

By the time she filed her claim, the claimant had found childcare for her premature twins that enabled her to work full-time on the second or third shift. Her work search log showing three job applications a week for suitable work satisfied the active work search requirement. She is in unemployment and eligible for benefits under G.L. c. 151A, §§ 29(a) and 1(r)(2).

**Board of Review
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Issue ID: 0022 5536 94

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Allison Williams, 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 separated from her position with the employer and filed a claim for unemployment benefits with the DUA, effective July 30, 2017. On September 14, 2017, the DUA determined that the claimant was not eligible for benefits. 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 and denied benefits in a decision rendered on October 25, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not available for work due to childcare, 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 further evidence about the claimant's availability for work during the second and third shift, as well as her job search efforts. The claimant participated in the remand hearing and, 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 original conclusion, that the claimant is 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 record after remand shows that the claimant had child-care coverage for the second and third shifts, and she actively searched for full-time work.

Findings of Fact

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

1. The claimant worked as a Medical Assistant for the employer, a doctor's office, from 1/20/14 through 3/2/17, when she went out on maternity leave.
2. The claimant was on maternity leave from 3/2/17 until 6/30/17.
3. The claimant was due to return to work on 6/30/17 but remained on a personal leave of absence from that date through the present. The claimant was not able to return on 6/30/17 because she had no child care for first shift.
4. The claimant's family member was supposed to watch her twins but decided she was not able to since the twins were premature.
5. The claimant was informed by the employer that her job would be available to her once she is able to find child care and return.
6. The employer would have had continuing work available to the claimant had she been able to work.
7. The claimant filed an unemployment claim on 8/2/17.
8. The claimant is available for full time work. She can work Monday through Friday 3 PM and on.
9. The claimant had child care available for second and third shifts. Her mother could watch her children with the claimant's husband during this time.
10. The claimant could have worked second and third shift. The claimant's most recent employer was only open for business from 8 a.m. to 5 p.m. and had no work available for the claimant during the second and third shifts.
11. The claimant has been looking for jobs as a Medical Assistant or Secretary and in the hotel industry. She previously performed work in the hotel business. She most recently worked as a Medical Assistant with her last employer.
12. The jobs that the claimant has applied for would meet her schedule of availability.
13. The claimant searches only online.
14. The claimant maintained a log of her searches beginning August 2, 2017. (Remand Exhibit # 5)

CREDIBILITY:

The claimant's credibility is in question as she provided conflicting testimony at the remand hearing. The claimant initially testified at the original hearing that she was not able to return to work on first shift with her most recent employer because the family member (her mother) who was supposed to care for her children did not feel comfortable watching premature twins. When asked at the remand hearing if she could work full time and what hours she would be able to work the claimant indicated she could work Mondays, Wednesdays, and Fridays 24 hours [sic] this would include first shift. She testified at the remand hearing that her mother would care for her twins during second or third shift with the help of the children's father.

In addition, the claimant was not able to provide any contact information for the employers to who[m] she applied for work online and had no other method of searching for employment.

Ruling of the Board

In accordance with our statutory obligation, we review 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. As explained more fully below, we do not accept portions of the review examiner's credibility assessment, which state that the claimant provided conflicting testimony. The portion of Consolidated Finding # 3, which states that the claimant has remained on a personal leave of absence from June 30, 2017, is misleading and unsupported. We further note that the review examiner's reference to the claimant's husband in Consolidated Finding # 9 is also unsupported, inasmuch as at all times, the claimant made reference to her children's father, but did not indicate that he was her husband. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant is not in unemployment within the meaning of the statute, as outlined below.

G.L. c. 151A, § 29(a), authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

"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.

Under this section of law, the claimant must establish that during the period that she is claiming unemployment benefits, she was both available for and actively searching for full-time employment, but has not been able to find suitable work. 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).

Because the claimant did not open her claim and begin certifying for benefits until the week ending August 5, 2017, we focus upon her availability and job search efforts only from that week forward. As for her availability, the consolidated findings show that the claimant had childcare coverage that enabled her to work full-time Monday through Friday on the second and third shift, beginning after 3:00 p.m. *See Consolidated Findings ## 8 and 9.* We see nothing inconsistent or disqualifying about the claimant testifying that she was unable to return to her former employer's full-time day shift position at the end of her maternity leave on June 30, 2017, because her mother was uncomfortable caring for premature new-born twins alone. By the time she opened her claim, her mother and the childrens' father were available to care for the twins together so that the claimant could seek full-time work on the evening or night shift. *See Consolidated Finding # 9.*

In her original decision, the review examiner relied heavily on findings that the claimant remained on a personal leave of absence and her former employer had a job waiting once she found childcare. *See Remand Exhibit # 1.* During the remand hearing, the claimant testified that her former employer had filled her old position, suggesting that whatever casual understanding they had at the end of her maternity leave, that option was now closed.¹ Even if the former employer had kept her day shift job open, it was no longer suitable because the claimant does not have childcare coverage to work a full-time day shift position.

As for actively searching for new work, the claimant has demonstrated that since August 2, 2017, she has applied for at least three different jobs each week in work that she is suited for and at times that she is available but has been unsuccessful. *See Consolidated Findings ## 11–14 and Remand Exhibit # 5.* We are satisfied that the claimant has shown a reasonable, good-faith effort to search for new employment. *See Evancho*, 375 Mass. at 282. It is not necessary, as the review examiner observed in her credibility assessment, that the claimant provide contact information simply because the DUA's form asks for it. The DUA expects a claimant to "follow a course of action which is reasonably designed to result in prompt re-employment in suitable work." DUA Service Representative Handbook, § 1005(C).² The claimant has done so.

We, therefore, conclude as a matter of law that the claimant has met her burden to show that she is in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r)(2).

¹ 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).

² Consolidated Finding # 13 states that the claimant only searches on-line. In this day and age, we do not find this to be particularly limiting. As the claimant testified, even when she visited an employer in person, she was directed to apply on-line. The latter testimony is also part of the unchallenged evidence in the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending August 5, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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