

BR-124226

CLAIMANT APPELLANT:
Hearings Docket # 000000

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. Ferullo, 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's last day of work was December 23, 2011. She filed a claim for unemployment benefits with the DUA which was initially approved, but subsequently denied in a re-determination issued on March 21, 2012. The DUA determined that the claimant was overpaid in the amount of \$2,008.00. The claimant appealed the re-determination and overpayment to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's re-determination and overpayment and denied benefits in a decision rendered on August 15, 2012. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not able, available, and actively seeking work, as required under G.L. c. 151A, § 24(b). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the claimant an opportunity to submit written reasons for agreeing or disagreeing with the decision. The claimant did not respond. Our decision is based

upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the claimant, who spent approximately three weeks in Hawaii to attend a funeral but had a flexible return ticket and continued to look for employment while she was out of state, was able, available, and actively seeking work.

Findings of Fact

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

1. The claimant worked as a field manager performing gardening services for the employer. The claimant would not be provided with work during the winter months and would normally be recalled to that job during the month of March. The claimant's last day at work for the employer was December 23, 2011. (As of December 23, 2011 the claimant had worked three previous seasons with the employer.)
2. The claimant filed her claim for unemployment on January 3, 2012.
3. The claimant received an informational packet in the mail from the Department after filing her claim for benefits.
4. The claimant was signing to receive unemployment benefits on line.
5. The claimant's weekly unemployment benefit rate is \$502. The claimant received her full weekly benefit rate for the weeks ending February 11, 2012 through March 3, 2012.
6. The claimant's best friend's mother passed away in October 2011. A memorial service was scheduled in Hawaii in February 2012. The claimant's friend purchased the claimant a ticket to travel to Hawaii to attend the services.

7. The claimant traveled to Hawaii on February 7th to attend her best friend's mother's memorial services. The claimant returned to Massachusetts on February 29, 2012.
8. Prior to leaving for Hawaii the claimant spoke to a DUA representative. The claimant informed the representative that she was going out of state. The claimant was simply instructed to continue to look for work while away. (At no time was the claimant informed by the DUA representative that she would be considered not to be available for work and ineligible for unemployment benefits. If the claimant had been provided that information she would not have traveled to Hawaii.)
9. The claimant did not have any scheduled interviews in Hawaii when traveling there. The claimant did set up a work related educational seminar in Hawaii in an attempt to network. The seminar was on tropical plants and was a one day seminar.
10. The claimant took her computer to Hawaii and was conducting a job search while there. The claimant was looking for work in Massachusetts.
11. The claimant was looking for full-time work in the hospitality field, catering, gardening or performing financial planning.
12. Every day while in Hawaii the claimant was looking at three different websites for work and was sending out her resume.
13. The claimant had not received any offers of work. If the claimant received any offers of work from employers in Massachusetts, while in Hawaii, the claimant would have returned to Massachusetts.
14. On March 21, 2012 the claimant was issued a Notice of Redetermination and Overpayment, Form 3727-B, indicating that she was disqualified in accordance with Section 24(b) of the Law, because 'during the time spend traveling for personal reasons, you were not available for work. Therefore, you did not meet the availability requirements of the Law, and you are subject to disqualification under the above-cited section of the Law.' The disqualification period was the four weeks ending February 11, 2012 through March 3, 2012. The overpaid amount indicated was \$2,008 and it indicated that the overpayment was due to misrepresentation of fact(s). The claimant filed an appeal to that determination on March 23, 2012.

Ruling of the Board

The Board adopts the review examiner's findings of fact. 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.

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

An individual, in order to be eligible for benefits under this chapter, shall . . . (b) Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted

“Whether an employee is ‘available for work’ is primarily a question of fact.” President and Fellows of Harvard College v. Dir. of Division of Employment Security, 376 Mass. 551, 555 (1978). The review examiner denied benefits to the claimant on the grounds that she was physically out of state for the three weeks in question and, therefore, unavailable for work. However, the review examiner also found that the claimant brought her computer to Hawaii and conducted a job search while she was there, looking at three different websites for work every day and sending out her resume to apply for jobs. Furthermore, the review examiner found that the claimant attended a work-related seminar in Hawaii in an attempt to network and find employment. While the claimant’s temporary presence in Hawaii certainly would have presented her with logistical challenges in searching for a job and attending an interview, the claimant had a flexible return ticket which would have allowed her to return to Massachusetts on short notice if necessary.¹ Under the circumstances, the claimant has shown that she was able, available, and actively seeking work.

We, therefore, conclude as a matter of law that the claimant is able, available, and actively seeking work, within the meaning of G.L. c. 151A, § 24(b).

¹ The claimant’s flexible return ticket, while not explicitly incorporated into the review examiner’s 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 Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the weeks ending February 11, 2012 through March 3, 2012, and for subsequent weeks, if otherwise eligible. The claimant is not overpaid benefits.

BOSTON, MASSACHUSETTS
DATE OF MAILING -

John A. King, Esq.
Chairman

Sandor J. Zapolin
Member

Stephen M. Linsky, Esq.
Member

[Member/Chairman _____ declines to sign the majority opinion]

[Member/Chairman _____ 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-

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.

A.M./ typist's initials