

At her doctor's advice, the claimant took a leave of absence from her restaurant hostess job during the third trimester of her pregnancy because she was at elevated risk of complications from COVID-19 and other respiratory illnesses. As she remained capable of, and available for, remote work during this time, she met the eligibility requirements of G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0062 4527 91

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 took a leave of absence from her position with the employer on January 10, 2021. She reopened a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 28, 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 modified the agency's initial determination and denied benefits during the period from January 10 through May 2, 2021,¹ in a decision rendered on July 28, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was neither in total nor partial unemployment, 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 remanded the case to the review examiner to obtain additional evidence about the claimant's capability and availability to work during her leave. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. 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 had been unable to work during her leave of absence, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings now provide that she was capable of, and available for, either part-time or full-time remote work during her leave.

Findings of Fact

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

¹ Although the hearing decision disqualifies the claimant until May 2, 2021, we presume he meant to disqualify her through the week ending May 1, 2021.

1. The employer is a restaurant. The claimant began her employment for the employer in June of 2020. The claimant worked as a full-time hostess for the employer.
2. The claimant's position required her to be in constant contact with the public. As a hostess for the employer, the claimant was required to stand at a desk in the front of the restaurant and interact with all customers entering the employer's restaurant. The employer did not have any glass or other protective barrier separating the claimant from customers. The claimant's duties also included answering the telephone and taking food orders and reservations over the telephone.
3. The claimant has prior experience in customer service and has experience interacting with customers over the telephone.
4. Since 1/10/2021, the claimant has had access to a telephone, a computer, and internet at her home.
5. A certain owner (Owner) supervised the claimant.
6. In January 2021, the claimant entered the third trimester of her pregnancy with a due date of 4/15/2021.
7. Prior to 1/10/2021, the claimant's physician directed her to take a break from work during the final trimester of her pregnancy. The claimant's physician told her that her pregnancy placed her at a high risk of severe complications from COVID-19 and other respiratory infections.
8. On or about 1/10/2021, the claimant requested a leave of absence from the employer because her physician directed her to take a break from work during the final trimester of her pregnancy and because her physician told her that her pregnancy placed her at a high risk of severe complications from COVID-19 and other respiratory infections. The claimant expected to be able to return to work approximately three weeks after giving birth. Owner approved the request for leave with an expected return to work date on or about the week beginning 5/2/2021.
9. On 2/12/2021, the claimant was again told by a co-worker that Owner had filled her position with the employer. The claimant did not attempt to contact Owner to inquire if her position was no longer available.
10. The claimant gave birth to her child on 4/12/2021.
11. From 1/10/2021 until 5/2/2021, the claimant was able to perform remote work on either a part-time or full-time basis. Within approximately two weeks of giving birth to her child, the claimant felt physically able to return to routine

exercise and physical activity. During that two-week period following the birth of her child, the claimant felt physically able to perform remote work on either a part-time or full-time basis.

12. From 1/10/2021 to 5/2/2021, the claimant did not have any restrictions on her ability to perform remote work on either a part-time or full-time basis. From the birth of her child on 4/12/2021 to 5/2/2021, the claimant had childcare arrangements in place that would allow her to work remotely on either a part-time or full-time basis. Multiple members of the claimant's child's family were available to provide childcare to allow the claimant to be available for work.

13. On 4/25/2021, the claimant had a telephone appointment with her physician. Her physician noted that she felt well with no complaints. The claimant's physician told the claimant that she was cleared to return to work.

14. On 5/02/2021, the claimant did not return to work for the employer.

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 consolidated 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 consolidated findings of fact and deems 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 is ineligible for benefits.

G.L. c. 151A, § 29 authorizes benefits to be paid only to those in "total unemployment" or "partial unemployment." These terms are, in turn, 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. . . .

In the present case, the consolidated findings provide that the claimant was on an employer-approved leave of absence from January 10 through May 1, 2021. *See Consolidated Finding # 8.* The question before us is whether the claimant was in unemployment within the meaning of the above provisions under G.L. c. 151A, §§ 29 and 1(r), during that time.

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 January 10 through May 1, 2021, we must also consider 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.² 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.³

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.⁴ 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 where the claimant’s usual work posed a substantial risk to the claimant’s health due to an underlying medical or other condition.⁵

Here, the consolidated findings show that the claimant’s physician had directed her to take the leave of absence from her regular in-person restaurant work, as it was during her third trimester of pregnancy, and she was at an elevated health risk of complications from COVID-19 and other respiratory infections. Consolidated Finding # 7. After remand, the consolidated findings further provide that, during her leave, the claimant remained capable of, and available for, full- or part-time remote work. *See Consolidated Findings ## 11 and 12.* Given these findings, the claimant has met her burden to show that she was unable to perform her usual job due to the COVID-19 public health emergency, but she remained available for some type of suitable work.

Finally, we note that, although the claimant testified that she was looking for work during her leave, the review examiner did not render any findings about her work search efforts. We need not consider whether the claimant was actively searching for work, because the DUA had also temporarily waived the work search requirement during the period before us.⁶

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).

⁵ *See* DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 24, 2020), p. 2.

⁶ 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.” 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).

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period January 10, 2021, through May 1, 2021, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 15, 2023



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.

AB/rh