



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:

Appeal number: **BR-262307**

APPELLANT: (claimant)

[REDACTED]

RESPONDENT: (employer)
Star Markets Company Inc.
c/o The Frick Co.
P.O. Box 283
St. Louis, MO 63166

Office #23

On November 8, 1999, 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 June 30, 1999, and September 17, 1999.

On August 26, 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 evidence and to make additional and consolidated findings of fact. The Deputy Director returned the case to the Board on September 23, 1999.

The Board has now 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 claimant is not in total unemployment within the meaning of section 29(a) & 1(r) of the Law. The claimant, who had been working with the instant part-time employer prior to her employment with her full time base period employer, continued to work with the instant employer after her separation from her full time employer, until she was no longer able to work and was granted a leave of absence through the thirty-fourth week of her pregnancy. Given the fact that she was a patient in her doctor's "high risk obstetrical clinic" and that she had been advised to "stay off her feet and take things easy until her thirty-fourth week of pregnancy", it may be reasonably concluded that she was unable to work not only as a cashier, but in any capacity. Therefore, the claimant is subject to disqualification under the above-cited section of the Law.

The claimant is ineligible for benefits for the week ending May 15, 1999, and for an indefinite number of weeks thereafter until she meets the requirements of the Law.

Sections 29(a)(b) and 1(r)(1)(2) of Chapter 151A of the General Laws is pertinent and provides as follows:

Section 29. (a) An individual in total unemployment and otherwise eligible for benefits whose average weekly wage in his base period exceeds sixty-six dollars 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; provided, however, that earnings up to one-third of his weekly benefit rate shall be disregarded. In no case shall the amount of earnings so disregarded plus the weekly benefit rate equal or exceed the individual's average weekly wage. Such partial benefit amount shall be rounded to the next lower full dollar amount if it includes a fractional part of a dollar.

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.
- (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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.
- (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 June 30, 1999. The claimant was present with legal representation. The employer's agent also was present. The Deputy Director's representative held a remand hearing on September 17, 1999. Again, the claimant was present with counsel and the employer agent appeared. Whereupon, the Deputy Director's representative consolidated his final findings of fact as follows:

1. The claimant was employed as a part-time cashier from November 22, 1996, through May 1, 1999, after which she requested and was granted a medical leave of absence by the employer. Working approximately ten to twelve hours per week, the claimant was scheduled for five to six hours on Saturdays and five to six hours on Sundays.
2. At the time of her separation, the claimant, having received a \$.25 per hour increase in mid April, 1999, was earning \$7.30 per hour. Entitled to time and a half for work on Sundays, the claimant received \$10.95 for each hour she worked on Sundays.
3. The claimant, from August, 1998, through April 9, 1999, had also been working on a full time assignment from a temporary job placement agency as a data entry clerk/receptionist. The assignment ended on April 9, and the claimant continued to work for the instant employer as she had been doing since before she had accepted this assignment.
4. Having last worked on Saturday, May 1, 1999, the claimant, who was expecting a baby on August 8, called in sick on May 2, indicating that she was having problems with her pregnancy and that her doctor had requested that she stay off her feet through the thirty-fourth week of her pregnancy.
5. Informed that she did not wish to be taken off the payroll and that she intended to return to work after the thirty-fourth week, the employer advised her that if she submitted a note from her doctor, she would be given a medical leave of absence through her thirty-fourth week.
6. The claimant thereafter submitted a note from her doctor, which stated that, as a patient in the "high risk obstetrical clinic", she had been advised to "stay off her feet and take things easy until her thirty-fourth week of pregnancy". She then filed a claim for unemployment benefits on May 13, 1999.
7. The claimant, after ceasing to work for the instant employer, continued to search for full time work that would not require that she be on her feet. Able to perform and seeking office work similar to what she had been doing on her full time assignment from the temporary job placement agency, the claimant kept in contact with that agency. Available to work forty hours per week, she also sent out resumes and read the "help wanted ads" twice during the week and on Sundays.
8. The claimant did not refuse any work, nor did she receive any offers of employment. Anticipating the approaching birth of her baby, the claimant ceased her search for employment during the week ending July 17, 1999.
9. Although the claimant, in accordance with the doctor's note given to the employer, was able to return to work for the instant employer as of the week ending July 10, 1999, she did not seek to return to work at that time.
10. After the birth of her baby, the claimant returned to her part-time work for the instant employer on Sunday, September 5, 1999. At the same time, she resumed her search for full time employment, but has not returned to work for any other employer.

- 11. The claimant's doctor later certified in a letter dated September 21, 1999, that he had asked the claimant to stop working "as a cashier" in May, 1999, because of the strenuous work and the requirement that she remain standing for long periods of time. He further stated that the claimant, throughout her pregnancy, was able to perform primarily seated, non-strenuous work on a full time basis.

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 began a leave of absence from this employer on May 1, 1999, due to problems associated with her pregnancy. Her doctor advised her to stay off her feet at that time and through the 34th week of her pregnancy. The claimant had been working as a cashier for this employer on a subsidiary, part-time basis, ten to 12 hours each weekend.

However, while the claimant was unable to perform this type of work while on leave, she was capable of, available, and unable to find other suitable employment. She was still capable of performing full-time work similar to the office work she had performed at her full-time primary employment up until that assignment ended on April 9, 1999. She also continued to be available and in search of full time work.

The Board, therefore concludes that the claimant was in unemployment within the meaning of sections 29(a) and 1(r).

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending May 15, 1999, and subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
 DATE OF MAILING - NOV 18 1999

Francis J. Holloway
 Francis J. Holloway
 Chairman

Kevin P. Foley
 Kevin P. Foley
 Member

APPELLANT: I.D. # [REDACTED]
 RESPONDENT: I.D. # [REDACTED]

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

LAST DAY - DEC 20 1999

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