



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114

Tel. 626-6400
Office Hours:
8.45 a.m to 5.00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

CORRECTED DECISION

Appeal number:

BR- 263321

CLAIMANT APPELLANT:

[REDACTED]

[REDACTED]

Office #02

EMPLOYING UNIT:

Association for Community Living
c/o UTCA Inc
One Monarch Place #250
Springfield, MA 01104

EMP.# 72-020720

On March 29, 2000, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Deputy Director's representative on July 20, 1999, November 22, 1999, and December 13, 1999.

On September 9, 1999, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The Board remanded the case to the Deputy Director to take additional testimony and to make additional findings of fact. The Deputy Director returned the case to the Board on December 29, 1999.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

The evidence and testimony presented in this hearing established that the claimant is on a leave of absence, requested by herself, due to a broken knee. A date on which the leave will end has never been established. It is concluded that the claimant is not in total unemployment within the provisions of Section 29(a) and 1(r) of the Law.

The suggestion, that a separation took place when the claimant found her own replacement in May, was not persuasive. Nor was it supported by the claimant's own testimony or written evidence.

In view of the facts, the claimant is subject to disqualification and denied benefits.

Benefits are denied beginning with the week ending 6-12-99 and indefinitely, until the claimant meets the requirements of the Law.

Sections 25(c)(1), 29(a) & 1(r)(2) of Chapter 151A of the General Laws are pertinent and provide as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for-

- (e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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,

Section 29. (a) Any individual in total unemployment and otherwise eligible for benefits . . .

Section 1. The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise: -

- (r) "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.

- (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. Services rendered in consideration of remuneration received for relief, support, or assistance, furnished or provided by any agency of the commonwealth, or of a political subdivision thereof, charged with the duty of furnishing aid or assistance, shall not be construed as wage-earning services.

An individual who is not entitled to vacation pay from his employer shall be deemed to be in total unemployment during the entire period of any general closing of his employer's place of business for vacation purposes, notwithstanding his prior assent, direct or indirect, to the establishment of such vacation period by his employer.

The Deputy Director's representative held a hearing on July 20, 1999. The claimant was present. The employer did not appear. The Deputy Director's representative held a remand hearing on November 22, 1999. Both parties appeared. The Deputy Director's representative continued the remand hearing on December 13, 1999. Both parties appeared again. The Deputy Director's representative then consolidated her final findings of fact as follows:

1. The claimant worked on a part-time basis as a community companion for the instant employer, a human service agency, on and off from 7-97 to about 6-2-99, at a rate of \$8.25 per hour.
2. While working as a community companion, the claimant also had a full-time position elsewhere.

3. The claimant performed services for this employer as a community companion. She served as a companion for a mentally challenged (Downs [sic] Syndrome), hyperactive male, who did not need assistance with physical needs. He enjoyed sporting activities such as hiking, basketball, and swimming.
4. On 1-9-99, the claimant broke her knee. She requested, and was granted by the instant employer, a leave of absence. The claimant did not know when she would be able to return to work, and no specific leave of absence end date was established.
5. The claimant's knee did not heal as she hoped it would. She kept her employer updated as to the status of her medical condition. At no time did the employer ever deny the claimant the time she needed off from work due to her broken knee.
6. Week after week, the claimant kept hoping her condition would improve so she could return to work. In April or May, the claimant returned to work for about a month and a half. At that time, she was unable physically to do the activities that the client enjoyed. The employer suggested various other activities, such as going out to eat and reading and writing at the library. The claimant found that the client did not get the same enjoyment at the library that he did with more physical activities such as hiking and basketball.
7. The claimant really liked the person with whom she worked. Because she wanted "the perfect match" for that person, she took it upon herself to find her own replacement to work with that person. She did so in May or June, 1999.
8. At no time did the claimant discuss with the instant employer what would happen with her own employment when she was again able to perform her job duties. Nor did she discuss with the employer the fate of the replacement's employment when she was able to return to her job.
9. At no time did the claimant ever submit to the instant employer a resignation, either verbally or in writing. Nor did the employer ever notify the claimant that her employment was terminated.
10. When an extended leave of absence from her primary job was not available to the claimant, she resigned her primary job. Then, on 6-8-99, the claimant filed a claim for unemployment benefits.
11. On 6-9-99, the claimant sent her employer a letter. The letter indicated, in part, that the knee problem had become a life problem, that she did not know her future, and that she had put in for disability. She indicated that she walked with a cane and spent many hours with an ice pack. She also said that she loved working with Kevin (the client for whom she was a companion) but did not think she could offer him the services he liked or the companionship the employer expected. She further said she wanted to, and asked the employer to please let her know if the employer could think of anything she might be able to offer in the future.
12. The letter further stated as follows: "So...Maybe next year, after surgery and physical therapy and other medical needs I will resume employment. Unless you can think of something I haven't; I am involved with Mass Rehab, but even they can not help at this time. I am not giving you my notice. However you have the right to let me go. Kevin is great, but my physical capacity is good for two hours, this includes errands I might have. I have good days and many bad ones; by this I mean pain, swelling and locking of my right knee. Please call me."

13. After receipt of the 6-9-99 [sic], the employer suggested the claimant call the human resource office in Springfield. The human resource office does not do the hiring for the various programs. There are several hiring authorities for programs for various programs.
14. Had the claimant contacted the human resource office, medical documentation would have been requested stating the claimant's limitations. The claimant did not contact the human resource office.
15. After being referred to the human resource office, the claimant had no further contact with the employer until 7-30-99, when she sent the Personnel Director a letter. Between about 6-9-99 and 7-30-99, the claimant did not update the employer as to her medical status, as she had found a replacement to work with the client and her medical condition had not significantly changed.
16. The claimant still intended to return to work when she was physically able to do so, but once she found the replacement, she did not plan to return to work as a companion for the same client for whom she had previously been a companion.
17. At the time of filing, the claimant was capable of performing some work; up to 25 hours per week, with many limitations. The amount that she could work depended on controlling the pain. Since 6-12-99, she had not been on "heavy duty medication" and the pain was not controlled as on 11-22-99. Her limitations included walking, sitting, lifting, and driving. She could drive about 20 minutes, with 30 minutes as her outside limit. She needed flexible hours so she could work around her limitations. She might be able to work one day and then be in too much pain to work for a couple of days thereafter.
18. The claimant attended college for six years, and has an associate's degree in special education. She is qualified to do counseling and teach various things including crafts, basic skills, community integration, and self worth. She has taught education, one-on-one, covering a variety of subjects and skills.
19. The claimant looked for work by talking to friends, calling agencies, and checking the DET computers in Greenfield and Athol. She had a couple of interviews in August. Her work search included employers in Greenfield, Turners Falls, Orange, Athol, Northampton, Amherst, Easthampton, and Springfield, some of which were within her driving limit and some which were not.
20. The claimant was not offered any work and she did not refuse any work.
21. At the time of filing, both the claimant and her part-time employer indicated the claimant was still employed.
22. Upon written request by the DET for additional information relative to the claimant's employment with the part-time employer, the claimant indicated she was on a leave of absence requested by herself, for a disability. That information was provided to the DET dated 6-17-99.
23. Between 6-17-99 and the date of her unemployment hearing, the claimant had no contact with the employer during which her employment status was altered in any way.
24. When the claimant is physically able to perform her job duties, she plans to contact the employer.

25. Subsequent to the claimant's initial unemployment hearing, she did contact the employer in writing, on 7-30-99, to request alternative duties, and absent those, offer her resignation.
26. Prior to her injury, the claimant normally worked for this part-time employer eight hours per week. She made her own schedule and generally worked on Wednesdays from 4:00 to 6:00 p.m. and on Saturdays, 6 hours during the day.
27. The claimant last worked for this employer on or about 6-2-99. The gross wages paid by this employer in the last completed calendar quarter of the base period were \$198.48. She worked about six weeks.
28. The claimant's benefit rate was \$182.

CREDIBILITY: While there was extensive testimony given during the hearing, by both the claimant and the employer, there were actually few disputed material facts. The claimant's suggestion, that she believed she was separated when she found her replacement was not persuasive. It was not supported by the claimant's own written documentation. Nor was it supported by the letter sent to the employer dated 6-9-99. The employer's testimony, that the claimant was paid \$376.29 in the first quarter of 1999 was not supported by the payroll document presented by the employer.

After reviewing the record, the Board adopts the consolidated findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes as follows:

The claimant had not permanently left her employment when she filed the claim on June 8, 1999. Therefore, § 25(e)(1) of the Law, cited above, is not applicable.

The claimant was on an indefinite leave of absence pending recovery from her knee injury and until she submitted her resignation on July 30, 1999. In a June 9, 1999 letter to the employer, the claimant informed the employer of her inability to perform her job duties due to her knee problem and she requested the employer to let her know of work available in the future. The employer did not offer her other suitable work. The claimant intended to return to work when physically able to do so, though she knew she would not be able to return to work with the same client since she was replaced.

However, although claimant was not able to perform work for this employer, she was capable of, and available to perform other types of work for up to 25 hours per week, with Medical restrictions.

The Board notes that, in a separate decision in docket #267313, by a representative of the Deputy Director, the claimant was determined to be a qualified individual with a disability and, therefore, despite the medical restrictions, found to be capable to and available for work.

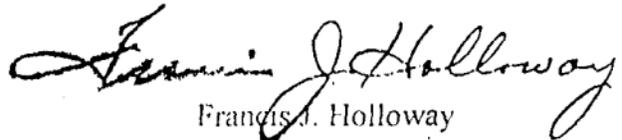
Also, the claimant is qualified to perform work without the same physical requirements as this employment, and she has sought, but been unable to find work.

The Board, therefore, concludes that the claimant is in unemployment within the meaning of Sections 29(a) and 1(r)(2) of the Law, cited above.

The Board *modifies the Deputy Director's decision. The claimant is entitled to benefits for the weeks ending June 12, 1999, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS

*DATE OF MAILING - APR 04 2000


Francis J. Holloway
Chairman


Kevin P. Foley
Member

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

*LAST DAY - MAY 04 2000

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