

**The claimant's children's school re-opened in a hybrid learning model, and they needed supervision on the days they were learning remotely. However, the claimant was unable to secure alternative childcare and had to take a leave of absence. She remained available for work during the two days a week her children were engaged in in-person learning. Held she was in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r) in light of the DUA's temporary flexible policies adopted in response to the COVID-19 pandemic.**

**Board of Review  
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**Issue ID: 0053 6608 29**

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 filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 8, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed in part, and overturned in part the agency's initial determination. In a decision rendered on December 20, 2021, the review examiner denied the claimant benefits during the period between September 6, 2020, and April 3, 2021, and awarded benefits during the period between April 4, 2021, and August 28, 2021. We accepted the claimant's application for review.

Benefits were denied during the period between September 6, 2020, and April 3, 2021, after the review examiner determined that the claimant was not capable of or available for any kind of work during that period and, thus, was disqualified under G.L. c. 151A, §§ 29 (a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 capable of or available for any kind of work during the period on appeal because her children's schools were operating in a hybrid learning plan and she had to assist her children on the days when they were engaged in remote learning, 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. On August 26, 2019, the claimant began working part-time for the employer, a public school, as a second-grade classroom assistant. She was supervised by the classroom teacher and the school principal. She earned \$20.99 per hour.
2. The claimant worked four days a week, from 9:30 a.m. to 12:30 p.m.
3. The claimant had two children in elementary school, a 9-year-old and a 7-year-old.
4. In the fall semester of 2020, the claimant's children attended school on a hybrid model as a result of the COVID-19 pandemic. The children went to school 2 days a week.
5. The claimant is the primary caregiver for her children.
6. The claimant could not find childcare for her children while they were remote learning.
7. All available professional childcare was too expensive for the claimant.
8. There were no family members who were available to care for the children during work hours.
9. On August 13, 2020, the claimant asked the employer for a leave of absence because she needed to stay home and help her children attend school remotely.
10. The claimant proposed to return for the following school year in fall of 2021.
11. The claimant's leave was approved.
12. On September 8, 2020, the claimant began a leave of absence.
13. The claimant's leave was unpaid.
14. When the claimant went on her leave, the employer filled the claimant's position.
15. The claimant did not ask for remote work.
16. The employer had openings for remote work, including part time and fulltime classroom assistants.
17. The claimant had to tend to her children's needs and help them with their schoolwork.
18. The claimant was not available to work remotely while her children were learning remotely.

19. On April 5, 2021, the claimant's children returned fulltime for in-person learning. Fulltime meant that the students were in-person 4 days a week and remote for 1 day.
20. After April 5, 2021, the claimant was available to work her normal hours.
21. When her children returned to school in-person, the claimant reached out to the employer to see if the employer had any need for her and to indicate that she was available for work.
22. The employer had substitute teaching work available for the claimant.
23. The claimant would occasionally work for the employer as a substitute teacher when work was available. She worked 17 times as a substitute teacher, most of which were half-days. She was paid \$23.00 per hour.
24. The claimant did not ask to return to her work prior to the end of her leave of absence.
25. The claimant returned to work on August 28, 2021.
26. The claimant filed for unemployment benefits effective September 13, 2020. Her weekly benefit amount is \$113.00.
27. On October 8, 2021, the Department of Unemployment Assistance issued a Notice of Approval allowing the claimant benefits under Sections 25(e)(1) of the Law commencing the week beginning June 28, 2020, and until she had had 8 weeks of work and had earned an amount equivalent to or in excess of 8 times her weekly benefit amount.

### 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 21 stating that the claimant did not seek alternate employment with the employer until her children returned to full-time in-person learning, as inconsistent with the evidence of record. In adopting the remaining findings, we deem 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 capable of or available for work within the meaning of the law during the period between September 6, 2020, and April 3, 2021.

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 Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980). In this case, because the relevant period is from September 9, 2020, to April 3, 2021, 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 (DOL) also advised states that they had significant flexibility in implementing the able, available, and work search requirements, as well as flexibility in determining the type of work that was suitable given an individual’s circumstances.<sup>2</sup>

The DOL stated that individuals could be considered available for work if they were available for any work for all or a portion of the week claimed, provided any limitation upon their availability did not constitute a withdrawal from the labor market.<sup>3</sup> In response, the DUA announced that, if an individual was in total unemployment while on any type of unpaid leave of absence, the claimant was not subject to disqualification under G.L. c. 151A, §§ 29, 1(r), or 24(b), as long as the reason for the claimant’s inability to work was related to COVID-19, and the claimant remained available for some type of suitable work. This included lack of child-care due to COVID-19. *See DUA UI Policy and Performance Memo (UIPP) 2020.14* (Nov. 24, 2020), pp. 3 and 4.<sup>4</sup>

In response to the COVID-19 pandemic, the claimant’s children’s schools implemented a hybrid learning model for the start of the 2020–21 academic year. Finding of Fact # 4. Because the claimant was unable to obtain alternative childcare for the days her children were engaged in

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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> *See* UIPL 10-20, 4(b).

<sup>4</sup> This policy was in effect until September 4, 2021. *See* UIPP 2021.06 (Sept. 9, 2021), p. 1; and UIPP 2021.07 (Sept. 9, 2021), p. 1.

remote learning, she had no choice but to request a leave of absence. *See* Findings of Fact ## 6–11 and 17. Therefore, pursuant to the flexible definition of suitable work adopted in response to the COVID-19 public health crisis, the claimant may not be disqualified solely on the grounds that she could not continue working as a classroom assistant due to a lack of childcare.

While the claimant could not continue working in her normal position, she was capable of and available to work for the employer during the days that her children were at school for in-person learning. *See* Findings of Fact ## 4 and 18. Moreover, contrary to the review examiner’s findings, the undisputed testimony of both parties was that the claimant made herself available to work as a substitute teacher for the employer throughout the entirety of the 2020–21 academic year.<sup>5</sup> As the record indicates the claimant was available for work at least two days a week during the period between September 6, 2020, and April 3, 2021, we conclude the claimant met the modified availability requirements during that period.

The claimant became available to work her normal schedule as of April 5, 2021. Finding of Fact # 20. Because the employer had filled the claimant’s position at the beginning of the 2020–21 academic year, the claimant remained unemployed as of April 5, 2021. *See* Finding of Fact # 25. The definition of total unemployment also requires that the claimant show that she was unable to obtain suitable work. Ordinarily this means a claimant has to be actively looking for work. However, in response to the COVID-19 public health emergency and in accordance with the EUISSA and the DOL guidance, the DUA waived the work search requirement from March 8, 2020, through June 12, 2021. *See* UIPP 2021.04 (Jun. 15, 2021), p. 1–2. Although there are no specific findings about the claimant’s work search efforts, her testimony indicated that she was not actively seeking work with other employers while on a leave of absence. This means that, once the work search requirement was reinstated, the claimant no longer met the definition of being in total unemployment.

We, therefore, conclude as a matter of law that the claimant was unemployed within the meaning of G.L. c. 151A, §§ 29 and 1(r), until the work search waiver was reinstated.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from September 6, 2020, through June 12, 2021, if otherwise eligible.

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<sup>5</sup> The parties’ testimony in this regard, while not explicitly incorporated into the review examiner’s findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 11, 2022**



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](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.

LSW/rh