

**The claimant did not accept the employer's invitation to return to work due to concerns that she could possibly transmit COVID-19 to her father, who suffers from several medical conditions that increase his risk of severe illness, if he were to contract the virus. However, the claimant did not give the employer an opportunity to address her COVID-19 related safety concerns. She is ineligible for benefits because she did not make reasonable efforts to preserve her employment.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Charlene A. Stawicki, Esq.  
Member  
Michael J. Albano  
Member**

**Issue ID: 0053 6971 13**

### 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 separated from her position with the employer on May 15, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 24, 2020. The claimant 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 awarded benefits in a decision rendered on February 19, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant left employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 separated for urgent, compelling and necessitous reasons because she was concerned that she could transmit COVID-19 to her father, and that she made a reasonable effort to preserve her employment, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The employer is a dress shop. The claimant worked as a social media manager and customer service worker for the employer. The claimant worked for the employer from October 2019 to 3/11/2020.

2. The employer's owner (Owner 1) supervised the claimant.
3. The employer hired the claimant to work full-time. The claimant then switched to a part-time status two months into her employment.
4. The claimant's main role was to market the employer via social media. The claimant's secondary role was to assist customers and pack orders.
5. The claimant worked two days per week for twelve hours per week. The claimant worked at the employer's shop in [Town A], MA.
6. The employer sells dresses from its shop in [Town A], MA. The employer also sells dresses online.
7. The claimant lives with her father. The claimant's father has high blood pressure, high cholesterol, diabetes, and a white blood cell condition. The claimant's father's doctor determined that the claimant's father was at increased risk of severe illness from COVID-19 infection.
8. The employer closed its store to in-person shoppers on 3/15/2020 due to the COVID-19 pandemic. The employer continued its business online.
9. The employer gave an option to its workers to temporarily cease work if they had concerns with COVID-19. The employer offered this to the claimant on 3/15/2020. The claimant told the employer that she wanted to cease work due to the pandemic. The claimant wanted to cease work because she did not feel comfortable and wanted to socially distance from other people. The employer did not give a return-to-work date to the claimant. The claimant did not give a return-to-work date to the employer.
10. Shortly after the claimant decided to cease work in March 2020, Owner 1 asked the claimant if the claimant wanted to perform some work from home. The claimant told Owner 1 that she wanted to perform remote work. On 3/19/2020, Owner 1 told the claimant that she did not have any remote work for her. The employer did not offer any remote work to the claimant after this.
11. The claimant and Owner 1 exchanged text messages on 4/23/2020. In this exchange, the owner indicated that she looked forward to the claimant's return to work. In this exchange, the claimant reported that she was "looking forward to things settling soon."
12. The employer made posts to a social media platform when the claimant remained away from work. The posts featured photographs of Owner 1 and another worker (Worker 1) next to each other. In the photographs, neither Owner 1 nor Worker 1 wore masks. Worker 1 had been tested for COVID-19 when the employer took the photographs. Owner 1 had not been tested for

COVID-19 when the employer took the photographs. The claimant saw these posts. The claimant did not ask the employer if Owner 1 or Worker 1 had been tested for COVID-19.

13. The employer did not completely re-open its store prior to 5/15/2020. The employer continued online business and allowed customers into its shop by appointment only.
14. In May 2020, the employer planned for the claimant to return to work in its warehouse. The warehouse is down the street from the employer's retail shop. The employer planned for the claimant to work in an office in the warehouse with one other person. The employer planned for the claimant to go to the retail shop occasionally to retrieve items from there. The employer socially distanced in its warehouse. The employer spaced out workers' desks and provided hand sanitizer.
15. The employer asked the claimant to return to work. The employer asked via an e-mail dated 5/14/2020. The e-mail reads:

Hello [claimant's name]! Hope you've been well. I'd love to have you come back to work again. Same job, same work, we are just operating a little different now (Outlined below) -our day is spent working at the warehouse only, and we really only go to the store to take photos/make content. I do not anticipate opening the store again probably until Prom season (January). We're e-commerce only for a while. As the rest of the country is opening up, our online orders are increasing a lot! It's a more relaxed work environment with no store. -our hours are now 11-5, we only work Mon-Fri. (That said, I'd love to have you back on your scheduled 2 days Tuesday and Thursday again – 11-5) [i]f you want to work more days than this let me know. -since the store is closed, you don't come in contact with anyone else except me, really. All the mail carriers wear masks and gloves when they drop off our packages. -since we are not customer facing, you can wear whatever you want to work now! (I wear hoodies almost daily, haha) -we have a mini fridge to bring lunch[.] Anyway, you're a great worker and I'd love to have you back on the schedule. Please let me know if you're interested and we can pick a date for you to start back up. How's next week?

16. The claimant responded to the employer's 5/14/2020 invitation to return to work. The claimant responded via e-mail on 5/15/2020. The e-mail reads:

Hey [Owner 1's name], Yes I have received and read your email and I've been thinking a lot about this. I don't think it's best for me to come back just yet. I live with someone who is at very high risk due to what's going on around us and I wouldn't feel comfortable at the moment taking a chance when they are so close to me. Hope you understand, Thank you!

17. The claimant did not ask the employer for remote work after she received the employer's 5/14/2020 e-mail.
18. The employer did not reply to the email the claimant sent to it on 5/15/2020. The employer and the claimant did not have any more communication about the claimant's return to work.
19. The claimant did not accept the employer's invitation to return to work in May 2020 because she was not comfortable with a return to work at that point. The claimant was not comfortable because she lived with her father who was at a higher risk of severe illness from COVID-19 infection and because she determined that the employer did not practice social distance [sic]. The claimant determined this because she saw the employer's posts on social media in which Owner 1 and Worker 1 did not wear masks.
20. The claimant would have worked remotely for the employer if the employer had offered and assigned remote work to her.
21. The claimant did not go out and party in the spring and summer of 2020. The claimant modelled [sic] for a photograph shoot in August 2020. The claimant went to a studio for this work. A makeup artist put make-up on the claimant. The makeup artist work [sic] a mask and face shield. The participants in this endeavor all received COVID-19 rapid tests.

### 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 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 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 made reasonable efforts to preserve her employment.

The record does not establish that the claimant affirmatively resigned from her position with the employer. However, the review examiner concluded that the employer-employee relationship severed when the claimant refused the employer's offer to return to work. We agree. Because the claimant initiated her separation, this case is properly analyzed under G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under the foregoing provisions, the claimant has the burden to show that she left employment for good cause attributable to the employer or for urgent, compelling, and necessitous reasons.

The claimant declined to return to her job because she was concerned that her exposure to the COVID-19 virus at work would jeopardize the health of her father, who was at increased risk of severe illness from COVID-19 infection and with whom she lives. *See* Findings of Fact ## 7 and 19. In effect, she believed the work to be unsuitable. “Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of ‘good cause.’ *See Graves v. Dir. of Division of Employment Security*, 384 Mass. 766, 768 n. 3 (1981).” *Baker v. Dir. of Division of Unemployment Assistance*, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28*.

In this case, because the claimant seeks benefits from May 17, 2020, through the present, 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.<sup>1</sup> The U.S. Department of Labor (DOL) has also advised states that they have significant flexibility in determining the type of work that is suitable given an individual’s circumstances.<sup>2</sup> Pursuant to this federal guidance, the DUA has stated that, as a matter of policy, a claimant has good cause to refuse suitable work if the health or safety of the claimant’s immediate family member, or another household member, is put at unreasonable risk by the conditions of employment. DUA UI Policy and Performance Memorandum (UIPP) 2020.12 (Oct. 8, 2020), p. 2.

In this case, the claimant saw photographs on the employer’s social media platform of the owner and an employee not wearing face masks, which made her concerned that the employer would not adhere to COVID-19 safety procedures if she were to return to work and increase her risk of exposure to the virus. *See* Findings of Fact ## 12 and 19. Given these considerations, we believe the claimant may have had good cause for refusing the employer’s invitation to return to work.

The review examiner determined that the claimant separated for urgent, compelling, and necessitous reasons. The findings show that the claimant lives with her father, who has several medical conditions that increase his risk of severe illness from COVID-19 infection if he were to contract the virus. Since his health and safety drove her decision to decline work, we might agree with his conclusion. *See* Finding of Fact # 19.

---

<sup>1</sup> *See* EUISAA, Pub. Law 116-127 (Mar. 18, 2020), § 4102(b).

<sup>2</sup> *See* U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 10-20 (Mar. 12, 2020), 4(b).

However, to be eligible for benefits, a claimant must also show that she made reasonable efforts to preserve her employment prior to resigning or that such attempts would have been futile. Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (1979); Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). The review examiner concluded that the claimant made a reasonable attempt to preserve her job because she did not quit at the onset of the pandemic and indicated to the employer that she wanted remote work. *See* Finding of Fact # 10. We do not believe the review examiner’s analysis went far enough.

When the claimant declined to accept the employer’s invitation to return to work in May, 2020, she made no efforts to explain to the employer her concerns, ask about the social media posts, or inquire about the employer’s COVID-19 safety measures, such as whether it required mask wearing. As a result, the employer did not have an opportunity to consider and discuss with the claimant any potential means of addressing her concerns through some type of workplace accommodation. There is nothing in the record showing that any attempt to resolve these concerns would have been futile. While Findings of Fact ## 10 and 20 establish that the claimant did ask for remote work early in the pandemic and that she would have worked remotely had the employer offered this type of work to her, this request for remote work occurred two months prior to the employer’s invitation to return to work on May 14, 2020. She did not explore this option when she declined work again. *See* Finding of Fact # 17.

We, therefore, conclude as a matter of law that the claimant is not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), because she failed to make reasonable efforts to preserve her employment.

The review examiner’s decision is reversed. The claimant is denied benefits for the week beginning May 17, 2020, and for subsequent weeks until, such time as she has had at least eight

weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 25, 2021**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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](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.

JMO/rh