

Under DUA's COVID-19 Emergency Regulations and flexible policies adopted in response to the COVID-19 pandemic, the claimant is deemed to meet the requirements of G.L. c. 151A, §§ 29 and 1(r), while on a leave of absence from her employer because she has no child-care.

**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 has been on a leave of absence from her employer since July 12, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 21, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on October 28, 2020. We accept the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of the law while on a leave of absence 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 is not eligible for benefits while on a leave of absence is supported by substantial and credible evidence and is free from error of law, where she remains able to work for the employer, but cannot because she does not have child-care due to the COVID-19 pandemic.

Findings of Fact

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

1. The claimant works as a Certified Nurses Aide for the employer.

¹ Because the employer did not complete its DUA fact-finding questionnaire, it is not an interested party in this case. Nonetheless, it was invited to participate in the hearing, but did not attend.

2. On 07/12/20, the claimant requested a leave of absence for personal reasons because she did not have childcare for her 10-year-old daughter. Her request was approved by Human Resources.
3. The child's summer program was closed due to COVID-19 and the claimant was unable to obtain alternative childcare arrangements.
4. The claimant remains on a leave of absence and intends to return to work when schools resume in-person learning.
5. On 08/21/20, the DUA issued a Notice to Claimant of Disqualification determining that the claimant was on an indefinite leave of absence by her employer and therefore she was not in unemployment and subject to disqualification beginning 07/12/20 and indefinitely until she meets the requirements of the Law.

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 ultimate 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 regular unemployment benefits while on her leave of absence.

The review examiner's conclusion that a claimant is not in unemployment simply because she is on a leave of absence is an error of law. 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 July 5, 2020, the effective date of her claim, through the present, 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 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, 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.

The Emergency Regulations defined suitable work, in relevant part, as follows⁶:

In determining whether work is suitable the department will consider whether a claimant has a condition that prevents the claimant from performing the essential functions of the job without a substantial risk to the claimant's health or safety. For purposes of this section, "condition" [means]⁷ a request to a claimant from an employer, a medical professional, a local health official, or any civil authority that a claimant or a member of the claimant's immediate family or household member be isolated or quarantined as a consequence of COVID-19, even if the claimant or the claimant's immediate family or household member has not actually been diagnosed with COVID-19.

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.

⁵ DUA UI Policy and Performance Memo (UIPP) 2020.13, p. 3.

⁶ 430 CMR 22.04 (effective Mar. 16, 2020).

⁷ The word "means" is used in 430 CMR 22.04 (effective Mar. 16, 2020). The later regulations substituted "includes" and further provided: "but is not limited to, an underlying medical or other condition that puts the claimant at increased risk for severe illness from COVID-19".

In this case, the claimant did not have work from the employer because she did not have child-care to watch her 10-year-old child. Finding of Fact # 2. Specifically, her child's school and summer homework health program have been offered only on a virtual basis due to COVID-19, which meant that her child has had to stay home during the claimant's normal work hours both in the summer and into the school year. *See* Findings of Fact ## 3 and 4.⁸ Because the claimant has not been able to find other child-care arrangements, she cannot perform her regular job, but she expects to return to work as soon as school resumes in-person instruction, and she has maintained contact with her employer during her leave of absence.⁹

As for whether the claimant has been available for suitable work under the emergency regulations, it may be that the order not to allow in-person participation in the summer program and academic year school originated from a medical professional, a local health official, or a civil authority. If so, the claimant met the emergency regulations' definition of suitable work. This information is not in the record. However, it is not necessary to our decision. Pursuant to federal guidance, the DUA has stated that, as a matter of policy, a claimant is not disqualified for refusing otherwise suitable work if, due to age, medical condition or infirmity, another individual requires the claimant's full-time care and no alternative care is available due to COVID-19.¹⁰ The claimant's circumstances fall squarely within this policy.

We, therefore, conclude as a matter of law, that while the emergency regulations were in effect,¹¹ the claimant met the criteria for standby status.¹² During this period, she is deemed to have met the work search and availability requirements of G.L. c. 151A, §§ 29(a) and 1(r), because she remained in contact with the employer and was willing to work, but her employer did not have any suitable work for her to perform without childcare for her daughter.

⁸ 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).

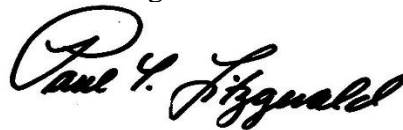
⁹ This is also part of the unchallenged evidence in the record, including the claimant's hearing testimony and responses to her DUA fact-finding questionnaire. *See* Exhibit 1.

¹⁰ *See* DUA UIPP 2020.12 (Oct. 8, 2020), p. 2–3.

¹¹ Technically, the first set of regulations expired on June 14, 2020, and the second set of regulations did not take effect until August 4, 2020. However, by policy, the DUA has extended the terms of the first set of Emergency regulations to cover the gap, the period between June 14 and August 3, 2020. *See* UIPP 2020.13 (Nov. 2, 2020), p. 2.

¹² The first set of Emergency Regulations at 430 CMR 22.03(2), also placed a four- to eight-week limit on the amount of time a claimant may be on standby status. Under the authority of the DUA Director, the time limitation has been waived. *See* UIPP 2020.13, p. 2.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 5, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

DATE OF DECISION - November 25, 2020

Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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