule from full-time to per diem, with a consistent schedule of Monday from 7:00 a.m. to 7:00 p.m., Wednesday from 7:00 p.m. to 7:00 a.m., and a partial shift on Saturday morning.
9. On 1/28/2024, the claimant sent the Director an email informing her that he agreed to be a per-diem employee with the new consistent work schedule.
10. Between 1/28/2024 through the 5/6/2024, the claimant continued to work as a per-diem employee with a consistent weekly set schedule of Monday from 7:00 a.m. to 7:00 p.m., Wednesday from 7:00 p.m. to 7:00 a.m., and a partial shift on Saturday morning.
11. On 5/6/2024, the claimant sent the Director an email message inquiring if he could return to the work schedule he was assigned upon hire because his school schedule changed due to a new semester.
12. The Director informed the claimant that his previous work schedule was no longer available because the employer filled the position on 4/1/2024.
13. The Director informed the claimant that the employer could not accommodate the claimant's requests for changes in his work schedule based on his school

schedule. The Director suggested that the claimant switch to a regular per-diem employee status without a consistent schedule.

14. The Director informed the claimant that, as a regular per-diem employee, he needed to respond to the group email messages and the text messages that were regularly sent with available shifts, and that he would be assigned to the shifts that he requested on a first come first serve basis.
15. The claimant agreed to continue working as a regular per-diem employee. The claimant informed the employer that he was likely going to begin looking for another job.
16. The Director did not remove the claimant from the group text message that provided available shifts for urgent coverage.
17. The Director sent the email messages with available shifts to the claimant's work email address and the claimant's personal email address.
18. Since 5/6/2024, the claimant's employment status was a regular per-diem employee without a consistent work schedule because the employer could not accommodate the claimant's request for change in his work schedule based on his school schedule.
19. On 6/7/2024, the claimant sent the Director an email message with three (3) shifts that he wanted to work from the available shifts he received in an email message.
20. On 6/9/2024, the Director sent the claimant an email message informing him that the three (3) shifts he requested to work were not available.
21. During the week ending 6/15/2024, the claimant worked 5.75 hours with the employer.
22. On 6/17/2024, the claimant opened a claim for benefits, effective 6/9/2024. The claimant's weekly benefit amount was determined to be \$622.00 with an earnings disregard of \$207.33, totaling \$829.33.
23. Since the week ending 6/15/2024, the claimant was still employed by the employer as a per diem triage clinician.
24. Since the week ending 6/15/2024, the claimant had no illnesses, injuries, or medical conditions preventing him from working full-time hours.
25. Since the week ending 6/15/2024, the claimant was available to work full-time hours each week.

26. Since the week ending 6/15/2024, the claimant has been looking for full-time work.
27. Since the week ending 6/15/2024, the employer has provided the claimant with available shifts through weekly or biweekly email messages and through text messages for urgent coverage.
28. Since the week ending 6/15/2024, the claimant has not contacted the Director to request to work any of the available shifts.
29. On 6/22/2024, the claimant was scheduled to work but he called out of work due to being sick.
30. During the week ending 6/22/2024, the claimant worked 17.25 hours with the employer.
31. The claimant did not communicate with the employer since he called out sick for his 6/22/2024 shift.
32. The employer continued to send the claimant available shifts through his work and personal email accounts, and through the group text messages for urgent coverage.
33. The claimant has not performed any services or earned any wages with the employer after the week ending 6/22/2024.

[Credibility] Assessment:

The parties did not dispute that the claimant was employed by the employer since 6/15/2024. The parties also did not dispute that the claimant was hired as a full-time employee with a set schedule of Sunday, Monday, and Tuesday from 7:00 p.m. to 7:00 a.m. Additionally, the parties agreed that the claimant did not perform any wage-earning services for the employer since the week ending 6/22/2024. Given the consistent and undisputed nature of the testimony on these points between the parties, such testimony is deemed credible in this case.

The claimant's testimony at the initial hearing that he was capable of, available for, and actively seeking work since the week ending 6/15/2024 is credible because the parties agreed that the claimant requested to return to his original full-time work schedule. Additionally, the Director testified that she did not know if the claimant was capable of, and available for, working since 6/15/2024 because the claimant did not communicate with the employer since after he called out for his 6/22/2024 shift.

Although the claimant testified at the initial hearing that the employer initiated the change in his employment status from full-time to per-diem employment, that the Director removed him from the group text messages with available shifts, and that

he filed his claim for unemployment benefits effective 6/9/2024 because the employer did not have available shifts once he became a per-diem employee, the claimant's testimony is not credible based on the Director's testimony at the remand hearing, a review of the claimant's testimony from the initial hearing, and the claimant's failure to attend the remand hearing to provide further context and explanation in light of the Director's specific and detailed testimony.

The Director testified at the remand hearing that the claimant initiated the change in his employment status from full-time to per-diem employment when he requested changes in his work schedule based on his school schedule – on 1/6/2024 and 5/6/2024. The Director further testified that the employer continued to send the claimant email messages to the claimant's work and personal email accounts and text messages with available shifts on a weekly and/or biweekly basis, and the claimant failed to respond to the employer's communication after 6/22/2024.

Greater weight is given to the Director's testimony at the remand hearing than the claimant's testimony at the initial hearing because the claimant's testimony was vague, inconsistent, and lacked specific details about the dates, and the substance of each correspondence with the Director related to the change in his work schedule and status. In contrast, the Director's testimony during the remand hearing was consistent, detailed, and straightforward. While the employer did not provide copies of the email correspondence between the Director and the claimant, the Director testified that she kept copies of the email correspondence related to the change in the claimant's work schedule and employment status, and she provided details about the email messages during her 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 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.

Pursuant to these provisions, 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.

During the week of June 9, 2024, the claimant worked 5.75 hours and earned gross wages of \$110.57 (5.75 hours x \$19.23 per hour). He worked 17.25 hours during the week of June 16, 2024, and earned gross wages of \$331.72 (17.25 hours x \$19.32 per hour). Consolidated Findings ## 3, 21, and 30. While he was capable of and available for full-time work during these two weeks, it appears that the employer was not able to offer him any additional shifts. Consolidated Findings ## 19, 20, 24, and 25. Because the claimant worked less than a full-time schedule and earned less than his weekly benefit amount in each of these two weeks, he was in partial unemployment pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), during the period between June 9, 2024, and June, 22, 2024. *See* Consolidated Finding # 22.

However, the claimant did not perform any work for the instant employer beginning the week of June 23, 2024. Consolidated Finding # 33. Following remand, the review examiner accepted as credible the employer’s testimony that it continued to offer the claimant available shifts as a triage clinician since he filed his claim for benefits. Consolidated Finding # 27. 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’s witness was able to provide specific testimony about correspondence the employer sent to the claimant offering him shifts, we have accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner’s credibility assessment, the consolidated findings show that the claimant regularly declined the employer’s offers of work beginning the week of June 23, 2024. The shifts offered by the employer are presumed to be suitable, as the offers were for work in the claimant’s usual emergency triage clinician position. Inasmuch as the review examiner rejected the claimant’s testimony that the employer did not have any work available, and he has offered no other reason for declining to accept the available shifts, he has not shown good cause for declining the employer’s offers of suitable work. Thus, he was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), beginning the week of June 23, 2024.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), from the week beginning June 9, 2024, through June 22, 2024. We further conclude the claimant has not met his burden to show that he was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), as of June 23, 2024.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive partial benefits for the week of June 16, 2024, if otherwise eligible. He is denied benefits for the week of June 23, 2024, and for subsequent weeks, until such time as he meets the requirements of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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