



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114  
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

DEVAL L. PATRICK  
GOVERNOR

TIMOTHY P. MURRAY  
LT. GOVERNOR

SUZANNE M. BUMP  
SECRETARY, LABOR AND  
WORKFORCE DEVELOPMENT

**BOARD OF REVIEW  
DECISION**

JOHN A. KING, ESQ.  
CHAIRMAN

DONNA A. FRENI  
MEMBER

SANDOR J. ZAPOLIN  
MEMBER

BR-106952 (Feb. 13, 2009) -- Vacation pay to a merchant marine on shore leave was disqualifying remuneration under G.L. c. 151A, sec. 1(r), because he retained a contractual right to continued employment during this period of compulsory job rotation.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to deny unemployment benefits. We review pursuant to our authority under G.L. c. 151A, § 41 and affirm.

Benefits were denied after the review examiner determined that the remuneration which the claimant received as vacation pay was disqualifying within the meaning of G.L. c. 151A, §§ 1(r) and 29(a). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case back to the review examiner to make subsidiary findings from the record. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The claimant's last date of work was February 7, 2008. He filed a claim for unemployment benefits with the DUA, but was disqualified in a determination issued by the agency on March 27, 2008. The claimant appealed that determination to the DUA hearings department. Following a hearing on the merits attended by both parties, a review examiner also denied the claimant benefits in a decision rendered on May 14, 2008.

The issue on appeal is whether the claimant's vacation pay was disqualifying remuneration because it was received during a period of regular employment.

Findings of Fact

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

1. The claimant worked for the employer as a third mate and prior to filing his claim he had been employed most recently from 9/24/07 through 2/7/08.
2. The claimant's employment is considered rotational.
2. The claimant is a member of the American Maritime Officers Union.
3. The claimant most recently worked on a vessel named the [Name of ship].
4. The claimant works 120 days on board ship and then he is laid off while another union member works a 120 day shift holding the same position the claimant held on the ship. The 120 day rotation is an average number of days between rotations or a "rough number", because it depends on the ship's schedule at sea and the need of the worker that is off to take more time between rotations. The rotation is based upon union rules. The goal of the rotation rules was to disburse work to as many union members as possible. (2)
5. In his last rotation on the [Name of ship] the claimant worked 142 days before they had a replacement for him on that ship. (2)
6. The claimant has worked under this same type of rotation on the same ship starting in 2005.
7. The claimant is considered a permanent employee on this ship and therefore the ship is obligated to take him back after the other employee has completed a 120 day rotation.
8. On 2/20/08 the claimant filed a claim for unemployment benefits.
9. In a telephone interview on 3/27/08 the claimant indicated that he is entitled to vacation pay during his lay off.
10. On 2/11/08 the claimant applied for vacation pay through the union and he was paid a gross check in the amount of \$20,339.02.
11. The vacation pay is a union benefit and is contributed to by each employer for whom he works. If he does not apply for vacation pay within 545 days of his lay off[,] he will lose the vacation pay.
12. The vacation pay was more than his daily wage while working.

13. The claimant is able to continue to look for work with the union during this lay off.
14. On the vacation benefit statement received by the claimant his back to work date is listed as 6/27/08.
15. Information taken from the claimant during a telephone interview that took place on 3/27/08 included the following:

**What are the dates of the company shutdown/layoff?** 2/8/08 to 6/21/08  
**What is your definite or tentative Return to Work date?** 6/7/08 [sic]

16. At the time of the hearing the claimant was informed that he was due back on board ship on 6/13/08.
17. The union hiring hall played the following role in the claimant's assignments: (1)
  - the claimant was required to apply for work on the vessel through the hiring hall.
  - the claimant could be subject to fines and a possible suspension for working on a ship without going through the union.
  - the claimant was permitted to apply to the union hiring hall for work during the interval between assignments, but the union has the right to say to the claimant, "you've worked too [sic] much this year."
18. The following restrictions were imposed upon the claimant's ability to collect his vacation pay from the union vacation plan: (3)
  - The claimant was required to be a union member in good standing, which means that there are no fines levied against him and that he is current in union dues payment.
  - The claimant was not permitted to be working on a union contracted vessel at the time he submitted his request for vacation pay.

#### Ruling of the Board

The Board adopts the DUA review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 1(r) provides, in pertinent part, as follows:

- (2) [A]n 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 of and available for work, he is unable to obtain suitable work . . . .

- (3) For the purpose of this subsection, “Remuneration”, [means] any consideration, whether paid directly or indirectly . . . received by an individual (1) from his employing unit for services rendered to such employing unit . . . and (3) . . . as payment for vacation allowance *during a period of regular employment*; . . . (emphasis added.)

G.L. c. 151A, § 29, in relevant part, states as follows:

- (a) Any individual in total employment and otherwise eligible for benefits . . . shall be paid for each week of unemployment . . . .

If the claimant received his vacation payment during a period of regular employment, this payment disqualifies him from also receiving unemployment benefits. Conversely, if his employment relationship was severed at the time, the vacation payment does not disqualify him. *See* DUA Service Representative’s Handbook, § 1415(S).

The U.S. Department of Labor has provided guidance as to whether an employment relationship persists.

[A]n offer of new work includes . . . an offer of re-employment to an unemployed individual by his last (or any other) employer with whom he does not have a contract of employment at the time the offer is made. . . . The question is whether the offer of re-employment is an offer of a new contract of employment. If the worker . . . was discharged or laid off indefinitely, the existing contract of employment was thereby terminated. An indefinite layoff, that is a layoff for an indefinite period with no fixed or determined date of recall, is the equivalent of a discharge.”

Unemployment Insurance Program Letter No. 984 (1968), *quoted in Campos v. California Employment Development Dept.*, 132 Cal.App.3d 961, 967-968 (Cal. Ct. App. 1982).

In Campos, seasonal frozen food workers, who had a right to recall on a seniority basis, but no contractual right to recall within a specific time period, were held to have severed their employment relationship. 132 Cal.App.3d at 974. *See also In re Burger*, where a New York court found that longshoreman who obtained daily work assignments through a “shape up” system were not deemed to be in employment between jobs. 98 N.Y.S.2d 932 (N.Y. App. Div., 1950). In that case, longshoreman lined up twice a day to be chosen for particular jobs; they had no guarantee of being selected. *Id.* at 933-934. The court distinguished these longshoremen’s expectancy of employment from those hired through a hiring hall, where jobs were shared through compulsory rotation. *Id.* at 935.

In this case, the method for hiring the claimant was prescribed by the collective bargaining agreement, and work was made available through a union hiring hall on a rotational basis for the purpose of allocating the work equally. Unlike the seasonal employees in Campos, the claimant had more than a mere expectancy to return to work; he had a legal right. As long as he remained a union member in good standing, the claimant remained a member of a group with a contractual right to continued employment.

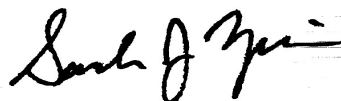
In our view, the interval between the claimant's active duty assignments was a normal incident of his continued employment. Therefore, we conclude as a matter of law that the claimant received vacation pay during a period of regular employment within the meaning of G.L. c. 151A, § 1(r).

The DUA review examiner's decision is affirmed. The claimant is denied benefits for the weeks ending February 23, 2008 through June 23, 2008.



John A. King, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - February 13, 2009**



Sandor J. Zapolin  
Member

Member Donna A. Freni did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**  
**(See Section 42, Chapter 151A, General Laws Enclosed)**

**LAST DAY TO FILE AN APPEAL IN COURT – March 16, 2009**