



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-109764 (Jan. 21, 2010) -- A claimant who is treated as a full-time employee cannot be considered an on-call worker subject to the Mattapoissett exclusion, even though he works variable hours. Claimant is entitled to partial benefits when the employer offers less than full-time hours.

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 benefits following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed for unemployment benefits with the DUA for the week ending December 20, 2008, during a period of less than full-time work. The agency found him eligible for benefits in a determination issued on January 14, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner overturned the agency's initial determination and denied the claimant benefits based on G.L. c. 151A, §§ 1(r) and 29(a)(b). In a decision rendered on April 1, 2009, the review examiner concluded that the claimant was an on-call worker and, therefore, not entitled to benefits during any week in which he worked some, but less than full-time, hours. The review examiner allowed benefits during weeks in which the employer had no work for the claimant.

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence and make further findings. Only the claimant attended the subsequent remand hearing. Thereafter, the review examiner issued consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The issue on appeal is whether the claimant is an on-call worker.

Findings of Fact

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

1. The claimant has been employed as a mover for a commercial moving company since October 1, 2006.
2. The claimant initiated a new claim for benefits on December 27, 2008. The effective date of that claim is December 14, 2008.
3. Shortly thereafter, it was determined that the claimant was monetarily eligible to receive weekly benefits in the amount of \$337.00, plus \$75.00 in dependency allowance and that his weekly earnings exclusion equaled \$112.33.
4. During the weeks ending December 20, 2008, December 27, 2008, January 10, 2009, and January 24, 2009, the claimant worked less than a full-time schedule of hours.
5. During the weeks ending January 3, 2009 and January 17, 2009, the employer had no work available for the claimant and did not offer the claimant any work.
6. The claimant received \$160.00 in holiday pay for the week ending January 3, 2009, which he accurately reported when he claimed benefits for such week.
7. The employer maintains a list of employees referred to as a "seniority list."
8. The significance of being on the seniority list is that employees on the list are classified as regular full-time employees, rather than spare part-time help.
9. The claimant is on the seniority list.
10. The claimant has not always been on the seniority list.
11. One gets on the seniority list by either the employer asking the employee if he wishes to be placed on the list or per union contract an employee who works Monday through Friday for 90 days qualifies for the list.
12. The employer also has other movers who are not on the seniority list. The difference between seniority list movers versus other movers is that the seniority list movers receive benefits such as overtime preference, paid holidays, paid vacation, five paid floating days each year, paid bereavement leave, and paid jury duty.

13. The employer does provide uniforms to seniority list employees.
14. The claimant has vacation time, sick time, paid holidays and health insurance through the employer.
15. Such benefits are not available to all employees of the employer. A mover must be on the seniority list in order to receive such benefits.
16. The claimant does have regular hours, which are Monday through Friday, from 6:45 am until the job is finished.
17. If the claimant works outside those regular hours he is paid overtime, which is 1.5 times his regular pay rate.
18. Under its union contract the employer is required to inform the claimant the previous afternoon if it will have no work for the claimant the next day.
19. In the Side Letter of Agreement to its contract with the union, there is an agreement concerning employees' on-call status. The agreement being that the employer will not contest unemployment benefits by stating seniority list employees are on-call employees.

Ruling of the Board

The Board adopts the 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.

Under G.L. c. 151A, § 29(a) and (b), individuals in either partial or total unemployment may receive unemployment benefits:

“Unemployed” and “Unemployment”, an individual shall be deemed to be unemployed and in unemployment if either in “partial unemployment” or in “total unemployment” as defined in this subsection.

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

(b) An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed;...

G.L. c. 151A, § 1(r) defines partial and total unemployment as follows, in relevant part:

(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 of and available for work, he is unable to obtain any suitable work....

We think it is clear on its face that a claimant who is a full-time employee cannot be considered an on-call worker; moreover, the DUA’s on-call designation is reserved for part-time employees. *See Service Representative’s Handbook § 1220(I)*. The consolidated findings in the present case reflect that the employer made a distinction between “seniority list” workers, such as the claimant, and part-time employees who were called as needed. Those on the seniority list had a regular Monday through Friday schedule of 6:45 a.m. until the job was completed. They were given priority in all assignments, including overtime work. The seniority list employees received numerous benefits not offered to part-time workers including: paid leave for holidays, vacations, floating days, and bereavement leave; uniforms provided by the company; and an employer guaranteed minimum payment to their union health insurance. Finally, in a side letter of agreement to its contract with the claimant’s union, the employer agreed not to advance the proposition with the DUA that “seniority list” employees were on-call employees for unemployment purposes.¹

We, therefore, conclude as a matter of law that the claimant is a full-time employee. Thus, the claimant is in partial unemployment during any week in which the employer offers him less than a full-time schedule of work and is in total unemployment during any week in which no work is available.

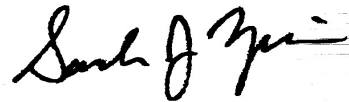
¹ While this provision is, of course, unenforceable as a matter of law, it does at least indicate the intention of the parties with regard to the employment status of “seniority list” personnel.

The review examiner's decision is reversed. The claimant is allowed benefits for the week ending December 20, 2008 and for subsequent weeks if otherwise eligible.

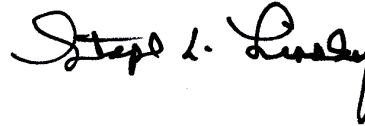


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 21, 2010



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
Member

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 – February 22, 2010