

Under DUA’s flexible policies adopted in response to the COVID-19 pandemic, the claimant met the requirements of G.L. c. 151A, §§ 29 and 1(r), while on a leave of absence from her employer because she was caring for her husband who was ill with COVID-19. She did not meet the requirements of G.L. c. 151A, §§ 29 and 1(r), during the extended portion of her leave when she chose not to work to care for her daughter and new grandchild.

**Board of Review
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Issue ID: 0061 6506 60

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 with an effective date of April 5, 2020. The claimant re-opened her existing claim on December 6, 2020, which was later denied in a determination dated August 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 affirmed the agency’s initial determination and denied benefits in a decision rendered on November 1, 2022. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant was not in total unemployment and thus, was disqualified under G.L. c. 151A, § 29(a), (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 in unemployment because she was not available for work while on a leave of absence, 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 worked for the employer as a full-time ticketer/selector from 4/28/2015 until 12/8/2020 when she last performed work before re-opening her existing claim for unemployment benefits.
2. The claimant’s husband was diagnosed with [COVID-19] in December 2020. The claimant does not call [sic] the date of his positive [COVID-19] test.

3. The claimant called the employer informing them that she would be remaining out of work for a few weeks to care for her husband.
4. The employer allowed the claimant to remain out while she cared for her husband and told her that she would be able to return back to per [sic] position.
5. The claimant's then [sic] daughter gave birth on 12/17/2020.
6. After her daughter gave birth, the claimant began caring for her daughter and the baby since the bay's [sic] father could not stay home from work.
7. The claimant contacted the employer again and requested additional time off to care for her daughter and her grandchild.
8. The employer had the claimant complete FMLA paperwork which was approved for the period of 1/11/2021 through 3/15/2021.
9. The claimant returned to work full-time on 3/16/2021.

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 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 ineligible for benefits for her entire 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, 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; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded . . .
- (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 claimant seeks benefits beginning December 6, 2020, 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) 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.² The DOL stated that individuals may 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.³

In response, the DUA promulgated a policy 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 claimants who were caring for an adult at home because of COVID-19.⁴

The claimant was at home caring for her husband while he was ill with COVID-19 beginning December 8, 2020. Findings of Fact ## 2 and 4. While caring for her husband, she testified that she was able to work remotely.⁵ There was nothing in the record to suggest that the claimant had other available options to provide care to her husband. Given these circumstances, we believe that she met the modified availability requirements while on leave from her usual job from the week beginning December 6, 2020, until January 9, 2021.

The claimant then began caring for her daughter and her newborn grandchild on January 11, 2021. *See* Findings of Fact ## 6 and 8. She took additional time off under the Family and Medical Leave Act (FMLA), for the period of January 11, 2021, until March 15, 2021, and she returned to work full-time on March 16, 2021. Findings of Fact ## 8 and 9. Because nothing in the record indicates that she had to care for her daughter and grandchild due to COVID-19, the claimant's unavailability to work during this period did not meet either the statutory definition for total unemployment or the DUA's flexible policies.

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 *See* DUA UI Policy and Performance Memo (UIPP) 2021.03 (Jan 29, 2021), p. 6-7.

⁵ 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).

We, therefore, conclude as a matter of law that the claimant may not be disqualified for the period she was caring for her husband who was ill with COVID-19 pursuant to 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. Once she was no longer impacted by COVID-19, beginning January 11, 2021, she was not entitled to benefits.

The review examiner's decision is affirmed in part and reversed in part. The claimant is eligible for benefits for the week beginning December 6, 2020, until week ending January 9, 2021. She is disqualified for the week beginning January 10, 2021, and for subsequent weeks, until she meets the requirement of G.L. c. 151A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 21, 2023



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

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.

MR/rh