



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT  
BOARD OF REVIEW

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## BOARD OF REVIEW DECISION

BR-123913 (Jan. 8, 2013) – Since the claimant, a lawyer in a firm which included her last name in the name of the firm, did not hold an ownership interest, share in the profits or losses, or invest any capital in the firm, her base period earnings constituted wages under G.L. c. 151A, §§ 1(k) and 1(s)(A), and she satisfied the monetary eligibility requirements of G.L. c. 151A, § 24(a).

### Introduction and Procedural History of this Appeal

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

The claimant separated from her position with the employer on August 19, 2011. She filed a claim for unemployment benefits with the DUA, which was initially approved. On May 23, 2012, the agency redetermined her eligibility, concluding that she was monetarily ineligible under G.L. c. 151A, § 29(a), and that she was responsible for returning \$5,113.00 to the unemployment fund. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's redetermination in a decision rendered on July 9, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's earnings did not qualify as wages within the meaning of G.L. c. 151A, §§ 24(a) and 1(s); and, therefore, she did not satisfy the monetary eligibility requirements to qualify for benefits. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties and Counsel for the DUA an opportunity to submit written reasons for agreeing or disagreeing with the decision. The claimant and Counsel for the DUA each submitted responses. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, a lawyer in a firm which included her last name in the name of the firm, but who was a salaried employee, held no ownership interest or policy-making role in the firm, did not share in the firm's profits or losses, and invested no capital, was an employee rather than a partner in a partnership, such that her earnings could not be used to establish monetary eligibility for benefits under G.L. c. 151A, § 24(a).

### Findings of Fact

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

1. The claimant filed a new claim for benefits on 12/22/2011, establishing a base period which began on 10/1/2010 and ended on 9/30/2011. The claimant performed work for only one employer during such period, last working on 8/19/2011.
2. The claimant had wages in the amount of \$12,600.00 for the quarter ending 12/31/2010, \$10,800.00 for the quarter ending 3/31/2011, \$12,600.00 for the quarter ending 6/30/2011 and \$7,200.00 for the quarter ending 9/30/2011.
3. The DUA determined the claimant was monetarily eligible for benefits in the amount of \$485.00 per week based on the wages from her base period employer.
4. The DUA paid the claimant benefits in the amount of \$5,113.00 for the 13 weeks ending 12/31/2011 through 4/21/2012.
5. The DUA subsequently discovered that the claimant was a partner of her base period employer and removed the base period wages from her unemployment claim. The DUA issued a new monetary determination indicating that the claimant was monetarily ineligible for benefits.
6. The claimant is a non-equity partner for the base period employment. The partnership is listed [sic] a K-1 Partnership.
7. The claimant had worked for the base period employer, a small law firm, as an attorney for many years. In 2006, after the employer dissolved a previous partnership, the owner asked the claimant to use her name for the business in addition to his name and list her as a non-equity partner.
8. The claimant agreed to become a partner of the law firm and entered into the K-1 partnership in 2006. The claimant does not have any zero [sic] percentage of ownership, equity or liability from the K-1 partnership.

9. The claimant remained as a regular employee and continued to be issued a W2 each year as she had in her past years of employment.
10. On 8/19/2011, the claimant was laid off by the business partner due to business being slow. The [claimant] remains as a non-equity partner of the employer however she is looking for [full-time] work elsewhere.
11. On 5/23/2012, a Notice of Redetermination and Overpayment was mailed to the claimant informing her that she was subject to disqualification under Section 29(a) of the Law. The notice also informed the claimant that she was overpaid benefits in the amount of \$5,113.00 for the 13 weeks ending 12/31/2011 through 4/21/2012.
12. It was determined by the local office that the overpayment was due to an error without fraudulent intent on the part of the claimant.

#### Ruling of the Board

The Board adopts the review examiner's findings of fact with the exception of the portion of Finding of Fact #8, which provides that the claimant agreed to become a partner of the law firm. This portion of Finding of Fact #8 is inconsistent with the review examiner's finding in Finding of Fact #9, which provides that the claimant remained a regular employee, and, for the reasons set forth below, it is incorrect as a matter of law. We deem the remainder of the findings to be supported by substantial and credible evidence. However, we reach our own conclusions of law.

G.L. c. 151A, § 24, provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall—

- (a) Have been paid wages in the base period amounting to at least thirty times the weekly benefit rates; . . .

Wages are defined, under G.L. c. 151A, §§ 1(k) and (s)(A), as payment to an employee who performs services for an employer. At issue is whether the claimant's services were performed as a partner or as an employee.

Because a partnership may be created loosely and without written documentation, courts will look to the facts and circumstances of the relationship among the parties to determine whether a partnership exists. Southex Exhibitions, Inc. v. R.I. Builders Assoc., Inc., 279 F.3d 94, 100 (1<sup>st</sup> Cir. 2002) (agreement between business entities did not create a partnership). This is particularly so with law firms.

[D]etermining whether an attorney is a partner or a mere employee, “cannot be decided solely on the basis of whether a firm calls—or declines to call—a person a partner. A court must peer beneath the label and probe the actual circumstances of the person’s relation with the partnership.”

Morson v. Kreindler & Kreindler, LLP, 616 F.Supp. 171, 172-173 (D. Mass. 2009) (held “contract partner” to be an employee rather than a partner because, *inter alia*, he held no ownership interest, made no capital contribution, did not share in the profits, was not exposed to liability for the firm’s debts, was paid a fixed salary, and filed a W-2 with his tax return), *quoting* Serapion v. Martinez, 119 F.3d 982, 988 (1<sup>st</sup> Cir. 1997).

In light of the facts in this case, the claimant would not be considered a partner under Massachusetts law. First, in order to constitute a partnership, there must be co-ownership. G.L. c. 108A, § 6(1). Here, the review examiner found that the claimant did not have any ownership interest. Second, sharing of profits is considered *prima facie* evidence that an individual is a partner. G.L. c. 108A, § 7(4). The record shows that the claimant did not share in the firm’s profits<sup>1</sup>. Additionally, the employer reported her wages on a Form W-2.<sup>2</sup> Looking beneath the fact that the firm letterhead held the claimant out to the public as a partner, we conclude that she did not have the requisite ownership interest nor other indicia of a partnership — liability for losses, profit-sharing, or capital contribution<sup>3</sup>. *Compare* Herdier v. Dir. of Division of Unemployment Assistance, 82 Mass. App. Ct. 701 (2012) (wages earned by a managing partner with ownership interest in a restaurant were not qualifying wages for purposes of monetary eligibility under G.L. c. 151A, § 24); and Trongone v. Board of Review, 2012 WL 2094079 at \*2 (N.J. Super. Ct. App. Div. 2012) (unpublished opinion) (working member of a partnership was not an employee for the purposes of unemployment benefit eligibility, where the claimant shared fifty percent of the profit, loss, and capital of the business).

Since we conclude as a matter of law that the claimant did not perform her services for the employer as a partner, her base period earnings constitute wages, within the meaning of G.L. c. 151A, §§ 1(k) and (s)(A), and she has satisfied the monetary eligibility requirements of G.L. c. 151A, § 24(a).

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<sup>1</sup> The Schedule K-1 forms issued to the claimant in 2009 and 2010, appearing in Exhibits 9 and 10, show zero profit sharing payments and the employer’s sworn affidavit, appearing in Exhibit 11, attests to the fact that the claimant did not receive any distributions other than regular payroll wages. While not explicitly incorporated into the review examiner’s findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

<sup>2</sup> *See* Exhibit 11. Id.

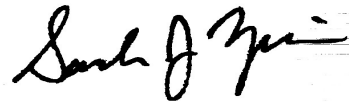
<sup>3</sup> *See* Exhibits 9 and 10, line J. Id.

The review examiner's decision is reversed. The claimant has not been overpaid benefits as she was monetarily eligible to receive benefits for the week ending December 31, 2011 and for subsequent weeks if otherwise eligible.

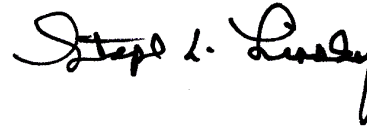


John A. King, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF MAILING - January 8, 2013**



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 7, 2013**

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.