

Although the claimant took a leave of absence and eventually separated from her employer due to ongoing childcare challenges and was no longer available to work for that employer, the claimant established that she was available for full-time work under the DUA's temporary eligibility requirements that were adopted in response to the COVID-19 public health emergency.

**Board of Review
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Issue ID: 0074 0410 03

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 effective October 25, 2020, which was denied in a determination issued on November 23, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination in part, reversed it in part, and denied benefits for the period beginning April 18, 2021, through June 26, 2021, in a decision rendered on April 1, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was unavailable for work, and, thus, was disqualified under G.L. c. 151A, § 24(b). 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 take additional evidence about the claimant's availability to work. 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 unavailable for work because she was unwilling to send her youngest child to daycare and had two other children who were learning remotely, 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 filed an initial claim for unemployment insurance benefits, effective 10/25/20. Prior to filing her initial claim, the claimant worked full-

time as a quality control inspector. The claimant worked in this position for two years and has prior work experience as an electrical/mechanical technician.

2. For the period between April 18, 2021, and June 26, 2021, there were no adults living in the claimant's household, besides the claimant.
3. The claimant filed her initial claim after taking a leave of absence from her work. The claimant returned to work in November but subsequently took off the month of December and returned on 1/4/21. During the period of November 2020 and January 2021, the claimant did not work any hours. During the period of 4/19/21 and 6/26/21, the claimant did not work any hours.
4. The claimant has children, ages 4, 7, and 9, who were remote learners at that time. Prior to her children being at home, the youngest child attended a daycare program while the older two attended in-person school. While the children were learning from home, the claimant worked off and on when she had someone to watch the children. The claimant's nephew and husband provided care so that the claimant could work. The claimant's husband and nephew were available to watch the children every day after their workday. Both the husband and nephew work full-time during the morning and end their workdays at 3:00 p.m. The claimant was available to work 40 hours. The claimant requested second shift work from her last employer, but her request was denied. The claimant sought alternate daycare options. The claimant considered friends, but they did not want to be involved. The claimant contacted the daycare that her child was attending and two others, but none had any spots available.
5. The claimant requested an additional leave of absence in April 2021. On 4/13/21, the employer issued the claimant written notice with instructions for requesting a leave. The claimant contacted the employer's insurance provider and learned that she did not qualify for a paid leave. The employer approved the claimant for leave from 4/9/21 through 4/23/21 and told the claimant that she needed to return to work or resign her position on 4/23/21. The claimant resigned.
6. After 4/23/21, the claimant was available for full-time work performing inspection or document review. The claimant was available to work 40 hours per week. The claimant's availability was not limited to specific days or hours each week. The claimant was available for work seven days per week, after 3:30 p.m. The claimant did not receive any offers of full-time or part-time work.
7. After resigning her position, the claimant completed a DUA factfinding questionnaire regarding the reason for her separation. In her responses, the claimant wrote that she quit because she was not comfortable sending her child to daycare because there were cases of coronavirus at the daycare. The daycare center closed periodically when children reported having the coronavirus.

8. The claimant quit her job because her child's daycare was closed. The child's daycare program closed on or about 4/19/21 and then reopened for two days before closing again because of another case of COVID-19. The daycare did not permanently close. The daycare closed certain classrooms for three days if a child in the room had coronavirus. The daycare was not open on 4/23/21 when the claimant was required to return to work. The daycare reopened on or about 6/7/21. The claimant brought her child to the daycare when it reopened in June. When the daycare was closed, the claimant called another location, but it was not accepting children because of the pandemic, and it had a waitlist. The claimant also reached out to friends for help.
9. The claimant's children returned to in-person learning on 6/7/21. The claimant's child returned to daycare on 6/7/21. After her children returned to in-person learning and daycare, the claimant began seeking work. The claimant left a message for her last employer but did not receive a response. The claimant eventually obtained new work and began working full-time on 6/28/21. The claimant's youngest child returned to daycare and the claimant's husband changed his work schedule in order to provide care for the children during the summer months when school was no longer in session.
10. On 11/23/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 24(b) of the law for the week beginning 4/18/21 and indefinitely thereafter.
11. On [11/30/21], the claimant appealed the Notice of Disqualification.

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 not available for work during the relevant timeframe on appeal.

At issue in this case is the claimant's eligibility under G.L. c. 151A, § 24(b), which provides, in pertinent part, as follows:

[An individual, in order to be eligible for benefits under this chapter, shall] . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any
other occupation for which he is reasonably fitted

Under this section of the law, the claimant bears the burden of proving that she is able, available for, and actively seeking employment.

The review examiner disqualified the claimant on the grounds that she was not available for any work, because she had to remain at home to care for her children. The review examiner's initial conclusion, however, did not consider the temporary policies adopted by the DUA to alleviate hardships caused by the COVID-19 pandemic.

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 April 18, 2021, through June 26, 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.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 may be considered available for work if they are available for any work for all or a portion of the week claimed, provided any limitation upon their availability does not constitute a withdrawal from the labor market.³ In response, the DUA announced that, if an individual is in total unemployment while on any type of unpaid leave of absence, the claimant is 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 is related to COVID-19, and the claimant remains available for some type of suitable work. This includes lack of child-care due to COVID-19.⁴

Prior to filing for benefits, the claimant worked full-time. *See Consolidated Finding # 1*. However, as the claimant's children remained home due to remote learning and frequent daycare closures as a result of the COVID-19 pandemic, the claimant had no choice but to take a leave of absence and eventually resign from her employment, so that she could remain home with them. *See Consolidated Findings ## 3–5*. The claimant was, therefore, unable to continue working at the employer's place of business because of restrictions put in place in response to the COVID-19 public health emergency.

While the claimant would not be available to work at the employer's location, she was available to perform full-time inspection and document review work 40 hours per week, seven days per week, after 3:30 p.m. each day and still provide the necessary supervision for her children. *See Consolidated Finding # 6*. Pursuant to the flexible definition of suitable work adopted by DUA in response to the COVID-19 public health crisis, the claimant may not be disqualified, because she could not perform her usual work due to a lack of childcare and remained available for some type

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) 2020.14 (Nov. 24, 2020), pp. 3 and 4.

of suitable work. The claimant met the modified availability requirements as of the week beginning April 18, 2021.⁵

We, therefore, conclude as a matter of law that the claimant may not be disqualified under G.L. c. 151A, § 24(b), during the period between April 18, 2021, and June 26, 2021, because she has met the temporary eligibility requirements adopted by the DUA in response to the COVID-19 pandemic.

The review examiner's decision is affirmed in part and reversed in part. We affirm that portion of the decision entitling the claimant to receive benefits from the week beginning June 27, 2021. However, we reverse that portion of the decision denying benefits. The claimant is also entitled to receive benefits from the week beginning April 18, 2021, through June 26, 2021, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 19, 2022



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.

JMO/rh

⁵ We also note that, 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).