

**The claimant was not entitled to benefits while on paid maternity leave because she was receiving remuneration in excess of her weekly benefit amount and earnings disregard. After her maternity leave expired, the claimant did not search for work for a period because she intended to return to work for the employer. When she did begin searching for work, she imposed impracticable limitations on the jobs she would accept. As she was not conducting an active and reasonable work search, she was ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).**

**Board of Review  
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**Issue ID: 0067 5984 40**

### 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 effective January 3, 2021, which was denied for the period beginning April 11, 2021, in a determination issued on November 20, 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 in part and overturned in part the agency's initial determination and denied benefits for the period between March 19, 2021, and September 17, 2021, in a decision rendered on November 18, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during the period between March 19, 2021, and September 17, 2021, and, thus, was disqualified under G.L. c. 151A, §§ 29(a) 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 pertaining to the claimant's unemployment status during the period on appeal. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 was not in unemployment because she was on a paid medical leave after giving birth and was unavailable for work after her leave of absence had ended due to a lack of childcare, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. On 01/05/2021, the claimant filed for unemployment benefits with the Department of Unemployment Assistance (DUA), effective 01/03/2021.
2. Prior to filing for benefits, the claimant worked as an overnight freight worker for the employer, a building and construction retail company. The claimant began working for the employer in March of 2019. She worked 9:00 p.m. – 5:30 a.m., Sunday through Thursday. The claimant earned approximately \$16.00 per hour.
3. The claimant last performed work for the employer on or about 03/18/2021.
4. On or about 03/19/2021, the claimant was approximately eight months pregnant and travelled to New York for the weekend to visit family.
5. While in New York, the claimant went into labor. She gave birth prematurely to twins via cesarian section on 03/25/2021.
6. On or about 03/25/2021, the claimant called her supervisor to inform him that she had given birth.
7. The claimant began an employer approved paid maternity leave on 03/19/2021 that continued through approximately 09/17/2021. The claimant received weekly earnings in the amount of \$850.00 during her maternity leave.
8. The claimant's earnings during her maternity leave sometimes varied week to week. In the summer of 2021, the claimant received a single lump sum payment in the amount of \$4,000.00 in maternity leave benefits. Thereafter, she received \$850.00 weekly from the employer.
9. During the period beginning 03/19/2021 through the week ending 05/29/2021, the claimant was not physically capable of or available to work full-time, part-time, or remotely because she was recovering from the cesarian section surgery and caring for and breastfeeding her twins.
10. Following an eight to ten-week recovery, the claimant became physically capable for full-time employment during the week beginning 05/30/2021.
11. The claimant was initially out-of-state when she gave birth, visiting family. She remained out-of-state during her recovery from her surgery and through October of 2022, because there she had family to help care for her babies.
12. The claimant returned to the Commonwealth sporadically for the period beginning May of 2021 and through about October of 2022 in order to facilitate a move to a new residence.

13. Prior to giving birth, the claimant had made childcare arrangements with her cousin, who owns a childcare facility within the Commonwealth. After the birth of her twins, the claimant's cousin did not have space in her daycare for two infants.
14. Beginning 03/19/2021 and through 09/17/2021, the claimant was unavailable to work full-time because she was caring for and breastfeeding her twins. The infants were born prematurely, resulting in a lot of doctor's appointments, further impacting her ability to work a full-time job.
15. The claimant continued to breastfeed her children for approximately eight months.
16. During the period beginning 05/30/2021 through October of 2022, the claimant could only work part-time, remotely, because she remained out-of-state and was the primary caregiver to her twins.
17. The claimant has prior experience working in a call center, as a dispatcher, customer service work, and as an administrative assistant. During the period beginning 05/30/2021, the claimant could accommodate part-time, remote work in these types of jobs while caring for her infants because she had done this type of work in the past and had out-of-state childcare support.
18. The claimant was unable to find suitable childcare for her infants within the Commonwealth.
19. In or about September of 2021, the claimant called the employer's store manager stating she could not return to work due to a lack of childcare. The employer's manager told the claimant to put herself on an extended unpaid leave by contacting the employer's human resources department and call the employer when she was able to return to work.
20. Between 05/30/2021 and until mid-October 2021, the claimant did not search for work (full-time, part-time, or remote) because she had planned to return to her full-time position with the employer.
21. The claimant began actively searching for part-time remote work, three or four times per week, in or about October of 2021.
22. On 11/20/2021, the DUA issued a Notice of Disqualification to the claimant within Section 29(a) and 1(r) of the Law for the period beginning 04/11/2021 and subsequent weeks thereafter. The claimant appealed that determination.

[Credibility] Assessment:

During the remand hearing, the claimant candidly affirmed that she was on a paid medical leave of absence, not able to work, from 03/19/2021 to about 09/17/2021 after giving birth via cesarian section to twins. She added that in the summertime, she received a lump sum payment in the amount of \$4,000.00, followed by weekly payments in the amount of \$850.00. The claimant did not know the gross amount of the payment or whether deductions were withheld, only the amount of the payment that she received. At the remand hearing, the claimant provided additional testimony that she was initially not capable of working due to her recovery from the surgical procedure of a cesarian section over the course of approximately eight to ten weeks. The claimant added that, after the initial eight-to-ten-week period, she remained unavailable for full-time employment due to breastfeeding and caring for her infants. She stated that she remained out-of-state for family childcare support through October of 2022. The claimant offered further testimony that she began looking for work in earnest after the end of her maternity leave period on 09/17/2021 and did not do so before because she believed she would be returning to work for the employer. She candidly stated that, beginning on or about 05/30/2021, she was not available to perform full-time work. However, the claimant testified that she could work part-time, remotely, because she could perform her job duties while her children slept. The claimant alleged that she had previously worked as a call-center representative, a dispatcher, an administrative assistant, and customer service representative and felt that she could perform the duties of this type of work remotely while handling caring for her infants. She reasonably attested that she was able and available to work a part-time remote schedule while caring for her infants, beginning on or about 05/30/2021, because while remaining out-of-state she had help in childcare. However, that being said, the claimant candidly testified that she did not start looking for work in earnest until October of 2021. The claimant was consistent and thoughtful throughout her testimony at both hearings. As such, the claimant's testimony is deemed credible.

### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, while we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant was not entitled to benefits, we believe the review examiner erred in disqualifying the claimant only through the period ending September 17, 2021.

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:

“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. . . .

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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 found the claimant was on paid maternity leave with the instant employer from March 19, 2021, through September 17, 2021. Consolidated Finding # 7. Therefore, based upon the statutory definitions included above, the claimant’s unemployment status during this period turns on whether she received remuneration while on leave. Remuneration is defined, in relevant part, at G.L. c. 151A, § 1(r)(3), as the following:

[Any] consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit . . . and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment. . . .

Although the claimant was not performing any services for the employer between March 19, 2021, and September 17, 2021, there was no indication from the record that her maternity leave severed or altered the status or terms of the claimant’s employment. As such, the claimant’s status while on leave is most closely analogous to an individual on a paid vacation. *See* Board of Review Decision 0020 9713 01 (Dec. 27, 2017) (salary received while on a paid leave of absence was akin to vacation pay because the claimant was still in a period of regular employment while on leave). Because the employer continued to pay the claimant wages pursuant to an ongoing employment relationship, we conclude that the wages that she received while on maternity leave constituted remuneration within the meaning of G.L. c. 151A, § 1(r)(3).

When a claimant receives remuneration during any week she certifies for benefits, her unemployment status during that week depends, in part, upon whether she received remuneration in an amount less than her weekly benefit amount. G.L. c. 151A, § 1(r)(1). The DUA bases this calculation on the claimant’s gross wages, or the amount of remuneration a claimant receives before taxes, during each week at issue. In this case, the claimant was unable to recall her gross weekly income during the period she was on maternity leave. She testified only that she knew her net take-home pay during the period she was out on maternity leave was approximately \$850 per week. Consolidated Finding # 7.

As the claimant was unable to present evidence of her gross pay during the period she was on maternity leave, we must rely on the wage information obtained by the DUA. A review of the claimant's profile in UI Online, the DUA's online recordkeeping system, shows the claimant earned a total of \$13,260.86 from the instant employer during the 4<sup>th</sup> quarter of 2020. As this was the last complete quarter the claimant worked before going on leave, we believe it is a reasonable reflection of the claimant's regular gross earnings at the time she went on maternity leave. Dividing the claimant's total gross wages during the 4<sup>th</sup> quarter of 2020 by the number of weeks in that quarter ( $\$13,260.86 \div 13$  weeks) equals average gross weekly earnings of \$1,020.07. As the claimant testified to receiving net weekly wages of \$850 while on maternity leave, we can reasonably infer that her gross weekly wages between March 19, 2021, and September 17, 2021, were consistent with the \$1,020 she earned in the months preceding her leave.

The claimant's weekly benefit amount for her 2021-01 claim was determined to be \$670 with an earnings disregard of \$223.33. Accordingly, she would not be entitled to benefits during any week in which she earned gross wages in excess of \$893.33. As evidence from the claimant's testimony and her UI Online profile indicate her gross weekly wages during the period between March 19, 2021, and September 17, 2021, were approximately \$1,020, she was not in partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), while on maternity leave.

After her maternity leave expired, the claimant requested and was approved for an extended unpaid leave of absence. Consolidated Finding # 19. Although she was no longer receiving remuneration beginning the week of September 19, 2021, this does not automatically entitle her to benefits. A claimant must still be physically capable of, available for, and actively seeking full-time work in order to be eligible for benefits while on a leave of absence. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980).

The claimant testified that she did not begin searching for work until mid-October, 2021, because she intended to return to her full-time position with the instant employer. Consolidated Finding # 20. Under these circumstances, her intention to return to work with the employer does not relieve her of the statutory requirement that she conduct an active work search. Therefore, the claimant's decision not to search for work between September 18, 2021, and mid-October, 2021, renders her ineligible for benefits under G.L. c. 151A, §§ 29 and 1(r), during that period.

When the claimant did begin searching for work, her testimony was that she limited her searches to part-time, remote work. Consolidated Findings ## 17 and 21. An individual seeking unemployment benefits is required to show that she has made a reasonable, good-faith effort to find new employment. *Evancho v. Dir. of the Division of Employment Security*, 375 Mass. 280, 282–283 (1978) (“the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence”). The Massachusetts Supreme Judicial Court has long held that whether an unemployed person is unable to obtain work is “largely a question of fact as to which the burden rests on the unemployed person to show that [her] continued unemployment is not due to [her] own lack of diligence” *Id.* at 282–283. Accordingly, the DUA requires that, during every week in which the claimant certifies for benefits, the claimant makes an active and realistic work search by utilizing a variety of methods and contacting a variety of employers. *See e.g., Board of Review Decision 0018 3385 28* (Mar. 30, 2018).

Here, the claimant articulated several self-imposed limitations on her work search. In addition to limiting her work search to part-time and remote positions, the claimant's testimony indicated that the work she sought would have to accommodate her decision to regularly travel out-of-state. Consolidated Findings ## 11, 12, 16, 17, and 20. Additionally, as the review examiner noted in her credibility assessment, the claimant testified that any job she considered would have to accommodate the claimant's need to perform her job duties while her children slept.<sup>1</sup> Because the claimant would only consider part-time remote jobs that accommodated both her limited availability based on her children's sleep schedule and her decision to travel out-of-state on a regular basis, we cannot conclude that the claimant met her burden to show that she was conducting an active and realistic work search in a good faith effort to secure new employment. Therefore, we do not believe that the claimant has shown that she was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), beginning mid-October, 2021.

We, therefore, conclude as a matter of law that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r), beginning the week of March 19, 2021, and indefinitely thereafter.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week of March 19, 2021, and for subsequent weeks, until such time as she meets the eligibility requirements.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 22, 2023**



Paul T. Fitzgerald, Esq.  
Chairman



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.

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<sup>1</sup> The claimant's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. 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).

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://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