



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-111429 (Oct. 12, 2010) -- A majority of Board members held that a claimant, who volunteered a small portion of his time in the hope of obtaining a permanent position while continuing to actively search for full-time employment, was in unemployment under G.L. c. 151A, secs. 29 and 1(r). (The 3rd member did not have an opportunity to participate.)

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 a claim for unemployment benefits with the DUA and was originally awarded benefits. Subsequently, the DUA issued a redetermination on March 13, 2009, disqualifying the claimant from receiving benefits and notifying the claimant that he would have to return \$24,600 to the unemployment fund with a 12% interest penalty. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's disqualification but removed the interest penalty in a decision rendered on September 11, 2009.

Benefits were denied after the review examiner determined that the claimant had not shown that he was "in unemployment," pursuant to G.L. c. 151A, §§ 29 and 1(r). We accepted the claimant's appeal for review. 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 claimant's appeal.

The issue on appeal is whether the claimant was in unemployment while performing services without compensation for a company during the benefit year.

Findings of Fact

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

1. The claimant filed his claim for benefits on 5/22/08. He was thereafter paid benefits. The benefits here in issue and paid pertain to the [week ending] 5/24/08 through 3/7/09. The claimant's weekly benefit rate was \$600.00 per week (no dependency allowances).
2. Subsequent thereto, additional information was received which made necessary a notice of redetermination and overpayment which disqualified the claimant from receiving benefits for the [week ending] 5/24/08 and indefinitely.
3. That notice was issued on 3/13/09 under Section 29(a) & 1(r) and Section 71 of the Law. An overpayment in the amount of \$24,600.00 was established. Misrepresentation was indicated and a 12% surcharge was levied on the unpaid balance.
4. The claimant was also issued a "41 compensable week" disqualification per the provisions of Section 25(j) of the Law, to begin the claimant's next eligible week (due to unreported earnings).
5. As a result of information from the DUA hotline received on 10/4/08, it was learned that the claimant, who had been on a continued claim (BYE 5/16/09) since the [week ending] 5/24/09, and one other individual, may have been working for a new company, ([Employer B]) since filing his claim. No employment or wages were ever reported during the claim period.
6. Several documents showing on-line activity by the claimant for this company (from 5/15/08 through 11/17/08) were submitted, and they indicated the claimant had a job title of "logistics manager-inventory control".
7. The DUA sent the employer and its payroll service documents to report wages for the weeks of the claim period (forms 2307). They reported that the claimant was not on the company pay records and no wages were ever paid to the claimant.
8. The claimant was sent notices to provide information regarding same. He did not respond. As a result, the above determination and penalties were instituted.

9. At the hearing, the claimant testified that the company in question was being formed by one of the two partners of his previous employer, from whom he had been laid off. The two partners had some conflicts but the other partner was aware of the activity.
10. The claimant was promised a position with full wages eventually when the company became viable, but no wages were paid to him during the months of May through November of 2008.
11. To help the new company (a re-marketer for telecommunication systems) get started, however, the claimant agreed to allow his name and experience to be used and the job title be established. The claimant occasionally went to the new office location to help out with set-up and he performed some activity on-line with E-mails to customers and dealing with some invoices.
12. The claimant estimates that his weekly activity with this employer was minimal (4-5 hours per week). He never received compensation, and when after several months, no real job was established, he pressured the new company to bring him on the payroll. This only served to create conflicts, however, and he recalls that as of September, the relationship was severed due to the owner's personal legal and court difficulties and no employment ever occurred. The on-line documents submitted, however, show activity until 11/17/08, and the company continued with the owner's wife running the business from that point.
13. The claimant did not report this activity because he received no wages and did not think there was a real employer-employee relationship. He was seeking other full time work throughout this period as required by the DUA.
14. The claimant was not a partner or corporation officer in this new company. He had no controlling interest in same.

Ruling of the Board

The Board adopts the review examiner's 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.

The review examiner denied benefits after concluding that the claimant was not in full or partial unemployment within the meaning of G.L. c. 151A, §§ 29(a), 29(b), and 1(r). The relevant provisions are set forth below.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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. . . .

In order to be eligible for his full weekly benefit amount, the claimant would have had to be in total unemployment, namely, performing “no wage-earning services ... for which he [received] no remuneration.” G.L. c. 151A, § 1(r)(2). The review examiner disqualified the claimant because he found that the claimant was performing services for the entity [Employer B] at the same time that the claimant was reporting to the DUA that he was not working. Under G.L. c. 151A, § 1(r)(2), our first inquiry concerns the nature of services. During the relevant period, the claimant was performing 4-5 hours a week of services for this employer. However, because the claimant did not receive any remuneration for those services, he may still qualify for total unemployment benefits.

Our next inquiry is whether the claimant remained capable and available for work during the period that he was certifying for benefits. Finding of Fact #13 states that the claimant was seeking other full-time work throughout this period, as required by the DUA. We see no reason to disturb this finding.

As a matter of public policy, it does not make sense to disqualify a claimant who volunteers a small portion of his time in an effort to obtain permanent employment. To do so would, in the words of the Supreme Judicial Court, be to “reward the idle and punish the ambitious.” Emerson v. Director, Division of Employment Security, 393 Mass. 351, 353 (1984). For this reason, it is DUA policy to allow benefits to claimants who spend a minor portion of their time (under 20 hours per week) working in self-employment during the benefit year. Any income derived from those activities is subject to an earnings disregard. This is provided the work does not interfere with an active work search. *See* DUA Service Representatives Handbook §§ 1035, 1411. We see no difference whether the investment is intended to lead to self-employment or to a paying job with an employer. In the present appeal, the claimant’s work for [Employer B] falls squarely within this policy.

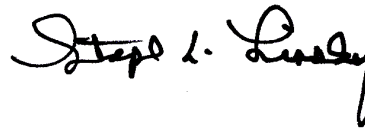
We, therefore, conclude as a matter of law that the claimant remained in total unemployment within the meaning of G.L. c. 151A, §§ 1(r)(2) and 29(a), while performing services without remuneration for 4-5 hours per week during the benefit year.

The review examiner's decision is reversed. The claimant was entitled to receive benefits for the week ending May 24, 2008 through November 22, 2008 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - October 12, 2010



John A. King, Esq.
Chairman



Stephen M. Linksy, Esq.
Member

Member Sandor J. Zapolin 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 – November 12, 2010