

While on a leave of absence, the claimant was on standby status and eligible for benefits under the DUA's COVID-19 Emergency Regulations, as she could not work because schools were closed due to the pandemic and her child-care provider was sick, possibly with COVID-19.

**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 reverse.

The claimant was on a leave of absence from her employer from May 1 through June 22, 2020. She filed a claim for unemployment benefits with the DUA, effective May 3, 2020, but was denied benefits through June 27, 2020, in a determination issued on July 8, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant,¹ the review examiner modified the agency's initial determination and denied benefits from May 1 through June 22, 2020, in a decision rendered on December 9, 2020. We accept the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's circumstances did not meet the legal definition of unemployment, and, thus, she was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 before the Board is whether the review examiner's decision, which concluded that the claimant was ineligible for benefits from May 1 through June 22, 2020, because she did not show that her leave of absence was necessitated by insurmountable circumstances related to COVID-19, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

¹ Although the employer is not an interested party in this case, it was invited to participate in the hearing as a witness-only.

1. The claimant began working for the employer in October 2016. She works full-time, from 2:30 p.m. until 1:00 a.m. on Tuesday through Friday.
2. After schools closed in Massachusetts, the employer offered childcare leaves to its workforce. The claimant did not pursue the employer's offer when it was initially made in April. The claimant later requested a leave of absence for the period of 5/1/20 through 6/1/20. On 5/2/20, the employer notified the claimant that she was approved to take the childcare unpaid leave and was expected to return to work on 6/1/20. On 6/11/20, the employer issued the claimant a second notice, informing her that she was approved to remain on leave until 6/22/20. The employer extended the claimant's leave through the last day of the school year. The claimant requested the extension because her children had schoolwork to do at home.
3. The claimant's children did not attend daycare. The claimant's mother provided care for the children during the period of time between when the claimant left for her second shift work and the children's father returned home from his work. The children's father works from 6:00 a.m. until 3:30 p.m.
4. At the time of requesting the initial leave, the claimant's mother was not available to care for the claimant's children due to illness.
5. On 6/22/20, the claimant returned to work. The claimant's mother was not available to care for the children when the claimant returned to work. The employer allowed the claimant to start her shifts late, in order to wait for her husband to arrive home and assume responsibility for the couple's children.
6. Prior to requesting a leave of absence, the employer [sic] did not request a temporary reduction or change in her shift hours in order to accommodate her childcare needs.
7. On 6/19/20, the claimant completed a DUA factfinding questionnaire, indicating that she was on a leave of absence from her work for the period of 4/30/20 through 6/22/20. In response to a question that asked the reason for the claimant's leave, the claimant responded: "Childcare because school and daycare is close."
8. On 7/8/20, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 29(a) & 1(r) of the law for the period of 4/26/20 through 6/27/20.
9. On 7/8/20, the claimant appealed the Notice of Disqualification.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2)

whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

To be eligible for unemployment benefits, the claimant must show that she is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(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

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

Ordinarily, under federal and Massachusetts law, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. They may meet these requirements, even though they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). In this case, because the claimant seeks benefits from May 3, 2020, the effective date of her claim, through June 22, 2020, the end of her leave of absence, we must also consider temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

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 promulgated COVID-19 Emergency Regulations relaxing its definition of suitable work and the standards for work search for individuals in certain circumstances.⁴

Under the emergency regulations, claimants who were temporarily unemployed from their employer because of lack of work due to COVID-19 and who had an expected return-to-work date,

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* 430 CMR 22.00, effective Mar. 16 – Jun. 14, 2020, and 430 CMR 22.00, effective Aug. 4 – Nov. 2, 2020. As a matter of policy, DUA extended the terms of the first set of regulations through August 3, 2020, to bridge the gap between the effective dates. DUA UI Policy and Performance Memo (UIPP) 2020.13 (Nov. 2, 2020), p. 2.

were deemed to be on stand-by status. While on standby status, they satisfied the work search requirement if they maintained contact with their employer and were available for all hours of suitable work. Additionally, as a practical matter, DUA has adopted the following policy⁵:

[C]laimants who attest that they are unemployed due to having been impacted by COVID-19 and intend to return to their former employer are automatically considered to be on standby status. A claimant could remain on standby potentially for the entire period from March 16, 2020-November 4, 2020, so long as the claimant fulfils the requirements.

In the present case, the findings show that, when schools closed in Massachusetts, the employer offered child-care leaves to its workforce. Finding of Fact # 1. Though not stated, it is common knowledge that schools shut down in Massachusetts to comply with the Governor's declaration of a state of emergency due to COVID-19 on March 10, 2020⁶, and the series of executive orders which followed. The claimant testified that she has children who are seven and nine years old⁷. These are school-age children, and we can infer that the sudden school closures forced them to stay home.

Finding of Fact # 3 states that, ordinarily, the claimant's mother cared for the children during the period that the claimant left to go to work for her 2:30 p.m. shift and when the claimant's husband returned home from his shift that ended at 3:30 p.m. Because the review examiner did not ask, we do not know if this arrangement had been in place for a while or was made in order to fill in a gap caused by the sudden school closure. In any event, the claimant's childcare arrangements ran into trouble at some point because her mother got sick. *See* Finding of Fact # 4. The claimant testified that they did not know if her mother had COVID-19. She further testified that she chose to take the offered leave of absence beginning May 1, 2020, and not sooner, because she ran out of her own paid time off. *See* Finding of Fact # 8.⁸ Because the employer had granted the claimant a leave of absence only until the end of the regular school year, her leave ended on June 22, 2020. *See* Finding of Fact # 2. Once the leave ended, the claimant obtained approval to start her shift later than usual, so that she could care for her children until her husband came home from work. *See* Finding of Fact # 5.

In her decision, the review examiner states that the claimant is disqualified from receiving benefits because she did not establish that her leave "was necessitated by insurmountable circumstances related to COVID-19." Nothing in the EUISSA, U.S. Department of Labor guidance, DUA emergency regulations, or subsequent DUA policy announcements requires that a claimant prove "insurmountable circumstances related to COVID-19" in order to be eligible for unemployment benefits. Rather, to have qualified for benefits while on temporary leave from an employer during the period that the emergency regulations were in effect (March 16 through November 2, 2020),

⁵ UIPP 2020.13, p. 3.

⁶ March 10, 2020 Executive Order No. 591.

⁷ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

⁸ This testimony is also part of the unchallenged evidence in the record.

the DUA merely requires that claimants attest that they are unemployed due to having been impacted by COVID-19 and intend to return to their employer.⁹

In this case, the record shows that the claimant went on a leave of absence when she did not have childcare because schools were closed due to the pandemic, the child-care provider was sick, possibly with COVID-19, and the claimant had exhausted her paid time off. We are satisfied that she was not working during this time due to having been impacted by COVID-19. Her return-to-work date shows that she intended to return to her job with the employer. The claimant was on standby status under the emergency regulations.

In her decision, the review examiner stated that it was worth noting that the claimant might have asked the employer to report late for work from the beginning, rather than at the end of the leave of absence. This seems to suggest that the claimant did not need to request time off and, therefore, should be denied benefits. To do so relies on hindsight to penalize the claimant for not proposing this solution earlier. Moreover, it is purely speculative. We have no idea whether the employer would have allowed that arrangement in early May.

The claimant has demonstrated that she was on a leave of absence due to the impact of COVID-19, that she remained in touch with the employer, and that she had an expected return to work date. Pursuant to the DUA's emergency regulations and DUA policy, she is deemed to have been on standby status and eligible for benefits during her leave.

We, therefore, conclude that the review examiner's decision to disqualify the claimant under G.L. c. 151A, §§ 29 and 1(r), is incorrect as a matter of law in light of the claimant's circumstances and flexibilities adopted in response to the COVID-19 pandemic.

⁹ UIPP 2020.13, p. 3.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 3, 2020, through June 22, 2020, if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 2020



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

AB/rh