

The claimant needed to go on a leave of absence when she was unable to perform her housekeeping job for the employer due to pregnancy. While on the leave, she was not actively seeking another job. However, she was in unemployment, as defined in G.L. c. 151A, §§ 29 and 1(r)(2), for a few weeks through the end of her pregnancy when DUA had waived the active work search requirement, and again after her three-month medical restriction was lifted.

**Board of Review
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Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 we affirm in part and reverse in part.

The claimant took a leave of absence from the employer and filed a claim for unemployment benefits with the DUA, effective November 24, 2019, which was denied in a determination issued on February 8, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on April 21, 2020. We accepted the claimant's application for review.¹

Benefits were denied after the review examiner determined that the claimant was on a leave of absence from the employer until January, 2020, and was incapable of working, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional evidence as to whether the claimant was capable of, available for, and seeking new suitable work while she was on a leave of absence from the employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), is supported by substantial and credible evidence and is free from error of law, where, on remand, the review examiner found that the claimant was capable of, and available for, some type of work during her leave of absence, but did not actively seek a new job.

¹ The claimant submitted a timely appeal on April 24, 2020. For an unknown reason, the appeal did not reach the Board until March 18, 2021.

Findings of Fact

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

1. The claimant opened an existing claim with an effective date of November 24, 2019.
2. The claimant worked for the employer, a hotel, from June 5, 2019, as a housekeeper.
3. The claimant learned that she was pregnant in October, 2019.
4. The claimant's delivery due date was June 2, 2020.
5. On or about October 15, 2019, the claimant notified her [supervisor], the employer's Head Housekeeper, that she was pregnant.
6. From at least October 27, 2019, the claimant was unable to work as a housekeeper for the employer while pregnant due to the harsh chemicals used in the workplace.
7. As of at least October 28, 2019, the employer did not have other work available for the claimant.
8. As of October 27, 2019, the claimant was on an approved leave of absence from the employer.
9. The claimant delivered her baby on May 28, 2020, via c-section surgery.
10. The employer required that the claimant provide medical documentation to support her leave of absence by an unknown deadline.
11. On or about June 15, 2020, the claimant contacted the employer regarding her return to work. The employer informed the claimant that she was separated from the employer because they received her medical documentation after the requisite deadline.
12. The claimant never returned to work for the employer after she delivered her baby.
13. While on a leave of absence the claimant could have worked as a cashier, warehouse, or grocery clerk.
14. Between October, 2019, and June, 2020, the claimant was able and available to perform other type of work that did not expose her to chemicals.

15. Between October, 2019, and May 28, 2020, the claimant did not actively seek any other type of work that did not expose her to chemicals because she was pregnant and feared any issue with her baby.
16. The claimant began to search for work after she delivered her baby on May 28, 2020.
17. The claimant was medically restricted from working for three months after May 28, 2020, because she gave birth via c-section surgery.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the review examiner's initial conclusion that the claimant was not in unemployment beginning October 28, 2019.

To be eligible for unemployment benefits, the claimant must show that she was in a state of unemployment, whether total or partial. Since the claimant did not perform any work during the time period addressed by the initial determination, the period beginning October 28, 2019, we must determine whether the claimant was in total unemployment. G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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 and available for work, he is unable to obtain any suitable work.

When applying this section of law to the facts of the case, the review examiner concluded the following in her decision:

From at least October 28, 2019, the claimant informed the employer that she was unable to work as a housekeeper for the employer while pregnant due to the harsh chemicals used in the workplace. The employer did not have other work available for the claimant.

Given the above, it is concluded that the claimant was not capable to work from October 28, 2019.

While the claimant established that she had not performed any wage-earning services as a housekeeper during the period of October 28, 2019, through the date of the hearing, and had become incapable of performing that particular job due to pregnancy, she did not have an opportunity to establish that she was available for other suitable work. Because the claimant's

availability for other types of work and her efforts at searching for other work were not addressed during the first hearing, the Board remanded the case, and the review examiner took additional evidence about the claimant's availability and work search efforts. As a result, the review examiner's findings now address each provision of G.L. c. 151A, § 1(r)(2).

We note that the statute itself does not specifically reference that a person must be seeking work in order to be in total unemployment. However, in order for a claimant to show that she is "unable to obtain any suitable work," she must have made efforts at obtaining, or searching for, work.

An individual who is unable to do her regular job for a certain period of time is not necessarily ineligible for unemployment benefits. In Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159, 163 (1980), a pregnant welder stopped working due to concerns that the welding work could negatively affect her pregnancy. She planned to return to work after the child was born. Since she was temporarily out of work for a reason beyond her control but could have done more suitable work and was looking for such work, the court deemed her to be in unemployment. Similarly here, although the claimant was unable to perform her housekeeping work for a certain period of time due to her pregnancy, she could have been in unemployment within the meaning of G.L. c. 151A, § 1(r)(2), if she had been able to do some kind of suitable work and was searching for such work.

The review examiner found that, although the claimant had been able and available to perform other types of work besides housekeeping, she did not actively seek any such work between October, 2019, and May 28, 2020, because she was pregnant and was concerned about how working would affect her baby. *See Consolidated Findings ## 13–15.* Thereafter, she was medically restricted from performing any work for three months. *See Consolidated Finding # 17.*

Ordinarily, these facts would disqualify the claimant for the entire period, from the effective date of her claim, November 24, 2019, until the week ending August 29, 2020. However, in March, 2020, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act (EUISAA) which, among other things, permitted states to modify their unemployment compensation law and policies with respect to work search and good cause on an emergency temporary basis as needed to respond to the spread of the COVID-19 pandemic.² The U.S. Department of Labor (DOL) has also advised states that they have significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that is suitable given an individual's circumstances.³ In response, the DUA waived the work search requirement from March 8, 2020, until June 13, 2021.⁴

Therefore, the claimant's failure to search for work while she was pregnant does not disqualify her from receiving benefits from March 8, 2020, until she gave birth on May 28, 2020. However, for the next three months, the claimant is also ineligible for benefits, because she was medically incapable of performing any work.

² *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

³ *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

⁴ *See* DUA UI Policy and Performance Memo (UIPP) 2021.04 (May 20, 2021).

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r)(2), only for a few weeks between March 8, 2020, and the end of her pregnancy when DUA had waived the active work search requirement, and again after her three-month medical restriction was lifted.

The review examiner's decision is affirmed in part and reversed in part. The claimant is eligible for benefits for the period March 8 through May 30, 2020, as well as beginning August 30, 2020, and for subsequent weeks, if otherwise eligible. She is denied benefits during the period November 24, 2019, through March 7, 2020, as well as for the weeks beginning May 31 through August 29, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

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

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

JMO/rh