

**Under temporary policies adopted in response to the pandemic, the claimant was eligible for benefits while out on leave, as she could not return to work due to the lingering effects of a COVID-19 infection. Additionally, the claimant was reasonably afraid of returning to work with the employer and contracting the virus again, as her previous infection resulted in severe symptoms. Claimant was permitted to be available only part-time for other work, because it was due to a COVID-19 related reason.**

**Board of Review  
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**Issue ID: 0051 3091 37**

### 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 last worked on April 2, 2020, before becoming ill and taking a leave of absence from the employer. She filed a claim for unemployment benefits with an effective date of August 9, 2020. In a determination issued on September 3, 2020, the DUA denied benefits to the claimant because she was on an indefinite medical leave of absence. 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 January 2, 2021. We accepted 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 only available for part-time work and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b) 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 not eligible for benefits while out on a leave of absence and only available for part-time work, is supported by substantial and credible evidence and is free from error of law, where the claimant took the leave of absence from the employer and reduced her availability for other work due to COVID-19 related reasons.

### Findings of Fact

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

1. On March 12, 2016, the claimant began working as a part time cashier for the employer, a home supply retailer. After a year or two she became a full-time employee.
2. At the start of the COVID-19 pandemic in March 2020, the employer had limited PPE equipment and the work environment was very dusty, making it difficult for anyone with a respiratory illness to work comfortably.
3. The last day the claimant was at work was April 2, 2020.
4. On or shortly after April 2, 2020, the claimant became ill. On April 6, 2020, she tested positive for COVID-19.
5. The claimant is over 70 years of age.
6. On April 9, 2020, the claimant spent the night in the hospital and was then sent home. She was rushed back to the hospital on April 13, 2020, and remain[ed] there for 2 weeks.
7. The employer placed the claimant on a leave of absence.
8. The employer provided all employees with 180 hours of emergency leave due to the pandemic, and employees over age 62 received an additional 60 hours.
9. The claimant presented the employer with medical notes which excused her from work through June 15, 2020.
10. The claimant was still unable to return to work as of June 15, 2020, as she had not yet had a negative COVID-19 test result. In addition, her oxygen levels and Vitamin B and D levels were low, and she developed pain in her legs if she stood for over an hour.
11. On July 15, 2020, the claimant provided the employer with a medical note stating that she would be able to return to work as of September 1, 2020, with restrictions. She was not [to] lift more than 10 pounds, stand for more than 2-3 hours, and she needed to take a break every 15-20 minutes. The employer was unable to accommodate these restrictions and instructed the claimant to remain out of work until she felt able to return without these restrictions.
12. The claimant's emergency leave pay was exhausted on August 7, 2020.
13. On August 11, 2020, the claimant filed her 2020-01, claim for unemployment benefits, effective August 9, 2020.
14. Since at least August 9, 2020, through the date of the hearing, the claimant has believed herself able to work up to 4 hours a day at a job, so long as the job would allow her to sit most of the time and stretch her legs every now and then.

Due to a fear of becoming re-infected with COVID-19, she has only been willing to work in an environment with limited public contact, such as an office.

15. The claimant cannot wear a mask for long periods due to her breathing difficulty. She uses two inhalers.
16. On September 24, 2020, the claimant's doctor provided her with a note stating that she should remain out of work for the following 8–12 weeks to recover her strength after her recent hospitalization for COVID-19.
17. The claimant has been engaging in at least three work search activities a week; calling businesses and / or friends and relatives, asking about work opportunities that meet her restrictions.
18. On September 3, 2020, DUA issued Notice of disqualification 0051 3091 37-01, stating that the claimant is subject to disqualification under MGL c. 151A, Section 29(a) and 1(r) starting August 9, 2020, and 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 original 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 was not in unemployment while she was out on a leave of absence and only available for other part-time work.

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. Under limited circumstances, they may meet these requirements even if they are only available to work part-time hours. *See* 430 CMR 4.45. In this case, because the claimant seeks benefits as of August 9, 2020, the effective date of her claim, 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.<sup>1</sup> 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.<sup>2</sup>

In response, the DUA adopted several policies, including a policy relaxing its definition of suitable work and expanding the circumstances under which claimants may limit their availability to part-time work.<sup>3</sup> Under this policy, employment is not suitable if it poses a substantial risk to the claimant's health or safety, the claimant's health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment, or the claimant has a reasonable belief that one of the above factors applies. Additionally, claimants may limit their availability to part-time employment for COVID-19 related reasons. These policies are effective retroactively to the beginning of the pandemic emergency on March 8, 2020.<sup>4</sup>

In this case, the review examiner denied benefits to the claimant after concluding that she was not in unemployment. Specifically, the review examiner noted that as of July 15, 2020, the claimant remained out of work on a leave of absence for reasons unrelated to any risk of contracting COVID-19, and she was only available for part-time work. We disagree with the review examiner's conclusion and reasoning.

The review examiner found that on July 15, 2020, the claimant's doctor recommended that she return to work with restrictions on September 1<sup>st</sup>, but the employer was unable to accommodate the restrictions. The review examiner further found that the claimant's doctor recommended on September 24, 2020, that the claimant remain out of work up to an additional 12 weeks in order to recover her strength after her recent hospitalization due to COVID-19. These findings establish that because the claimant was still suffering from the lingering effects of her previous infection with COVID-19 in April, 2020, she had not been able to return to her full-time work with the instant employer since April 2, 2020. However, the claimant was available to work part-time, up to four hours per day, in a job where she could sit most of the time. Additionally, the claimant was only willing to work in an environment with limited contact with the public, as she feared becoming infected with COVID-19 a second time.

Although the claimant's doctor had originally suggested that she could return to work with restrictions on September 1, 2020, he ultimately determined that the claimant should continue to remain out of work due to the lingering effects of her previous COVID-19 infection. Thus, as of

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<sup>1</sup> *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

<sup>2</sup> *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).


<sup>3</sup> DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 25, 2020), p. 2-3.

<sup>4</sup> DUA UI Policy and Performance Memo (UIPP) 2021.02 (Jan. 22, 2021), p. 2.

the effective date of her claim, due to her COVID-19 related medical condition, the claimant's work with the instant employer was unsuitable, and her inability to return to work was not disqualifying. Furthermore, even if the claimant's doctor had not advised her to remain out of work, but she chose to remain on a leave of absence due to her fear of contracting COVID-19 again, such circumstances would not be disqualifying, because the claimant's fear would have been reasonable given that her prior COVID-19 infection had resulted in severe symptoms and two hospitalizations. As to the claimant's part-time availability for other sedentary work with limited contact with the public, it is not disqualifying because this restriction was due to a COVID-19 related reason.

We, therefore, conclude as a matter of law, that the claimant was in total unemployment while she was on a medical leave of absence and only available for other part-time work due to reasons related to COVID-19. She is eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 15, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 30, 2021**



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](http://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.

SVL/rh