

**COMMONWEALTH OF MASSACHUSETTS**

MIDDLESEX, ss

TRIAL COURT  
DISTRICT COURT DEPARTMENT  
CONCORD DIVISION  
CIVIL NO. 0547CV0002

( Marc J. Zeitlin, )  
( Plaintiff )  
( vs. )  
( )  
(John P. O'Leary, in his capacity as )  
( Commissioner of the Division of )  
( Unemployment Assistance )  
( )

COMPLAINT FOR JUDICIAL  
REVIEW

**INTRODUCTION**

1. The plaintiff, Marc J. Zeitlin, seeks review and reversal of the decision of the Commissioner of the Division of Unemployment Assistance denying him unemployment compensation benefits.

**JURISDICTION**

2. Jurisdiction is conferred on this Court under G.L. c. 30A, § 14(7) and c. 151A, §42.

**PARTIES**

3. The plaintiff, Marc J. Zeitlin is an adult citizen of the Commonwealth who resides at 3 Sweetbriar Way, Acton, MIDDLESEX COUNTY, Massachusetts.
4. The defendant, John P. O'Leary, (hereinafter "Commissioner"), is the Commissioner of the Department of Unemployment Assistance of the Commonwealth of Massachusetts (hereinafter "DUA") and in that capacity is charged under G.L. c 23, § 3 with the administration of the unemployment program in Massachusetts pursuant to the Massachusetts Employment Security Law, G.G. c. 151A. The defendant's principal place of business is at the Charles F. Hurley Building, Government Center, Boston, SUFFOLK COUNTY, Massachusetts.

**FACTS**

5. On April 12<sup>th</sup>, 2004, the plaintiff filed a claim for unemployment benefits via the DUA's phone capability.
6. On April 17<sup>th</sup>, 2004, the plaintiff ended his first "wait week" of eligibility with no benefit payments.
7. On April 24<sup>th</sup>, 2004, the plaintiff ended his second week of eligibility, signed for and received benefits.

8. On May 1<sup>st</sup>, 2004, the plaintiff ended his third week of eligibility, signed for and received benefits.
9. On May 3<sup>rd</sup>, 2004, the DUA mailed a determination of eligibility to the plaintiff, stating eligibility retroactive to April 11<sup>th</sup>, 2004.
10. On May 8<sup>th</sup>, 2004, the plaintiff ended his fourth week of eligibility and signed for benefits, but due to accruing partial unemployment income, was not eligible for and did not receive benefits.
11. On May 15<sup>th</sup>, 2004, the plaintiff ended his fifth week of eligibility and signed for benefits, but did not receive benefits.
12. On May 22<sup>nd</sup>, 2004, the plaintiff ended his sixth week of eligibility and signed for benefits, but due to accruing partial unemployment income, was not eligible for and did not receive benefits.
13. On May 24<sup>th</sup>, 2004, the plaintiff was contacted by the DUA (Jane Vogel) via phone to determine eligibility for benefits.
14. On May 29<sup>th</sup>, 2004, the plaintiff ended his seventh week of eligibility and signed for benefits, but did not receive benefits.
15. On or about June 1<sup>st</sup>, 2004, the plaintiff attended a Career Center Seminar at the Lowell DUA office as required to maintain eligibility for benefits.
16. On June 5<sup>th</sup>, 2004, the plaintiff ended his eighth week of eligibility and signed for benefits, but did not receive benefits.
17. On June 12<sup>th</sup>, 2004, the plaintiff ended his ninth week of eligibility and signed for benefits, but did not receive benefits.
18. On June 16<sup>th</sup>, 2004, the DUA mailed a determination of ineligibility to the plaintiff, stating “engagement in self-employment” as the basis for disqualification.
19. On June 19<sup>th</sup>, 2004, the plaintiff ended his tenth week of eligibility and signed for benefits, but due to accruing partial unemployment income, was not eligible for and did not receive benefits.
20. On June 22<sup>nd</sup>, 2004, the plaintiff filed with Ms. Jane Vogel at the DUA for a claim disqualification hearing.
21. On June 22<sup>nd</sup>, 2004, The DUA mailed an appeal acknowledgment to the plaintiff.
22. On June 26<sup>th</sup>, 2004, the plaintiff ended his eleventh week of eligibility and signed for benefits, but did not receive benefits.
23. On July 3<sup>rd</sup>, 2004, the plaintiff ended his twelfth week of eligibility and signed for benefits, but did not receive benefits.
24. On July 10<sup>th</sup>, 2004, the plaintiff ended his thirteenth week of eligibility and signed for benefits, but due to accruing partial unemployment income, was not eligible for and did not receive benefits.
25. On July 17<sup>th</sup>, 2004, the plaintiff ended his fourteenth week of eligibility and signed for benefits, but did not receive benefits.
26. On July 31<sup>th</sup>, 2004, the plaintiff ended his fifteenth week of eligibility and signed for benefits, but did not receive benefits.

27. On August 7<sup>th</sup>, 2004, the plaintiff ended his sixteenth week of eligibility and signed for benefits, but did not receive benefits.
28. On August 21<sup>st</sup>, 2004, the plaintiff ended his seventeenth week of eligibility and signed for benefits, but did not receive benefits.
29. On October 15<sup>th</sup>, 2004, the DUA mailed a notice of appeal to the plaintiff, indicating a hearing at the Division of Employment and Training offices in Worcester, MA scheduled for November 1<sup>st</sup>, 2004, at 3 PM EDT.
30. On November 1<sup>st</sup>, 2004, a hearing was held on the plaintiff's appeal of the Benefit Determination before a duly appointed DUA review examiner.
31. At the hearing, the plaintiff testified that after being laid off from Philips, he attempted to obtain regular employment as a Mechanical Engineer by posting his resume' to "Monster.com" and sending résumé's to companies that had posted job openings. The plaintiff also testified that he created a company with which to attempt to become self-employed in the area of Mechanical Engineering Consulting. The plaintiff testified that for four of the seventeen weeks in question, had remuneration from self-employment partial employment as defined in G.L. c. 151A, § 1(r)(1) &(3), definition (2) that rendered him ineligible for benefits for those four weeks. The plaintiff testified that in the other thirteen weeks in question, he had no earnings or income whatsoever, and was in total unemployment as defined in G.L. c. 151A, § 1(r)(2). The plaintiff testified that his main effort during the seventeen week period was in obtaining work, primarily with regard to his self-employment, but also and substantially with respect to full time employment with another company. The plaintiff testified that at no point in the thirteen week period without income was he offered a job by another company, nor did he turn one down.
32. On November 30<sup>th</sup>, 2004, the review examiner issued a decision denying the plaintiff unemployment benefits.
33. On or about December 1<sup>st</sup>, 2004, the plaintiff timely filed an Application for Further Review of the Review Examiner's decision at the Board of Review in accordance with G.L. c. 151A, § 40.
34. On December 13<sup>th</sup>, 2004, the Board Of Review issued a form denial of plaintiff's Application for Further Review, rendering the Review Examiner's decision the final decision of DUA under G.L. c. 151A, § 41.

### **CAUSES OF ACTION**

35. The plaintiff realleges the facts set forth in paragraphs 5 through 34 above, and incorporates them by reference as though fully set forth herein.
36. The decision of the Commissioner disqualifying the plaintiff from receiving unemployment compensation benefits is based upon an error of law under G.L. c. 151A, § 1(r), which defines "remuneration", "partial unemployment" and "total unemployment", G.L. c. 151A § 24(b), which stipulates claimant's required actions for unemployment compensation benefits eligibility, G.L. c. 151A § 29(a) & 29(b), which define benefits under "partial unemployment" and "total unemployment", and "Mattapoissett v. Director of the Division of Employment Security, 392 Mass. 546, 466 N.E. 2d 125 (1984), and SRH § 1234(K)-(L)", which defines On-Call, Per Diem, Part-Time Variable, or As-Needed Employment.

37. The disqualification of benefits by DUA was based solely on the determination of intention of self-employment by the plaintiff. The plaintiff claims that no section of G.L. c. 151A stipulates self-employment as a disqualifier for receiving benefits. The plaintiff claims that G.L. c. 151A §1(r)(3), which defines “remuneration”, explicitly allows self-employment net income to be used in defining “remuneration”. If self-employment were to be a disqualifier for “total” or “partial” unemployment, there would be no reason to define “remuneration” to allow self-employment income – hence the definition of “remuneration” as stated is implicit understanding that self-employment or attempted self-employment is not a disqualifier for unemployment benefits. The plaintiff claims that since G.L. c. 151A § 24(b) makes no mention of the variety of employment being sought, but only the actions of seeking, there is again no disqualifier for self-employment. The plaintiff claims that his inability to obtain any suitable work, though capable of and available for work as defined in G.L. c. 151A §1(r)(2), whether “suitable work” were defined as employment by others or self-employment, is sufficient ground for declaring the plaintiff eligible for and in “total unemployment” for the ten weekly periods for which unemployment compensation benefits were denied.
38. The decision of the Commissioner which disqualified the plaintiff from receiving unemployment compensation benefits is otherwise based upon error of law, unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law in violation of G.L. c. 30A, § 14(7)(c), (e), and (g).

#### **PRAYERS OF RELIEF**

WHEREFORE, plaintiff respectfully requests that this Court:

1. Reverse the decision of the Commissioner and order DUA to award plaintiff unemployment compensation benefits for the ten weeks that were wrongly denied.
2. Grant the plaintiff compensation for any and all legal costs incurred with respect to this Complaint for Judicial Review.
3. Grant such other and further relief as this Court deems just and proper.

Date: 1/7/2005

Respectfully Submitted,  
Marc J. Zeitlin

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