

Based upon the claimant's testimony and detailed work search log, the review examiner found that she was able, available for, and actively seeking full-time work during her benefit year, even though she also spent 10-15 hours a week building her own business. She is eligible for benefits pursuant to G.L. c. 151A, § 24(b).

**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. Benefits were denied on the ground that the claimant was not available for, or actively seeking, full-time work, as required under G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, effective May 1, 2022, which was denied in a determination issued by the agency on May 25, 2022. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on October 4, 2022. The claimant sought review by the Board, which dismissed the appeal due to lack of jurisdiction, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On January 5, 2023, the District Court remanded the case to the Board for further administrative proceedings. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's availability for, and work search efforts to find, full-time work in light of starting a business during her benefit year. The claimant attended the remand hearing with counsel. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not looking for, or available for, full-time work due to her focus on building her own business, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits with an effective date of May 1, 2022.
2. Prior to filing her claim, the claimant had worked full time as a staff accountant. The claimant also has prior work experience as a cashier.
3. On or about April 18, 2022, the claimant established a new LLC so she could become self-employed selling hair care products online (the business).
4. Between approximately April 18, 2022, and late April 2022, the claimant occasionally worked up to twenty hours each week (mostly on weekends) to establish the business.
5. The claimant's goal was to establish the business as a full-time operation.
6. The business's net revenue between late April and late December 2022 was approximately \$500. The business's total expenses in 2022 were approximately \$20,000.
7. During the period from May 1, 2022, and subsequent weeks, the claimant had no physical or medical issues that prevented her from working full time.
8. During the period beginning May 1, 2022, and subsequent weeks, the claimant could work full time hours in addition to the work she was performing to establish the business, if full time employment had been offered to her.
9. The claimant misunderstood some of the questions asked when she completed weekly certifications and fact-finding questionnaires for the Department of Unemployment Assistance about her availability and work search efforts.
10. During the week beginning May 15, 2022, and ending May 21, 2022, the claimant was not limiting her work search to less than full-time work because she was engaged in self-employment activities. The claimant was looking for work in person, by word-of-mouth, and networking with others. The claimant was also searching on LinkedIn and Indeed. The claimant distributed her resume to some family members. The claimant spent approximately five hours this week looking for work.
11. During the week beginning May 22, 2022, and ending May 28, 2022, the claimant was not limiting her work search to less than full-time work because she was engaged in self-employment activities. The claimant did not perform any activities for the business that week. The claimant networked with friends, family, and school colleagues for job openings. The claimant distributed her resume to others and signed up to attend a job fair.
12. During the week beginning September 4, 2022, and ending September 10, 2022, the claimant was not limiting her work search to less than full-time work

because she was engaged in self-employment activities. The claimant searched online for jobs.

13. In any other weeks between May 1, 2022, and the present, the claimant did not limit her work search to less than full-time work because she was engaged in self-employment activities.
14. Between May 1, 2022, and the present, the claimant was spending 10 to 15 hours each week on weekends performing work for the business.
15. The claimant was available for full-time work in her usual occupation during the hours that she was not performing work to build the business.
16. If the claimant had been offered full-time work, she would have accepted it while she continued working to build the business on weekends.
17. The claimant maintained a spreadsheet of her work search efforts. The claimant created the spreadsheet in early May 2022 and made entries on an ongoing basis as she performed work searches. All the jobs she was looking for were full-time in the business and accounting fields. The claimant was not looking for part-time positions.
18. The claimant conducted at least three work search activities each week during her benefit year.
19. On May 25, 2022, the DUA sent the claimant a Notice of Disqualification stating she was disqualified from receiving unemployment benefits from May 15, 2022, and indefinitely thereafter.

Credibility Assessment:

Throughout the hearing, the claimant's testimony was often tentative and uncertain, primarily on issues unrelated to her availability and her work search efforts. Although some of the claimant's responses in weekly certifications and DUA questionnaires reflected an unavailability for work or lack of looking for work because of the business, the claimant was clear during the remand hearing about misunderstanding some of those questions. The claimant's testimony about her availability and work searches was consistent with her contemporaneous spreadsheet of her work search efforts and both are deemed credible. The claimant was also candid about the lack of success in establishing the business.

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

and credibility assessment, except to note as follows. Consolidated Finding # 13 states that the claimant was spending 10 to 15 hours a week performing work for her business between May 1, 2022, and the present. Inasmuch as this was derived from the claimant's testimony and the remand hearing was held on April 3, 2023, we infer that "present" referred to April 3, 2022. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, based upon these consolidated findings, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits, as outlined below.

Our decision in this case is governed by 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 G.L. c. 151A, § 24(b), the burden of proof is on the claimant. *See* Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282–283 (1978) ("the burden rests on the unemployed person to show that his continued unemployment is not due to his own lack of diligence") (citation omitted).

To be eligible for benefits, a claimant must be capable of, available for, and actively seeking full-time work.¹ In this case, there has never been a question as to the claimant's ability to work full-time. *See* Consolidated Finding # 7. In his original decision, the review examiner disqualified the claimant based upon his assessment that she was neither available for nor actively seeking full-time work, because she had been spending her time building her own business. This was based upon statements that the claimant submitted to the DUA in response to fact-finding questionnaires and weekly certifications. However, after remand, the review examiner's credibility assessment concludes that these statements were based upon the claimant misunderstanding DUA's questions.

The consolidated findings now show that during her benefit year, the claimant spent only 10–15 hours per week on the weekend performing work for her self-employment enterprise. Consolidated Finding # 14. They further provide that, during this time, the claimant had been available for full-time work in her usual occupation and would have accepted a full-time job if offered to her. Consolidated Findings ## 15 and 16.

As for her work search efforts, the review examiner has now found that the claimant conducted at least three work search activities each week during her benefit year, maintaining a contemporaneous spreadsheet log of those efforts. All of the jobs that she sought were for full-time positions. *See* Consolidated Findings ## 17 and 18. These revised findings are supported by the claimant's testimony and Remand Exhibit 6, a detailed work search log.²

¹ *See* G.L. c. 151A, §§ 1(r)(1), (2), and 29(a), (b), which reflect the Legislature's expectation that an unemployed worker will only be eligible for benefits if she is unable to obtain full-time work.

² 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).

Based upon the record and consolidated findings after remand, we conclude as a matter of law that the claimant has met her burden to show that she had been able, available for, and actively seeking full-time work, as required under G.L. c. 151A, § 24(b).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 1, 2022, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 14, 2023



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

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