



EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

In the matter of:

Appeal number: **BR-115501-OP**

CLAIMANT APPELLANT:

[REDACTED]

Hearings Docket # [REDACTED]

EMPLOYING UNIT:

[REDACTED]

EMP. # [REDACTED]

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie O'Connor, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits following the claimant's separation from employment, and to require repayment of \$16,887.00 in benefits that had been awarded on the claimant's claim. We review, pursuant to our authority, under G.L. c. 151A, § 41, and reverse.

The claimant was laid off from her position with the employer on December 5, 2008. She filed a claim for unemployment benefits with the DUA, which was initially approved. However, in a redetermination issued on January 14, 2010, the DUA found that the claimant was disqualified from receiving benefits effective the week ending April 4, 2009; and had been overpaid \$16,887.00 in benefits for the 39 weeks from the week ending April 4, 2009, through the week ending December 26, 2009. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's redetermination and overpayment, denying benefits in a decision rendered on August 11, 2010. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant refused to return to work following a seasonal recall and voluntarily left employment for good cause attributable to the employer and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain more information

about the timing of the claimant's Section 30 application, course approval and recall. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the decision below, the consolidated findings, and the review examiner's credibility assessment.

The issue on appeal is whether the DUA's approval of the claimant's submission of an application for retraining, pursuant to G.L. c. 151A, § 30, prior to the claimant's recall from a seasonal layoff excuses her from returning to work after recall and permits her to collect regular and extended benefits while attending school.

Findings of Fact

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

1. The claimant filed her claim for benefits effective 04/04/09. She was thereafter paid benefits. The benefits here in issue and paid pertain to the weeks ending 04/04/09 through 12/26/09. The claimant's weekly benefit rate is \$408.00 plus \$25.00 stimulus money.
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 04/04/09 and until the claimant has had eight weeks of work and in each of said weeks has earned an amount equal to or in excess of her weekly benefit amount.
3. That redetermination was issued on 01/14/10 under Section 25(e)(1), and 71 of the Law. An overpayment in the amount of \$16,887.00 was established. Misrepresentation was determined and a surcharge levied on the balance of the overpayment.
4. The claimant worked full time as a driver and laborer for the employer, a paving company, from 04/14/08 until 12/05/08. The claimant's rate if [sic] pay was \$19.00 per hour.
5. The claimant failed to return to work when called back from a seasonal lay off.
6. The claimant had worked for the claimant for approximately seven years. Each year as winter approached, the employer laid off its employees for the season. Each spring the employees were called back. The claimant had been laid off and called back multiple times by the instant employer.

7. On 12/05/08, the claimant was laid off from her employment for the winter season.
8. The claimant did not want to return to work for the instant employer. The claimant believed he was harsh and abusive towards her during her [2008] employment. The claimant never expressed these beliefs to the employer though she did consult with an attorney regarding her legal options in October or November, [2008]. The attorney advised the claimant to quit her employment and report the abuse to the police. The claimant chose not to follow the attorney's advice and continued to work until laid off for the season on 12/05/08. The claimant also attended the employer's Christmas party later in December, [2008].
9. In February 2009, the claimant decided to return to school. The claimant applied for Section 30 benefits in order to receive training to become a medical assistant.
10. On 03/02/09, the claimant submitted her Section 30 application to her school to complete and provide to the DUA pursuant to G.L. c. 151A, Section 30(c).
11. In March 2009, the employer attempted to contact the claimant to notify her that she would be called back to work in April 2009, weather permitting. He was initially unable to reach the claimant.
12. After several attempts, the employer contacted the claimant and called her back to work. The claimant informed the employer that she was unable to return because she had recently undergone surgery. The claimant told the employer she wouldn't be able to return until July or August. The employer expressed to the claimant that she should have notified him of her inability to work. The claimant then told the employer that she was not coming back at all because she was returning to school to become a medical assistant.
13. On 04/08/09, the DUA approved the claimant's application for Section 30 benefits.
14. On 05/04/09, the claimant began attending classes.
15. On 12/14/08, the claimant filed for unemployment benefits.

Credibility Assessment: In the instant case, the claimant and the employer attended the remand hearing. In the remand hearing, no conflicting testimony was presented regarding the claimant's application for and receipt of Section 30 benefits.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact and credibility assessment. 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 analyzing the claimant's separation, under G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that her separation was for good cause attributable to the employer. The review examiner initially concluded the claimant quit without good cause attributable to the employer by refusing her employer's offer of recall. We remanded the case to take additional evidence regarding whether and when the claimant submitted an application to the DUA for training, pursuant to G.L. c. 151A, § 30; whether and when the claimant's application for training was approved by the DUA; and when the claimant began attending classes. After remand, we conclude that the claimant's timely filing and DUA's approval of her application for G.L. c. 151A, § 30, retraining before she received notice of recall, renders her eligible for regular benefits as well as G.L. c. 151A, § 30 extended benefits.

After remand, the review examiner found that the claimant failed to return to work when called back after a seasonal layoff. The claimant last worked for the employer on December 5, 2008; when she was laid off for the winter. She applied for and qualified for benefits after this layoff.

While collecting benefits on layoff; the claimant decided to return to school for training to become a medical assistant. On March 2, 2009, she submitted to the DUA an application for training benefits, pursuant to G.L. c. 151A, § 30. *See* Remand Exhibit #8, pp. 2-4. On April 8, 2009, the DUA approved the claimant's application for training. *See* Remand Exhibit #8, p. 1. The claimant began attending classes pursuant to this approval on May 4, 2009.

The employer began attempting to contact the claimant sometime in March 2009 to notify her that work would resume in April 2009, weather permitting. At some point in March or April, the employer and claimant connected, and the claimant informed the employer she would not be returning to work because she was returning to school. The employer resumed work on April 21, 2009. *See* Remand Exhibit #9.¹

¹ The actual recall date of April 21, 2009, was initially provided to DUA by the employer on May 4, 2009. Remand Exhibit #9, while not explicitly incorporated into the review examiner's consolidated findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

In view of the specific factual circumstances presented in this case, we conclude that the timing of the approval of the claimant's application for G.L. c. 151A, § 30, training benefits and the actual date she otherwise would have returned to work compels approval of her G.L. c. 151A, § 30, training extension. We note that as of the date the claimant submitted her G.L. c. 151A, § 30, application, the claimant had not heard from the employer about any forthcoming recall. See Remand Exhibit #8, p. 2. At the time DUA approved the G.L. c. 151A, § 30, application (April 8, 2009), there was still no work available with the employer. Although the claimant's classes began shortly after the employer finally had work available (April 21, 2009 compared to May 4, 2009), the claimant had already been approved for and presumably was preparing to commence with her studies. We, therefore, conclude as a matter of law that the claimant's timely submission of and approval for training benefits before the employer recalled her to work qualifies her for regular and extended benefits, pursuant to G.L. c. 151A, § 30.

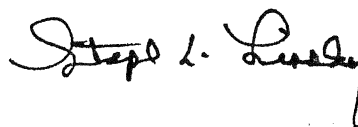
The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 4, 2009, and for subsequent weeks, if otherwise eligible. The claimant is also entitled to an extension of benefits, pursuant to G.L. c. 151A, § 30(c). The claimant is relieved of her obligation to search for work while attending school, pursuant to G.L. c. 151A, § 24(b); and of her obligation to accept work while attending school, pursuant to G.L. c. 151A, § 25(c).

Because we conclude that the claimant is entitled to regular and extended benefits under § 30(c), the claimant is not obligated to repay \$16,887.00 in benefits, plus interest.

BOSTON, MASSACHUSETTS
DATE OF MAILING – August 31, 2011



John A. King, Esq.
Chairman



Stephen M. Linsky, 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 – September 30, 2011