

The claimant took a leave of absence to care for her son while he was at home for the remote learning portion of his hybrid school schedule that was necessitated by the COVID-19 public health emergency. She is ineligible for benefits under G.L. c. 151A, §§ 29 and 1(r), for the fully paid portion of her leave. However, for the unpaid portion she is eligible pursuant to the flexible policies adopted in response to COVID-19, as she remained available for remote part-time work.

**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 was on a leave of absence from her position with the employer from September 13, 2020 – June 16, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 26, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency’s initial determination in a decision rendered on July 28, 2021, by adding an end date of June 19, 2021, to the indefinite disqualification beginning September 13, 2020. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that 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). 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. Neither party responded.

The issue before the Board is whether the review examiner’s decision, which concluded that the claimant was ineligible for benefits during both the paid and unpaid portion of her leave of absence, is supported by substantial and credible evidence and is free from error of law, where she took the leave for child-care needs caused by COVID-19 and she remained available for part-time remote work.

Findings of Fact

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

1. On August 30, 2004, the claimant began working full time as a teacher for the employer, a municipality. The claimant worked Mondays through Fridays, from 8:00 a.m. until 3:30 p.m. at a public school. The claimant was supervised by the School Principal. She was initially hired to work on-site.
2. The claimant has a son with special needs. He is 13 years old and in middle school.
3. The claimant's husband is an electrician and works full time on site.
4. The claimant is her son's primary caregiver.
5. In March of 2020, the employer's campus was closed for in-person learning in response to the COVID-19 pandemic.
6. The claimant worked remotely from March of 2020 through the end of the spring semester.
7. In the fall semester of 2020, the employer's school was utilizing a hybrid learning model, where students would come to campus a few days a week and attend school remotely for the remaining days. Students also had the option of attending school entirely remotely.
8. The students were scheduled to return to campus on September 16, 2020. At that point, the claimant was expected to have returned to on-site work.
9. The claimant's son's school participated in the same hybrid learning model as the claimant's school. The claimant's son attended school onsite from 8 a.m. until 11 a.m. and then remotely from 12 p.m. until 2:30 p.m. Monday through Tuesday and Thursday through Friday. The claimant's son then attended school remotely all day on Wednesday.
10. On August 14, 2020, the claimant requested a leave of absence under the Family First Coronavirus Response Act (FFCRA).
11. The claimant requested the leave because she needed to stay at home in order to care for her child while he attended school remotely.
12. The claimant did not have anybody who could care for her child while he was remote learning.
13. On August 17, 2020, the employer approved the claimant's leave of absence. The claimant's intended first day of leave was September 14, 2020. The intended last day of the leave was December 7, 2020.
14. The claimant was approved to work remotely until September 11, 2020.

15. The claimant worked remotely until September 11, 2020. During this time, the claimant engaged in professional development activities, such as on-line classes.
16. The claimant's leave of absence began on September 14, 2020.
17. The claimant's son returned to school on September 14, 2020.
18. The claimant cared for her son while he was learning remotely.
19. The claimant was also required to handle unanticipated concerns regarding her son, including administrative meetings and doctor's appointments.
20. The claimant's leave was paid as required by the FFCRA. She earned her full wages.
21. In early November 2020, the claimant applied for an unpaid extension of her leave of absence.
22. The claimant requested a leave of absence because she needed to continue to care for her son while he was learning remotely and to handle his additional needs.
23. The claimant's request for an unpaid leave was approved by the employer on November 12, 2020. Her unpaid leave was scheduled to begin on December 8, 2020 and continue until June 16, 2021 (the end of the school year).
24. The claimant filed an initial unemployment claim effective the week beginning November 1, 2020. The claimant's weekly benefit rate is \$855. The claimant's weekly earnings disregard amount is \$285.00.
25. The claimant's FFCRA leave expired on December 7, 2020. The claimant was paid fulltime wages until December 7, 2020 while on the FFCRA leave of absence.
26. The claimant began her unpaid leave of absence on December 8, 2020.
27. The employer had on-site work available to the claimant during her leave of absence. The claimant was not available for onsite work during the leave of absence due to having to monitor her child with his remote learning.
28. The employer had remote work available for the claimant during her leave of absence.
29. The claimant was not able and available for fulltime remote work.
30. The claimant was able and available for part-time remote work while her son was at school in-person, approximately 3 hours on those days.
31. The claimant did not ask for part-time remote work.

32. The employer did not offer part-time remote work.
33. The last week the claimant requested for unemployment benefits (as of the date of the hearing) was the week ending May 15, 2021.
34. The claimant's leave of absence ended on June 16, 2021. This was the last date of school for the employer' [sic].
35. The claimant had reasonable assurance that she will return to her position as a teacher in the fall semester of 2021. The claimant anticipates on returning to work for the employer for the employer's 2021-2022 school year which is scheduled to begin on August 30, 2021.
36. On February 26, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Sections 29(a), 29(b) & 1(r) commencing the week beginning September 13, 2020 and indefinitely thereafter until she meets the requirements of the law.

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 decline to accept the portion of Finding of Fact # 35, which states that the claimant had reasonable assurance of re-employment for the fall semester of 2021, as it is not a factual finding, but a ruling of law.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was not eligible for benefits during her unpaid leave of absence.

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

¹ Whether or not the claimant had reasonable assurance of re-employment is an issue to be addressed under a separate section of law, G.L. c. 151A, § 28A, which is not part of the case before us and it is immaterial to the issue on appeal.

(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 November 1, 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 (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

The DOL has stated that individuals may be considered available for work if they are available for any work for all or a portion of the week claimed, provided any limitation upon their availability does not constitute a withdrawal from the labor market.⁴ In response, the DUA announced that if an individual is in total unemployment while on any type of unpaid leave of absence, the claimant is 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 is related to COVID-19 and the claimant remains available for some type of suitable work. This includes 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.

The facts before us show that from September 13 – December 7, 2020, the claimant was on a leave of absence due to the need to care for her son while he was participating in the remote learning portion of his hybrid school week. *See Findings of Fact ## 5, 9, and 11 – 13*. Because the claimant was paid her full salary during this period of her leave of absence, we agree that she was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r)(2). *See Finding of Fact # 20*.

The claimant remained out of work from December 8, 2020, until June 16, 2021, for the same reason. However, during this time she was on an unpaid leave of absence. *See Findings of Fact ## 21 – 23*. We can reasonably infer that, just as with the claimant’s school employer, her son’s school required its hybrid learning schedule in response to the COVID-19 public health emergency. During the hours that her son was going to school for the in-person portion of the

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 UIPL 10-20*, 4(b).

week, the claimant was available for part-time remote work. Finding of Fact # 30. Thus, the claimant was out of work due to lack of child-care caused by the COVID-19 public health emergency, and during this time, she remained available for some type of suitable work. Pursuant to the flexibilities announced in DUA's UIPP memorandum, she may not be disqualified under G.L. c. 151A, §§ 29 and 1(r).

In rendering her decision, the review examiner concluded that the claimant was disqualified under G.L. c. 151A, §§ 29 and 1(r), because she failed to ask her employer for part-time remote work during the unpaid portion of her leave. We disagree. DUA's flexible policy simply requires that the claimant be *available* for some type of suitable work, as the active work search requirement was also waived during the COVID-19 public health emergency.⁵

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, §§ 29 and 1(r), the claimant was not in unemployment while on a fully paid leave of absence. However, we further conclude that she was in unemployment and eligible for benefits while on the unpaid, extended portion of her leave.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits from November 1 – December 5, 2020. The claimant is entitled to receive benefits for the week beginning December 6, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 29, 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:

⁵ See UIPP 2020.14, p. 4. We note that the work search waiver ended when the Governor ended the State of Emergency on June 15, 2021. Since the week beginning June 14, 2021, all claimants have been required to actively search for work in order to qualify for unemployment benefits. See UIPP 2021.04 (May 20, 2021).

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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/jv