



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FREN
MEMBER

SANDOR J. ZAPOLIN
MEMBER

In the matter of:

Appeal number: **BR-106663**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

Hemisphere Operating, Inc.

S.S. #

EMP. #

Office #43

Introduction

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to dismiss claimant's request for a hearing as untimely under G.L. c. 151A, § 39(b). We review pursuant to our authority under G.L. c. 151A, § 41 and reverse.

Factual and Procedural History of this Appeal

The claimant, a restaurant chef, gave notice in late October, 2007 of his intent to quit his employment on November 9, 2007 in order to take a new job at another restaurant. His then-employer, however, chose not to let him work up to the date of his intended resignation but instead discharged him on October 28, 2007. He promptly filed an unemployment insurance claim with the DUA. On November 20, 2007, the agency issued a notice to the claimant, determining that he was eligible for benefits during the first two weeks after his discharge. However, because he had stated an intention to quit his job, DUA disqualified him from receiving further benefits from the date that he had intended to quit. At the time he received this determination, the claimant was already employed full-time at his new job. However, he was laid off from that job some six weeks later. Upon separating from the new employer, the claimant attempted to reactivate his unemployment claim, but learned that the November 20, 2007 disqualification barred him from claiming benefits after his subsequent layoff from his new job. He requested a hearing on the November 20, 2007 determination, but that request was denied as untimely in a Determination as to Timeliness of Appeal, issued by DUA on February 5, 2007.

Subsequently, the claimant sought and obtained a hearing on the issue of the DUA's determination that his appeal had not been timely. Following a hearing on the merits attended by the claimant, a DUA review examiner affirmed that determination, dismissing the appeal in a decision rendered on March 21, 2008.

Ruling of the Board

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's subsequent decision, and the claimant's appeal, we conclude that the review examiner's decision is based on substantial evidence. However, we reach our own conclusions of law, as are discussed below.

By the time the claimant received the November 20, 2007 DUA determination, he was working full-time. Since he was not unemployed, he did not appeal that determination, because he could not be eligible for benefits.

However, when he subsequently became unemployed, the claimant found that his ability to claim benefits was precluded by the November, 2007 determination, but the time to appeal that determination had long expired. See, G.L. c. 151A, § 39(b) (the time for appealing DUA determinations is 10 days but may be extended for good cause to 30 days, after the determination is rendered).

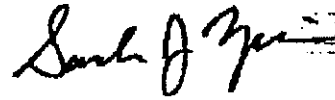
Thus, the sequence of events was such that it was not foreseeable for the claimant to need to fulfill the statutory timeliness requirements of G.L. c. 151A, § 39(b). Considerations of due process and fundamental fairness dictate that we not deny the claimant an opportunity to present his argument and be heard under these unique circumstances. See, 42 USC 503(a)(3) (state unemployment insurance laws must provide all individuals whose claims have been denied an opportunity to be heard); Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979) (the Social Security Act's statutory requirements for due process protections that must be afforded to UI claimants are coextensive with those that are guaranteed under the 14th Amendment).

The DUA review examiner's decision is reversed. The DUA is directed to afford the claimant an opportunity for a hearing in order to present evidence and to make his argument that the November 20, 2007 determination was in error as it affects his eligibility for benefits following his separation from new employer.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - August 1, 2008



Sandor J. Zapolin
Member

Member Donna A. Freni did not participate in this decision.

AB/w