

The claimant took a leave of absence when she lost her childcare as a result of the COVID-19 pandemic and was unable to secure alternative care. Because the claimant was available for remote work while at home caring for her children, she was available for work pursuant to the DUA's temporary flexible policies adopted in response to the COVID-19 public health emergency. Once the DUA's temporary work search waiver was lifted, however, she was ineligible for benefits.

**Board of Review
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Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 March 14, 2021, which was denied in a determination issued on August 5, 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 overturned the agency's initial determination and awarded benefits during the period January 10 through August 7, 2021, in a decision rendered on September 22, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had shown that she was capable of and available for remote work and, thus, was not disqualified under the temporary modifications made to G.L. c. 151A, §§ 29 (a) and 1(r) in response to the COVID-19 public health emergency. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to allow the employer to present additional evidence. Both parties 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 eligible for benefits because she was capable of and available for remote work even though she had to take a leave of absence to provide childcare as a result of the COVID-19 pandemic, 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 September 24, 2019, the claimant began working part time for the employer, a clothing store, as a sorter and a buyer. She worked approximately 15 hours per week, mostly on Saturdays and Sundays. She was supervised by the owner of the store. She earned a rate of pay of \$13.75 per hour.
2. In September of 2020, the claimant left the store for another opportunity, but returned on December 6, 2020.
3. The claimant has three children. She has a 10-year-old, a 3-year-old, and a 2-year-old.
4. The claimant lives with her children and her husband.
5. The claimant's husband was a fulltime tire technician. He worked from 7:00 a.m. – 7:00 p.m. during weekdays and from 10:00 a.m. – 5:00 p.m. on weekends.
6. The 10-year-old attended elementary school remotely because of the COVID-19 outbreak.
7. The 10-year-old did not require much attention while attending school and only needed help with joining virtual meetings, and occasionally being told to concentrate.
8. The claimant's children attended daycare, until the daycare closed because of COVID-19.
9. In December of 2020, the claimant applied for a daycare voucher from the Department of Transitional Assistance (DTA). The claimant's application was denied because she and her husband had recently married, and the official combination of their finances disqualified them from receiving aid with childcare.
10. The claimant's family, her father, mother, and sister, all worked and could not care for the children.
11. On January 16, 2021, the claimant informed the employer over text message that she could not come to work because she had childcare difficulties. The claimant told the owner that she did not have day care, and that her mother could no longer care for the children.
12. The employer offered the claimant a leave in order to care for her children and to give her time to resolve her childcare issues.
13. The claimant accepted the employer's offer.
14. The claimant did not know when she would be able to get childcare again.

15. The claimant did not ask for remote work.
16. The employer did not have remote work available for the claimant.
17. When the claimant left, she did not have a return-to-work date because she did not know how long it would take for her to receive the voucher.
18. The last day the claimant worked before she began the leave of absence was January 23, 2021.
19. The claimant began a leave of absence on January 25, 2021.
20. The leave of absence was unpaid.
21. On January 27, 2021, the employer asked the claimant through a text message if she knew when she could return. The claimant informed him that she hoped it would take 2–3 weeks.
22. The claimant applied for childcare vouchers in January, May, and July.
23. During the leave of absence, the claimant was able and available to perform remote work.
24. The claimant would have been able to perform office work, including working at a computer and answering phones.
25. The claimant would have worked in the same room where her 10-year-old attended school. This room is adjacent to the room where her two younger children play.
26. The claimant would have been able to monitor her children while performing office work.
27. In May of 2021, the claimant finally received a case manager from DTA. The case manager began trying to help the claimant acquire a daycare voucher.
28. In June of 2021, the claimant's sister lost employment and then tested positive for COVID-[19.]The sister did not recover from COVID-19 until late July of 2021.
29. The claimant's husband quit his job as a tire technician at the end of July of 2021 and started working as a driver for a delivery application.
30. On July 27, 2020, the owner texted the claimant because he had received a notice from the DUA that the claimant had quit her job.

31. The claimant explained that she had not quit her job, and that she was trying to register with the DUA in order to qualify for a childcare voucher from the DTA. The claimant also stated that she could return on Saturday and Sundays.
32. When the claimant said she could return, the owner put the claimant back on the schedule.
33. On August 5, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) & 1(r) of the Law commencing the week beginning July 4, 2021 and indefinitely thereafter until she met the requirements of the Law. The claimant appealed the notice.
34. The claimant returned on August 7, 2021, which was the earliest she could be scheduled.
35. The claimant was able to accept the employer's offer because her sister did not have employment and was well enough to care for her children on the weekends. In addition, the claimant's husband's schedule was more flexible and he could care for the children on the weekends as well.
36. On August 28, 2021, the owner sent a letter regarding the claimant's employment to DTA in support of her application for a daycare voucher.
37. The claimant received daycare vouchers for all of her children.
38. On September 15, 2021, the claimant quit her position after getting into an argument at the employer's establishment. She gave notice to her employer over text that she was quitting immediately.

Credibility Assessment:

Only the claimant attended the initial hearing. The employer and the claimant both attended the remand hearing.

The employer and the claimant's testimonies were consistent with each other in most respects. During the initial hearing, the claimant testified that her leave of absence began on January 6, 2021 and ended when she returned to work on August 14, 2021. During the remand hearing, the employer testified that the leave began on January 25, 2021 and ended when she returned to work on August 7, 2021. The claimant testified that she agreed with the employer's testimony, and that she had been confused about the exact dates during the original hearing. In addition, during the remand hearing, the claimant clarified that she had received daycare vouchers for her children after the employer sent a letter to DTA.

Both the employer and the claimant offered credible, substantial, and consistent testimony.

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 original 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, we agree with the review examiner's legal conclusion that the claimant was in unemployment within the meaning of the law during at least a portion of the period on appeal.

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 relevant period before us includes the weeks from January 10 – August 7, 2021, which is when the review examiner awarded benefits. During this period, the claimant is potentially eligible for extended Pandemic Emergency Unemployment Compensation (PEUC 1.0) under her 2020-01 claim.

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 relevant period is from January 10 – August 7, 2021, 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 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 stated that individuals could 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 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 lack of child-care due to COVID-19. *See* DUA UI Policy and Performance Memo (UIPP) 2020.14 (Nov. 24, 2020), pp. 3 and 4.⁴

When the claimant returned to work in December 2020, she had to obtain alternative childcare for her three children because their school and daycare programs remained closed due to the COVID-19 pandemic. Consolidated Findings ## 2, 6, 8, and 9. However, she was unable to obtain assistance from family members and was denied a daycare voucher from the Department of Transitional Assistance. Consolidated Findings ## 9 and 10. As she could not secure alternative childcare, she had to take a leave of absence from her employer in order to provide necessary supervision for her three children. Consolidated Findings ## 11–13. Therefore, pursuant to the flexible definition of suitable work adopted in response to the COVID-19 public health crisis, the claimant may not be disqualified solely on the grounds that she could not work due to a lack of childcare.

While the claimant was not available to work at her employer's location, she would have been able to perform remote work while supervising her children. Consolidated Findings ## 24–26. As the record indicates the claimant was available for remote work while on her leave of absence, we conclude the claimant met the modified availability requirements from January 24, 2021, through August 7, 2021, while on a leave of absence from the employer.

The definition of total unemployment also requires that the claimant show that she was unable to obtain suitable work. Ordinarily, this means that a claimant has to be actively looking for work. However, in response to the COVID-19 public health emergency, and in accordance with the EUISSA and the DOL guidance, the DUA waived the work search requirement from March 8, 2020, through June 12, 2021. *See* UIPP 2021.04 (Jun. 15, 2021), p. 1–2. Although there are no specific findings about the claimant's work search efforts, her testimony indicated that she was not

¹ *See* EUISSA, 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 This policy was in effect until September 4, 2021. *See* UIPP 2021.06 (Sept. 9, 2021), p. 1; and UIPP 2021.07 (Sept. 9, 2021), p. 1.

actively seeking remote work with other employers.^{5,6} This means that, once the work search requirement was reinstated, the claimant no longer met the definition of being in total unemployment.

Finally, we note that the review examiner's original decision awarded benefits beginning January 10, 2021, based upon the claimant's original hearing testimony that that is when her leave began. The consolidated findings now provide that the claimant worked for the employer until January 23, 2021, and that her leave of absence did not begin until the week beginning January 24, 2021. *See Consolidated Findings ## 18 and 19.* Prior to that she was working.

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), during her leave of absence from January 24 through June 12, 2021, because, pursuant to temporary DUA policies, she has met the eligibility requirements adopted in response to the COVID-19 pandemic.

The review examiner's decision is affirmed in part and reversed in part. The claimant is not entitled to benefits from the week beginning January 10, 2021, through January 23, 2021, or from the week beginning June 13, 2021, through August 7, 2021. The claimant is entitled to receive benefits during the period January 24, 2021, through June 12, 2021, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2022



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)**

⁵ We also note that, in accordance with the EUISSA and the DOL guidance, effective November 2, 2020, the DUA is waiving "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. Although the DUA announced this policy in November of 2020, it is authorized by the EUISSA and DOL guidance released in March of 2020. To disqualify a claimant under a more rigid reading of law prior to November 2, 2020, seems arbitrary and against public policy. As such, we further believe the claimant's work search requirements were waived.

⁶ 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).

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