

Where the claimant had asthma and lives with her father, who has multiple underlying conditions and a debilitating fear of COVID-19, she established that she had reasonable fear of exposure to COVID-19 and that her job was no longer suitable. When the claimant reduced her full-time hours to on-call relief status, but remained available for remote work, she was in total unemployment from the time she did not work any shifts until the employer discharged her, and is therefore eligible to receive benefits under G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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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 reduced her full-time schedule with the employer to on-call relief staff hours in April 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 18, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 25, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of the law because she had reduced her full-time schedule of hours to on-call relief status, and, thus, was disqualified under G.L. c. 151A, §§ 29(a), (b) 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 afford the parties an opportunity to provide additional evidence about the claimant's request to reduce her hours and her availability for full-time work. Both parties attended the remand hearing, which took place over two sessions. 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 eligible for benefits while working reduced hours in an on-call relief staff position, is supported by substantial and credible evidence and is free from error of law, where the claimant first reduced her schedule in April 2020 due to her concerns over becoming exposed to COVID-19, and subsequently only worked two additional shifts in May 2020.

Findings of Fact

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

1. E3-Other, E4-Other, E5-Other (each dated December 29, 2020) and E8-Other (dated December 30, 2020) have all been entered into evidence.
2. The following medical documentation was received and entered into evidence:
 - a. There are two medical documents relating to the claimant's father.
 - i. A letter from the father's primary care doctor, dated August 26, 2020, states that the father had a medical appointment that day and that he has underlying medical conditions that make him high-risk for serious complications if he was to contract COVID-19.
 - ii. A letter from the father's therapist, dated May 7, 2021, states that the father has been in treatment since March 2020 and that he has a debilitating fear of COVID-19. This fear makes the father not want anyone he lives with to work or go outside of the home. The claimant lives with her father.
 - b. There is one medical document relating to the claimant.
 - i. A letter from the claimant's primary care doctor, dated July 31, 2020, states that the claimant has asthma and the doctor recommends that the claimant stays out of work because of it.
3. The claimant began working as a Residential Counselor for the employer, a Residential Facility for Children, on March 9, 2020.
4. The claimant was hired to work a set and full-time schedule for the employer.
5. The claimant worked Monday through Friday, 7:00 a.m. until 3:00 p.m.
6. For the first several weeks of her employment, the claimant worked her full-time schedule.
7. On April 3, 2020, the claimant had a discussed [sic] with the Site Director of the facility. The claimant expressed her anxiety around COVID-19 and continuing to work her full-time schedule with the employer. The claimant informed the employer that she had asthma and she felt that made her a high-risk candidate for COVID-19. The claimant asked if she could drastically cut her hours with the employer. The claimant asked the employer what her options were at that point. The employer informed the claimant of the option of changing her status from full-time employee to relief staff. The claimant was told that in order for a relief staff to remain active with the employer, that staff member must work at least one shift every two months. The claimant liked the

idea and informed the employer she wanted to move forward with becoming a relief staff. The employer never mentioned the possibility of the claimant going out on a leave of absence.

- a. During her meeting with her supervisor on April 3, 2020, the claimant also discussed her concerns about her father and how anxious he was about COVID-19 and that it was affecting his mental health.
8. At the time the claimant asked her employer to change her position to one of a relief staff member, the employer still had on-going, full-time work [for] the claimant.
9. The understanding was that at some point, the claimant would go back to the original position she was hired to fill.
10. The claimant and the employer never discussed a date on which the claimant was expected to return to work on a full-time basis.
11. The claimant did not decide to quit her job because of COVID-19.
12. The claimant was told that she would be informed of shift openings via e-mail or possibly by telephone.
13. The employer had the claimant's personal e-mail, so that the employer could make sure that the claimant sees the e-mails listing available shifts.
14. The claimant saw an e-mail in May 2020, the claimant decided to work two of the listed shifts. The claimant responded to the email and informed the employer she would work the open shift [sic] on May 19, 2020 and May 26, 2020.
15. The claimant worked the shifts on May 19, 2020 and May 26, 2020.
16. The employer sent the claimant a list of available shifts at the start of June 2020.
17. The claimant never responded to the June 2020 e-mail. The claimant did not contact the employer at all. The claimant did not accept any open shifts.
18. On July 23, 2020, the employer sent the claimant another email about open shifts for [the] upcoming month or two.
19. The claimant did not initially respond to the July 23, 2020 e-mail from the employer.
20. The claimant did not accept any of the shifts listed in the July 23, 2020 e-mail.
21. The claimant sent her supervisor an e-mail on September 11, 2020, stating that she just saw the July 23, 2020 e-mail, but that because of COVID-19 she would

not be coming back to work soon and that she could not give a date that she was willing to commit to in order to return to work.

22. Between April 9, 2020 and September 23, 2020, the claimant was available for full-time remote work.
23. From September 23, 2020 until April 2021, the claimant was still only available for full-time remote work.
24. As of April 2021, the claimant has been available for full-time work.
25. The supervisor said he would speak to management about what to do.
26. On September 23, 2020, the employer informed the claimant that her employment with them was terminated.
27. The claimant filed for unemployment benefits and received an effective date of May 24, 2020.
28. DUA determined that the claimant's weekly benefit amount is \$243, with an earnings disregard of \$81.
29. On June 18, 2020, DUA issued a Notice of Approval under Section 29(a) & 29(b) & 1(r), indicating that the claimant received no hours of work and is therefore, in total unemployment[.]
30. The employer appealed the determination.

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 deem 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 is ineligible to receive benefits while she worked a reduced schedule as an on-call relief staff employee.

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.

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. Under limited circumstances, they may meet these requirements even if they are only available to work part-time hours. *See* 430 CMR 4.45. In this case, because the claimant seeks benefits from the week beginning May 31, 2020, through September 22, 2020, we must also consider 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 has 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 In response, the DUA adopted several policies, including a policy relaxing its definition of suitable work and expanding the circumstances under which claimants were permitted to limit their availability to part-time work.³ Under this policy, employment was deemed not suitable if it poses a substantial risk to the claimant’s health or safety, the claimant’s health or safety would be compromised due to an underlying medical or other condition if the claimant accepted the employment, or the claimant has a reasonable belief that one of the above factors applies. Additionally, claimants were permitted to limit their availability to part-time employment for COVID-19-related reasons. These policies were effective from the beginning of the pandemic emergency on March 8, 2020, through September 4, 2021.⁴

In this case, the review examiner denied benefits to the claimant after concluding that she was not in unemployment, as she had full-time hours available to her from the employer and had requested to have her hours reduced by becoming relief staff. We disagree with the review examiner’s conclusion and reasoning. After the remand hearing, the review examiner found that the claimant provided medical documentation establishing that she suffers from asthma and that her doctor recommended that she stay out of work during the COVID-19 surge. The medical documentation further established that the claimant’s father, who resides with the claimant, suffers from underlying medical conditions and a debilitating fear of COVID-19. *See* Consolidated Finding # 2. As a result of these health conditions, the claimant was concerned about contracting COVID-

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 DUA UI Policy and Performance Memo (UIPP) 2020.14, (Nov. 25, 2020), p. 2–3.

⁴ *See* UIPPP 2021.02, (Jan. 22, 2021), p. 2; and UIPPP 2021.07 (Sept. 9, 2021), p. 3.

19, and she reduced her employment from full-time to on-call relief hours. *See Consolidated Finding # 7.*

Given the unrefuted medical documentation in the record that describes the potential effect of COVID-19 on the claimant and her father should they contract the virus, we conclude the claimant's fear of contracting the virus due to her and her father's underlying health conditions was reasonable. Based on the above, the claimant's regular full-time schedule, which would expose her to a greater number of potentially infected people, became unsuitable.

Moreover, during the period at issue, from May 31, 2020, through September 22, 2020, the claimant remained available for full-time remote work, and there is nothing in the record showing that she otherwise refused suitable work. *See Consolidated Findings ## 22 and 23.*

We, therefore, conclude as a matter of law that the claimant was in total unemployment and eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r), as her on-call availability was due to a COVID-19 related reason under DUA's policy, and she was otherwise available for full-time remote work.

The review examiner's decision is reversed. The claimant entitled to receive benefits for the week beginning May 31, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 2021



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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