

Under DUA’s temporary 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 childcare.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0061 5761 81

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 reverse the portion of the review examiner’s decision denying benefits to the claimant.

The claimant filed a claim for unemployment benefits on June 1, 2020, and subsequently began a leave of absence from this benefit year employer on December 9, 2020. The DUA issued a Notice of Disqualification on February 9, 2021, denying benefits beginning on December 20, 2020, and indefinitely thereafter. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both the claimant and his employer¹, the review examiner issued a decision on April 14, 2021, affirming the agency’s determination and denying benefits from December 20, 2020, through February 6, 2021, but reversing and awarding benefits as of February 7, 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 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 childcare due to the COVID-19 pandemic.

Findings of Fact

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

¹ Because the employer did not complete its DUA fact-finding questionnaire, it is not an interested party in this case.

1. On April 19, 2020, the claimant began working, as a part time Director Care Professional for the employer a Human Services Staffing Agency.
2. The employer sends out shift lists to its employees. The employees can then request any of the available shifts. The employer will also contact employees regarding their availability for specific shifts that the employer is trying to fill.
3. The claimant has three children, ages 17, 7 and 4. The 17-year-old no longer lives with her. The 7-year-old is in 2nd grade and has been attending school remotely since the COVID-19 school closings. The 4-year-old is in preschool and returned to in person school 8 a.m. to 4 p.m. in February 2021.
4. The claimant's mother was retired and provided childcare, as needed, for the claimant. The claimant's preferred shifts were overnight, as it was easier for her mother to care for the children when they were sleeping.
5. The claimant's mother became ill in December 2020 (not with COVID-19). She became confused and unable to care for herself. She moved in with the claimant who needed to watch her 24/7, as she could become dangerous to herself or others if she became confused.
6. After December 9, 2020, the claimant declined all available shifts as she needed to care for her mother and as her mother was no longer available to watch her children while the claimant worked.
7. The claimant communicated with the employer that she was declining shifts due to her mother's health and childcare issues.
8. The claimant's mother died on February 3, 2021.
9. The claimant 4-year-old returned to in person pre-school in February 2021. School hours are 8 a.m. to 4 p.m. Work shifts are 7 a.m. to 3 p.m. The claimant has not found someone with reliable transportation to take her child to school in the morning so that she can accept first shift assignments once her 7-year-old returns to in person schooling.
10. The claimant's 7-year-old is still attending school remotely. The claimant has requested a grant that will allow the 7-year-old to attend school remotely in a group setting under supervision. She has not yet received this grant.
11. On 6/1/2020, the claimant filed her 2020-01 claim effective 5/24/2020.
12. On February 9, 2021, DUA issued Notice of Disqualification 0061 5761 81-02, stating that under MGL c. 151A, Section 29(a) and 1(r), the claimant is subject to disqualification starting December 20, 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 is ineligible for unemployment benefits while on her leave of absence.

We reject the part of the review examiner's decision concluding that a claimant is not in unemployment while on a leave of absence as 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 December 20, 2020, 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

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).

Pursuant to this 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-19.⁴ The claimant's circumstances fall squarely within this policy.

In this case, the claimant had relied on her retired mother to provide childcare for her 7- and 4-year-old children who live with her. The claimant's older child is in the second grade and has attended school remotely since schools were closed due to the COVID-19 public health emergency. Her younger child is in preschool and did not return to in-person school until February of 2021. Findings of Fact ## 3–4.

The claimant's mother became ill and became unable to care for herself in December of 2020, with a medical condition unrelated to COVID-19. She moved in with the claimant, who began to provide around-the-clock care for her mother thereafter. Finding of Fact # 5. After December 9, 2020, the claimant declined all available shifts with the employer because her mother was no longer able to provide childcare to the claimant's children while she worked. Finding of Fact # 6. The claimant communicated to the employer the reason for her inability to pick up shifts. Finding of Fact # 7. The claimant's mother died on February 3, 2021, her younger child resumed in-person preschool in February of 2021, but the claimant's older child continued to attend second grade remotely, and the claimant had no childcare as of the hearing convened on April 6, 2021. Findings of Fact ## 8–10.

The review examiner denied benefits between December 20, 2020, and February 6, 2021, because she concluded the reason for the claimant's leave of absence was that she had to provide 24-hour care for her mother, who was ill with a medical condition unrelated to COVID-19. While the review examiner's analysis may have been technically correct in that the claimant's leave of absence was precipitated by her need to care for her ailing mother, the claimant did not take her leave to care for her mother at the expense of providing care for her own children. The claimant did so *in addition to* having to provide care for her own children. Put another way, the claimant did not simply take a leave of absence to care for her own mother. She took a leave of absence because she lost her childcare when her mother became ill, and she had to provide care to *both* her children and her mother.

Where the claimant's children were only able to participate in school on a virtual basis due to COVID-19, and the claimant has not been able to find other child-care arrangements, she cannot perform her regular job. The review examiner credited her claim that she expected to return to work as soon as school resumes in-person instruction for her older child, or if she could secure a grant to allow this child to attend school remotely in a group setting with supervision. Finding of Fact # 10. As noted above, she has maintained contact with her employer during her leave of absence. Finding of Fact # 7.

We, therefore, conclude as a matter of law, that, pursuant to the DUA's temporary flexible policies, the claimant is deemed to have met the availability requirements of G.L. c. 151A, §§ 29(a) and

⁴ See DUA Unemployment Insurance Policy and Performance Memorandum (UIPP) 2020.12 (Oct. 8, 2020), p. 2–3; and UIPP 2020.14 (Nov. 25, 2020), p. 3. This policy has been made retroactive to March 8, 2020. UIPP 2021.02 (Jan. 22, 2021), p. 2.

1(r), because she was willing to work during her leave of absence, but her employer did not have any suitable work for her to perform without childcare for her children.

The review examiner's decision is affirmed in part and reversed in part. We affirm the portion of the review examiner's decision awarding benefits to the claimant after February 7, 2021, and thereafter, so long as she meets the requirements of the law. We reverse the portion of the decision denying benefits from December 20, 2020, through February 6, 2021, and conclude that the claimant is entitled to receive benefits for this period, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 3, 2021



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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

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.

JPCA/rh