

**While the claimant was capable of and available for work during his employer-imposed leave of absence, he was not searching for work. He, therefore, did not meet the requirements of G.L. c. 151A, §§ 29 and 1(r), and is ineligible for benefits.**

**Board of Review  
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**Issue ID: 0073 9136 51**

### 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 reverse.

The claimant filed a claim for unemployment benefits with the DUA effective November 14, 2021, which was denied in a determination issued on December 15, 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 in a decision rendered on January 29, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in total unemployment and, thus, was not 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 employer's appeal, we remanded the case to the review examiner to provide subsidiary findings of fact relevant to the claimant's unemployment status. 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 was in total unemployment because the employer placed him on an indefinite unpaid leave of absence and has since declined to engage the claimant in resolving the issue which precipitated the leave, 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 are set forth below in their entirety:

1. The claimant is Muslim.
2. From April 23, 2007, until October 27, 2021, the claimant worked for the employer, a municipality, as a full-time (42 hours weekly) firefighter.

3. The claimant's most recent and direct supervisor was the employer's lieutenant.
4. The claimant is part of a union.
5. Prior to August 4, 2021, the employer implemented policies to protect its employees from COVID-19. The employer required employees working to have regular temperature checks, report any COVID-19 symptoms, and answer questions regarding their health.
6. The claimant complied with the employer's requirements for temperature checks, reporting COVID-19 symptoms, and answering questions regarding his health.
7. On August 4, 2021, the employer announced a vaccine requirement policy (policy) for its employees. The policy stated that employees are required to verify to the employer that they are fully vaccinated by October 4, 2021.
8. The policy also stated, "Anyone who does not verify that they are fully vaccinated will be required to submit proof every seven (7) days of a negative COVID-19 screening test result and be subject to restrictions on official travel." (testing option)
9. The policy stated that any employee may apply for a "sincere religious exemption" (religious exemption) and obtain an accommodation from the employer if an employee cannot comply with the vaccine or testing requirements.
10. If an employee of the employer applies for a religious exemption and the employer denies the employee's application, the employer must provide a reason why the denial is justified and how an accommodation would provide an "undue burden".
11. On September 27, 2021, the claimant applied for a religious exemption to the policy.
12. By October 4, 2021, the claimant had not complied with the policy, nor did he receive any acknowledgment by the employer regarding his religious exemption.
13. By October 25, 2021, the claimant had not complied with the policy, nor did he receive any acknowledgment by the employer regarding his religious exemption.
14. On October 25, 2021, the employer emailed the claimant, stating that he did not comply with the policy, the employer would place the claimant on "unpaid administrative leave".

15. On October 25, 2021, the claimant emailed the employer, asking about the status of his religious exemption. The employer did not immediately respond to the claimant's request.
16. The employer decided to place the claimant on a leave of absence because the claimant was not able to verify his vaccination status, even though he had filed for a religious exemption.
17. On October 27, 2021, the employer placed the claimant on an employer-imposed unpaid leave of absence.
18. On October 29, 2021, the employer denied the claimant's application for a religious exemption but provided no reason why it was denying the claimant's application, nor did it provide any reason on how an accommodation for the claimant would be an "undue burden".
19. Immediately after the employer's denial of the claimant's application for a religious exemption, the claimant appealed the employer's decision. The employer has not given the claimant any response to his appeal.
20. On November 4, 2021, the claimant attended a disciplinary hearing with the employer, regarding the claimant's failure to verify his vaccination status with the employer and claimant's religious exemption application. According to disciplinary hearing rules, the employer would provide the claimant with a written decision within 7 days.
21. On November 15, 2021, the claimant filed for unemployment benefits with the Department of Unemployment Assistance (DUA), with an effective date of November 14, 2021.
22. On November 19, 2021, the employer provided the claimant a verbal decision of the November 4 hearing. The employer decided to continue to place the claimant on an employer-imposed leave of absence.
23. Since November 19, 2021, the employer has not communicated with the claimant.
24. Since being placed on a leave of absence, the claimant has made multiple requests to discuss his leave with the employer, including trying to find a compromise or resolution to allow him to comply with employer requirements. The claimant was willing to comply with past requirements, such as temperature checks. The employer has not responded to the claimant's requests to discuss the matter.
25. Since being placed on a leave of absence, the claimant filed a union grievance, but the union did not advance the claimant's grievance.

26. Since being placed on an employer-imposed leave of absence, the claimant has been physically and mentally capable of working.
27. Since being placed on an employer-imposed leave of absence, the claimant has been available to work full-time.
28. Since being placed on an employer-imposed leave of absence, the claimant has not used any sick, vacation, or personal leave.
29. Since being placed on an employer-imposed leave of absence, the claimant has not been actively seeking work because he only wants to be a firefighter and feels that other municipalities would not hire him because of his vaccination status.
30. The claimant has no disciplinary issues with the employer.
31. The claimant has no job dissatisfaction.
32. At no time did the claimant apply for a leave of absence.
33. The employer has not discharged the claimant.
34. The claimant did not quit his employment.
35. On December 20, 2021, the employer removed the testing option and required all of its employees be vaccinated.
36. Prior to the hearing date, January 19, 2022, the claimant filed a complaint with the Equal Employment Opportunity Commission.
37. Prior to the hearing date, the claimant filed a complaint with the Massachusetts Attorney General's Office.

### 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was in unemployment as defined under G.L. c. 151A.

To be eligible for unemployment benefits, the claimant must show that he 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; 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.

Thus, 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).

Here, the claimant was placed on a leave of absence by his employer after he declined to comply with the employer’s COVID-19 vaccination mandate. Consolidated Findings ## 7, 12, 17, 20, and 22. While we acknowledge the claimant’s testimony that his faith prohibits him from taking the COVID-19 vaccine, we decline to comment on the merits of the claimant’s request for a religious exemption, as it is not relevant to his eligibility for benefits under G.L. c. 151A, §§ 29 and 1(r). *See Consolidated Finding # 11.*

Since being placed on a leave of absence, the claimant has been capable of and available for full-time work. Consolidated Findings ## 26 and 27. However, he has not been actively searching for work, because he believes his vaccination status would be an impediment to obtaining any other employment as a firefighter. Consolidated Findings ## 26, 27, and 29. Accordingly, he does not meet the eligibility requirements for unemployment benefits.

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

The review examiner’s decision is reversed. The claimant is denied benefits for the week of November 14, 2021, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 27, 2022**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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](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