

The claimant, who had just given birth, lost her childcare as a result of the COVID-19 pandemic and was unable to secure alternative care. While the claimant had to take a leave of absence to stay home with her infant, she was available for remote work. Held she was available for work pursuant to temporary policy changes in response to the COVID-19 pandemic and eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

**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 filed a claim for unemployment benefits effective December 13, 2020, which was denied in a determination issued on January 7, 2021. 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 June 23, 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, 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 not capable of or available for work during the period on appeal because she was unable to obtain childcare, 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. The claimant began working for the employer as a full-time teller in October 2016. The claimant took a maternity leave from work during the period of June through August 2020. After returning to work from the leave, the claimant reduced her schedule to part-time. The claimant worked from 8:00 a.m. until 1:30 p.m. on four days each week; she was paid \$16 per hour.

2. The claimant's child was provided care by the claimant's mother-in-law for a period of one month after the claimant returned to part-time work. The mother-in-law became ill with coronavirus and was unable to provide care for the child. Subsequent to her illness, the mother-in-law experienced anxiety and depression and was no longer able to provide childcare. The claimant contacted a childcare provider who cares for the children of the claimant's sister. The provider did not have any capacity to take the claimant's child.
3. After contacting her sister's childcare provider, the claimant concluded that she could not afford childcare. The claimant contacted a relative who runs a childcare facility in [City A]. The relative gave the claimant a website where she could put herself on a wait list to see if she can obtain financial assistance with childcare expenses.
4. The claimant commenced a personal leave of absence sometime in October 2020 due to a lack of childcare. While on leave, the claimant tested positive for coronavirus. The claimant did not have any agreement with the employer with regard to when she would return to work.
5. On 12/2/20, the employer contacted the claimant to ask when she would return to work. The claimant informed the employer that she was unable to return due to a lack of childcare.
6. In February 2021, the employer contacted the claimant and told her that she was not on a leave of absence; she was on the schedule but recorded as absent since November. The employer told the claimant that she needed to renew her request for time off monthly and that she did not have job protection and would need to reapply.
7. In April 2021, the claimant renewed her leave with the employer.
8. The claimant filed an initial claim for unemployment insurance benefits, effective 12/13/20.
9. On or about 5/3/21, the claimant completed a DUA factfinding questionnaire in which she wrote: "(Employer) HR notified me that they have terminated me. Due to the fact that I can not return this month to work. They put me on a leave of absence since November with no pay, no job protection (I would have to reapply if I was able to come back). My manager has not responded to me since December 2, of 2020. I am unable to return because of no child care. I have asked if there was any work available from home and there is not. Due to the pandemic I have been struggling as a single mom and trying to make ends meet with the situation I am in."
10. On 1/6/21, 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 week beginning 11/1/20 and indefinitely thereafter.

11. On 1/7/21, the claimant appealed the Notice of Disqualification.

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. 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 within the meaning of the 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.

The review examiner disqualified the claimant on the grounds that she was not available for work because she had to remain at home to care for her newborn child. The review examiner's initial conclusion, however, did not consider the temporary policies adopted by the DUA to alleviate hardships caused by the COVID-19 pandemic.

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 claimant seeks benefits from December 13, 2020, through the present, we must also consider application of the 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.¹ 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.²

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.³ 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.

Prior to filing for benefits, the claimant's mother-in-law provided childcare when the claimant was at work. Finding of Fact # 2. However, sometime in October 2020, the claimant's mother-in-law contracted COVID-19, and was no longer able to provide childcare. *See* Findings of Fact ## 2 and 4. The claimant searched for alternative childcare options but was unsuccessful. *See* Finding of Fact # 3. Because she could not obtain other childcare, she had to take a leave of absence from her employer in order to provide full-time care for her newborn child. *See* Finding of Fact # 5. Moreover, while the claimant was not available to work at her employer's location, she contacted her employer to ask if she could perform at least some work remotely from her home. *See* Finding of Fact # 9.⁴ Thus, the record indicates the claimant was available for remote work while on her leave of absence. Pursuant to the flexible definition of suitable work adopted by DUA in response to the COVID-19 public health crisis, the claimant may not be disqualified as she could not work due to a lack of childcare and remained available for some type of suitable work. The claimant met the modified availability requirements as of the week beginning December 13, 2020.⁵

We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, §§ 29(a) and 1(r), because she has met the temporary eligibility requirements adopted by the DUA in response to the COVID-19 pandemic.

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

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

³ *See* UIPL 10-20, 4(b).

⁴ 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).

⁵ We also note that, in accordance with the EUISSA and the DOL guidance, effective November 2, 2020, the DUA waived "work search requirements until such time as the COVID-19 emergency measures have been lifted." DUA UI Policy and Performance Memo (UIPP) 2020.15 (Nov. 25, 2020), p. 2. The work search requirement was reinstated as of the week beginning June 13, 2021. UIPP 2021.04 (May 20, 2021).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 13, 2020, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 1, 2021



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 apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

LSW/rh