

When school and the extended year summer program required students to participate from home due to the pandemic, the claimant could not accept shifts of work for the employer, because she was the primary caregiver for her young children. Under the temporary, flexible definition of suitable work adopted during the COVID-19 public health emergency, the claimant may not be disqualified under G.L. c. 151A, § 24(b), for declining this work.

**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.

After the claimant was laid off from a different employer, her primary employer, she filed a claim for unemployment benefits with the DUA, effective May 3, 2020, which was approved in a determination issued on June 18, 2020. The employer in the present case 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 for the period June 14 through August 22, 2020, in a decision rendered on September 26, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had declined to work all hours available to her and, thus, she was disqualified under G.L. c. 151A, §§ 29 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 information about the reason(s) why the claimant declined work from the employer. 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 not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), is supported by substantial and credible evidence and is free from error of law, where the claimant was unable to accept work because schools were closed and she did not have childcare for her four-year-old children due to COVID-19.

Findings of Fact

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

1. The claimant has worked as a Per diem Nurse for the employer, a nursing home, from 8/5/19 through the present. The claimant has not separated.
2. The claimant typically worked two shifts for this employer per month, over two weekends. She earned \$34.00 an hour.
3. The claimant worked for the instant employer subsidiary to other employment elsewhere. The claimant was laid off from her primary employer when she filed for unemployment benefits. She was subsequently rehired full time on 8/31/20 by her primary employer. She works a hybrid schedule, half the day she works in person and the other half she works from home.
4. During the week beginning 6/14/20 to 8/22/20, the claimant refused work with the instant employer because she had no childcare. The claimant's husband resided in California. He return[ed] to Massachusetts once or twice a month before the pandemic. He left for California during the first or second week of April and returned on 8/19/20. He remained with the claimant until he returned to California during the first week of October 2020.
5. The claimant's children were four years old. One child is profoundly deaf and received speech therapy at school, and when the school closed, the services were online. The child had also received these services at home, which is now done by telehealth due to the pandemic. The other child has cerebral palsy and receives physical occupational therapy at school, and when the school closed, the services were provided remotely. This child had also received these services through outpatient services.
6. When schools were shut down due to the pandemic in March of 2020, the claimant had provided care for her children from March 2020 through the end of school year which ended on 6/13/20. The claimant also provided care for her children from 7/6/20 through 8/9/20, when they were working [sic] an extended school year remotely.
7. The claimant did attempt to find childcare for her children between March of 2020 and her return to work as of 8/22/20, but was not successful because the job was not consistent. PPE was not available from her employer at that time, which posed a risk. She posted and searched in the local social media groups but needed to disclose possible exposure due to [the claimant] working in a healthcare setting. The claimant only needed someone for weekends since no daycares were open on the weekends.
8. Since the claimant has returned to work, she watches her children when they are working remotely at home. The claimant works on the days her children are in school. This situation was not available over the summer of 2020 because the children were strictly at home and the claimant could not find childcare.

9. The employer has continued to employ the claimant to the same degree as prior to her filing for unemployment benefits.
10. Prior to filing her claim on 5/16/20, the claimant most recently performed services for this employer on 3/29/20.
11. The claimant's mother resides with the claimant. She was recently diagnosed with uterine cancer and is not doing well. She is currently going through treatment for the cancer.
12. The claimant provides financially for her mother. She also takes her to all her appointments, she cooks her meals and shops for her. The claimant's mother is independent, but the claimant was [going to take] a leave of absence from her job to help her with her mother's treatment.
13. The claimant does not have any siblings or other family members in Massachusetts who can help provide care for her mother.
14. The claimant's mother does not help with childcare for the claimant's children. Since the claimant's mother was not well, the claimant did not feel safe having her care for her children.
15. The claimant's circumstances changed after 8/23/20, when she returned to work for this employer and after September of 2020, when she returned to full time work for her primary employer, because her husband came back on 8/19/20 so the claimant was able to pick up shifts in August and September.
16. The claimant last worked for the instant employer on 9/20/20. On 9/27/20, the claimant emailed the employer a resignation letter indicated [sic] she was leaving her position as of 10/10/20.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. The portion of Consolidated Finding # 1, which states that the claimant has not separated is inaccurate, as it conflicts with Consolidated Finding # 16. In adopting the remaining findings, we 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 was ineligible for benefits during the period June 14 through August 22, 2020.

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. However, because the weeks at issue in this appeal are June 14 through August 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

Pursuant to this federal guidance, the DUA has stated that, as a matter of policy, a claimant is not disqualified for refusing otherwise suitable work if, due to age, medical condition or infirmity, another individual requires the claimant’s full-time care and no alternative care is available due to COVID-19.³ The claimant’s circumstances fall squarely within this policy.

The consolidated findings provide that the claimant, who usually worked a couple of weekend shifts per month for the employer, refused work starting June 14, 2020, because she had no childcare for her children. The children, both age four at the time, have significant disabilities. When the schools shut down due to the COVID-19 pandemic in March, 2020, the claimant had to provide care for them. *See Consolidated Findings ## 4–6.* This continued in the summer, as the extended school year was also done remotely. *See Consolidated Finding # 6.* Her husband, who would normally return to Massachusetts from his job in California once a month and care for the children while the claimant worked her shifts for the employer, was unable to return from California due to the pandemic from mid-April until August 19, 2020. *See Consolidated Finding*

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* DUA Unemployment Insurance Policy and Performance Memorandum (UIPP) 2020.12 (Oct. 8, 2020), p. 2–3; and UIPP 2020.14 (Nov. 25, 2020), p. 3. This policy has been made retroactive to March 8, 2020. UIPP 2021.02 (Jan. 22, 2021), p. 2.

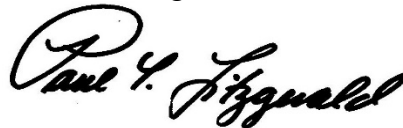
4.⁴ The claimant returned to work for the employer on August 22, 2020, once her husband had returned. *See Consolidated Findings ## 4 and 7.*

During this time, the claimant did look for other childcare, but she was not successful. As the claimant explained, she had difficulty because the days she worked were not consistent, she only needed care on weekends and daycare centers were not open on weekends, and she had to disclose that her work in a healthcare setting presented the possibility of exposure to COVID-19. *See Consolidated Finding # 7.* Although the claimant's mother resides with her, her mother has cancer, is undergoing treatment, and the claimant did not feel it was safe for her mother to care for the children. *See Consolidated Findings ## 11 and 14.*

In short, the claimant has established that, when the school and extended summer program required students to participate remotely from home in 2020 due to the COVID-19 pandemic, she became the primary caregiver for her young children and, as a result, she could not accept any shifts working for the employer.⁵ Pursuant to the flexible definition of suitable work adopted in response to the COVID-19 public health crisis, the claimant may not be disqualified from receiving benefits.

We, therefore, conclude as a matter of law that the claimant is eligible for benefits under G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 14, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 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 contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

⁴ 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).

⁵ The record also indicates that although the claimant was unable to work her weekend shifts for the employer due to lack of childcare, she remained available to perform other suitable work from home. Remand Exhibit 2, the claimant's appeal, states that she had been working remotely for her primary employer until she was laid off in June. This statement is also part of the unchallenged evidence in the record.

**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.

AB/rh