

The claimant had good cause for refusing suitable work on the day she was unable to secure childcare. However, the employer offered work throughout the week, including on days where she did have access to childcare. While her son did have a condition that potentially increased his risk from exposure to COVID-19, she was willing to return to work in a hospital setting. Because the claimant was unaware of what precautions the employer was taking to mitigate the spread of COVID-19, her decision to return to work in a hospital setting detracts from her assertion that her son's condition gave her good cause for declining the instant employer's work. Held she was not in total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).

**Board of Review
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Issue ID: 0066 2826 68

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 9, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 29, 2023. 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 beginning March 21, 2021, and, thus, 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 claimant's unemployment status. 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 beginning March 21, 2021, because she was not available for work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant opened a claim for benefits with an effective date of March 21, 2021.
2. The claimant worked as a *per diem* registered nurse for the employer from about December 1, 2019.
3. The claimant's schedule was determined according to the claimant's availability. Additionally, the employer's scheduler offered work directly to the claimant. The employer also sent out a bi-weekly list of available work to all its nurses.
4. Prior to her maternity leave of absence in November 2020, the claimant was assigned to work with a family. The family would post available hours on an online portal through which the claimant would also sign up to work for that family.
5. The claimant's last physical day at work was on November 15, 2020.
6. The claimant was on maternity leave from November 15, 2020.
7. From February 2021, the claimant was medically released to return to work.
8. From March 4, 2021, the employer offered work to the claimant.
9. From March 2021, the employer had work available every week for the claimant.
10. As of March 2021, the claimant's son was a newborn with a medical condition (floppy vocal chords). The condition made the son susceptible to respiratory infections.
11. The claimant was concerned that working at various families' homes would place her son at risk for COVID-19 infection.
12. The claimant refused the work offered due to childcare issues and COVID-19 related issues. The claimant refused the work offered by the employer because she was concerned about working in a new family's home due to her son's medical condition considering the COVID-19 pandemic. The claimant's husband was a police officer. He worked 80 hours per week. The claimant's husband was not available to care for their son due to his work schedule.
13. In May 2021, the claimant obtained a new *per diem* position with another employer, a hospital. The claimant accepted the position because she felt it was safer since it was at a hospital and not in someone's home.

Credibility Assessment:

It is not disputed that the claimant refused work offered by the employer from March 4, 2021. The claimant provided credible testimony that her refusal of work was due to childcare issues, and COVID-19 related issues. Her son had a condition that made him susceptible to respiratory infections and the claimant was reasonably concerned about placing him at risk considering the COVID-19 infection. In addition, the claimant's husband was not available to care for their son while she worked given his work schedule.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems 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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant was not entitled to benefits.

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.

Thus, 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, an employee need only be available for suitable work which she has no good cause to refuse. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19 (1980). Domestic responsibilities, such as childcare, may constitute "good cause" to refuse work or restrict availability to a certain schedule. *See id.* at 23. Additionally, because the claimant certified for benefits between May 21, 2021, and May 1, 2021, 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 (DOL) also advised states that they had 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 its definition of good cause for declining suitable work.³ Under this more flexible policy, a claimant had good cause for declining suitable work if the health or safety of an immediate family member or other household member was put at unreasonable risk by the conditions of her employment. This policy was made effective retroactively to the beginning of the pandemic emergency on March 8, 2020, and remained effective through September 4, 2021.

The review examiner's consolidated findings of fact indicate that the employer had offered the claimant work during each week she certified for benefits. Consolidated Findings ## 8 and 9. At the remand hearing, the claimant testified that she did not resume accepting hours for the family with whom she was previously working when she was cleared to return to work, because the family only had work available on days the claimant was unable to secure alternative childcare.⁴ See Consolidated Findings ## 4 and 12. As the claimant was unable to secure childcare on the days that this family had work available, we believe that the review examiner's consolidated findings of fact indicate the claimant presented good cause for declining the employer's offers of work with that particular family.

However, the claimant conceded that the employer had offered her work with other families on days of the week that did accommodate her babysitting schedule and her family's needs. Further, even though there was no indication from the record that the claimant's childcare situation had changed, she began accepting *per diem* work with another employer starting in May, 2021. Consolidated Finding # 13. Inasmuch as the claimant's testimony and actions confirm that her childcare issues limited her availability for work during only a portion of the week, the claimant has not shown that her childcare issues constituted good cause for declining *all* offers of work made by the instant employer.

The claimant testified that she chose to decline work offered by the employer on those days because she was concerned that working in a new family home would increase her son's risk of exposure to COVID-19. Consolidated Finding # 12. We consider whether the claimant has shown good cause for declining those offers of work pursuant to the temporary modifications to the unemployment law brought about by the COVID-19 pandemic.

Consistent with the claimant's uncontested testimony, the review examiner found that the claimant's newborn son was diagnosed with a medical condition that made him more susceptible to respiratory infections. Consolidated Finding # 10. However, such a finding, by itself, is

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) 2020.12, (Oct. 8, 2020).

⁴ This portion of the claimant's testimony, as well as the portions referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. 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).

insufficient to support a conclusion that the conditions of the work offered by the instant employer posed an unreasonable risk to the claimant's son's health.

As noted above, the claimant returned to work for a different employer in May 2021. She explained that she began accepting *per diem* work from this new employer because she believed that the conditions of working in a hospital setting were safer for her son. Consolidated Finding # 13. Apparently, she did not believe that the conditions of employment at the hospital posed the same unreasonable risk to her son's health as the work offered by the instant employer. However, by her own admission, the claimant did not have any communication with the employer after she underwent surgery in December, 2020, except to inform the employer that she was cleared to return to work in February 2021. Accordingly, she did not have any information about the precautions that the instant employer may have put in place to help mitigate its employees' risk of exposure to COVID-19, nor any information about whether she could work with clients and their families to take any additional precautionary measures she felt may have been necessary.

As the claimant's *per diem* work at a hospital would presumably expose her to a much larger population of people than the home-based work offered by the instant employer, the claimant has not demonstrated that the work she declined posed a greater of a risk to her son's health than the hospital-based work she chose to accept beginning in May, 2021. Without such a showing, we believe that the claimant's decision to return to work for a hospital in May, 2021, directly detracts from her assertion that she had good cause, as meant under the DUA's temporary flexible policy, to decline the employer's offered work.

We, therefore, conclude as a matter of the law that the claimant was not in total or partial unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r), because she has not shown good cause for refusing offers of suitable work from the instant employer.

The review examiner's decision is affirmed. The claimant is denied benefits from the week of March 21, 2021, through May 1, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 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.

LSW/rh