

0018 2363 62 (Oct. 28, 2016) – When claimant returned from an extended workers’ compensation leave of absence, the employer only had work available on the evening shift. Because this conflicted with her law school classes, the claimant chose to resign rather than forfeit \$14,000 in tuition. This was a financial decision and not good cause attributable to the employer to quit. Financial loss and stress do not constitute urgent, compelling, and necessitous circumstances.

**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**  
**Judith M. Neumann, Esq.**  
**Member**  
**Charlene A. Stawicki, Esq.**  
**Member**

**Issue ID: 0018 2363 62**

## **BOARD OF REVIEW DECISION**

### **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 resigned from her position with the employer on February 29, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 30, 2016. 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 28, 2016. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or for urgent, compelling, and necessitous reasons and, thus, was 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 claimant’s appeal, we remanded the case to the review examiner to afford the claimant an opportunity to participate in the hearing and to obtain further evidence about the circumstances causing her separation. 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 conclusion that the claimant had not established either good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving her job is supported by substantial and credible evidence and is free from error of law, where the evidence establishes that the claimant chose to continue her evening studies in law school rather than accept a job on a conflicting shift.

## 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 Civilian Dispatcher, for the employer, a Municipality, from March 29, 2010, until February 29, 2016, when she was separated from employment.
2. The claimant worked a full-time schedule of hours.
3. The claimant was a member of a union.
4. The claimant was informed at hire that she would never be guaranteed a certain shift.
5. When the claimant began working for the employer she was assigned to work the day shift.
6. Since August, 2013, the claimant has been enrolled and attended evening classes at a local law school in order to earn her law degree.
7. The employer has always been aware of the claimant's commitment to attending law school at night since she began in August, 2013.
8. The claimant worked on January 18, 2015.
9. While at work on January 18, 2015, the claimant slipped and fell on ice.
10. The claimant filed a worker's compensation claim.
11. The claimant went out on a leave from work, effective January 18, 2015.
12. The claimant remained out of work for over an entire year.
13. At some point before January 5, 2016, the claimant signed up for her evening law school classes for the spring semester, 2016, and paid approximately \$21,000 in tuition for the semester.
14. The claimant began her evening classes on January 5, 2016.
15. The claimant received worker's compensation up through January 19, 2016.
16. The claimant's worker's compensation claim deemed the claimant able to return to work as of January 20, 2016.

17. The claimant was medically cleared to return to work, effective January 19, 2016.
18. On January 20, 2016, the employer informed the claimant that the only available shift at that time was the evening shift. That shift began at 5 p.m. and went until 1 a.m.
19. The claimant told her employer that she was not available to work the evening shift because she was going to law school in the evenings.
20. The claimant subsequently agreed to return to work on January 25, 2016.
21. On or about January 25, 2016, the claimant filed a grievance with her union.
22. On January 25, 2016, the employer received a medical note from the claimant's doctor, stating that the claimant was to remain out of work until February 2, 2016. No further information was given.
23. On or about January 28, 2016, the claimant began seeking treatment for anxiety. The claimant was put on anti-anxiety and depression medication.
24. The claimant continued to meet with the union, but found it very stressful.
25. The grievance got up to step three, but was then denied.
26. On February 2, 2016, the employer received another medical note from the claimant's doctor, stating that the claimant was to remain out of work until February 16, 2016. No further information was given.
27. On February 23, 2016, the employer received a third medical note from the claimant's doctor, stating that the claimant should remain out of work until March 1, 2016. No further information was given.
28. At some point, the claimant's employer told the claimant that she either had to resign or quit school so that she could work the evening shift.
29. The claimant spoke to her school to see if it was possible to switch her schedule to day classes so that she could work the night shift for the employer.
30. The school told the claimant she could not change to day classes at that time.
31. The employer informed the claimant that in order to return to work she would need to pass a return-to-work exam.
32. The employer informed the claimant that he had scheduled her return-to-work exam for February 26, 2016. The claimant informed the employer that she

had a scheduling conflict and asked if it could be rescheduled. The employer agreed.

33. The claimant and the employer agreed to schedule the exam for February 29, 2016.
34. The claimant never went to her scheduled return-to-work exam on February 29, 2016.
35. The claimant never informed her employer that she would not be going to the exam.
36. The claimant decided that she could no longer work for the employer because it would prevent her from being able to attend the evening classes for spring 2016 (which she had already paid for), as well as because of her on-going anxiety issue.
37. On February 29, 2016, the claimant sent a letter to the employer, stating that she was resigning from her position, effective immediately.
38. On March 2, 2016, the claimant also sent her employer a resignation e-mail, which stated that she was resigning effective immediately.
39. At the time that the claimant resigned from her employment, her job was not in jeopardy.
40. The claimant filed for unemployment benefits and received an effective date of February 28, 2016.

### 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, prior to remand, is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. In Consolidated Finding # 13, the examiner's statement of \$21,000 in tuition as the amount the claimant paid for her spring, 2016, semester is incorrect. The claimant testified that tuition was \$35,250 for the semester and that, if she withdrew, the school would have reimbursed only 40%, resulting in a loss of \$21,150.<sup>1</sup> As discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant is ineligible for benefits.

---

<sup>1</sup> This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

Because the claimant resigned from her employment, her eligibility for benefits is governed by 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 . . . [or] if such individual established 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.

The claimant bears the burden to prove good cause attributable to the employer or urgent, compelling, and necessitous circumstances. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993).

The review examiner found that the claimant decided to resign for two reasons: (1) the claimant's return to second shift hours would prevent her from attending the final spring semester of law school, which she had already paid for, and (2) she was experiencing on-going anxiety issues. *See Consolidated Finding # 36.* We consider whether either of these reasons constituted good cause attributable to the employer or urgent, compelling, and necessitous circumstances for the claimant to submit her resignation on February 29, 2016.

The only references to the claimant's on-going anxiety appear in Consolidated Findings ## 23 and 36, which state that the claimant began seeking treatment for anxiety and depression on January 28, 2016, which included prescribed medications, and that her anxiety was a reason for quitting her job. Consolidated Findings ## 22, 26, and 27 refer to three medical notes submitted to the employer in order to excuse the claimant from returning to work between January 25, 2016, and March 1, 2016. The notes are not in the record, and the parties agreed that the notes did not refer to the claimant's underlying condition. They simply stated that the claimant was physically unable to return to work for that limited period. Therefore, any findings relating to anxiety were based exclusively upon the claimant's testimony.

“[A] ‘wide variety of personal circumstances’ have been recognized as constituting ‘urgent, compelling and necessitous’ reasons under” G.L. c. 151A, § 25(e), “which may render involuntary a claimant's departure from work.” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Medical conditions are recognized as one such reason. *See Dohoney v. Dir. of Division of Employment Security*, 377 Mass. 333, 335–336 (1979) (pregnancy or a pregnancy-related disability, not unlike other disabilities, may legitimately require involuntary departure from work). However, there must be sufficient evidence to establish that the medical condition rendered the claimant unable to perform or preserve her job.

In the present case, the medical evidence falls short. The three referenced doctor's notes neither identify the claimant's medical condition nor state that her medical condition rendered her incapable of returning to work after March 1, 2016. *See Board of Review Decision 0011 7414 02* (Aug. 18, 2014) (no evidence showed that the claimant was so impaired by his depression and

associated anxiety that he could no longer do his job or that he could not preserve his job), *citing Norfolk County Retirement System*, 66 Mass. App. Ct. at 766 (noting the significant importance of preservation efforts in the urgent, compelling, and necessitous analysis). Moreover, the claimant indicated that it was not the job, but the evening shift that was the problem. She testified that she would not have resigned if the employer had returned her to her 9:00 a.m.–5:00 p.m. shift.<sup>2</sup> Thus, we can fairly infer that whatever anxiety the claimant experienced in connection with her work at the time related to the change in hours.

More to the point, we think it is reasonable to infer that because the second shift rendered the claimant unable to attend her evening law school classes, the schedule conflict was the source of the claimant's anxiety. Apparently, the claimant was capable of working the offered hours, because she explored whether she could move her class schedule to days. *See Consolidated Finding # 29*. When the law school said no, the claimant had to choose between continuing with school and returning to work. As alluded to in *Consolidated Finding # 36*, choosing her job meant that the claimant would not be able to complete her spring 2016 law school semester and it meant forfeiting over \$21,000 in previously paid tuition. As the claimant testified, had she worked for the employer instead of going to school, she would have earned far less than the lost tuition, resulting in a net loss of about \$14,100.<sup>3</sup> In short, the claimant's decision to choose school was driven by a cost-benefit analysis.

In *Crane*, the Supreme Judicial Court held that financial harm and stress do not amount to urgent, compelling, and necessitous circumstances, within the meaning of G.L. c. 151A, § 25(e). *Crane*, 414 Mass. at 661. In that case, because the claimant's increased hours would have jeopardized his Supplemental Security Income benefits, he submitted his resignation. *Id.* at 659–660. We think that the circumstances in the present case are analogous. The claimant's continued employment for the employer would have jeopardized her financial investment in law school. Under *Crane*, we do not believe that the loss and resultant stress of losing tuition money is an urgent, compelling, and necessitous reason for leaving employment.

Finally, we consider whether the employer's assignment to the evening shift constituted good cause attributable to the employer to resign. In analyzing "good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving." *Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). The scheduling of work hours is ordinarily a business decision that falls within an employer's discretion. Here, the examiner accepted the employer's testimony that the claimant was being assigned to the second shift because it was the only shift available at the time she returned from her extended leave of absence. *See Consolidated Finding # 18*. Although the claimant argued that the new assignment was in retaliation for filing a workers' compensation claim, there is no evidence to substantiate that assertion.

The claimant also argued that the employer violated the collective bargaining agreement by failing to give her two weeks' notice of the shift change. However, even if this were true, the

---

<sup>2</sup> The claimant testified that if the employer had allowed her to keep her original shift, she would absolutely have stayed, because, "I loved what I did there." This testimony is also part of the unchallenged evidence in the record.

<sup>3</sup> Although the claimant's tuition numbers varied during the hearing, her testimony was consistent in asserting that she would have suffered a financial loss by withdrawing from school at that point in the semester.

claimant had an obligation to preserve her employment by continuing to work on the assigned second shift, while she sought to enforce her rights through the grievance procedure. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93–94 (1984) (an employee who voluntarily leaves employment due to an employer’s action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile). Nothing in the record suggests that at the time the claimant quit, she had exhausted her grievance rights.<sup>4</sup>

We, therefore, conclude as a matter of law that the claimant has failed to sustain her burden to show that her resignation was for good cause attributable to the employer or due to urgent, compelling, and necessitous circumstances, within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner’s decision is affirmed. The claimant is denied benefits for the period beginning February 28, 2016, 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 – October 28, 2016**



Judith M. Neumann, Esq.  
Member



Charlene A. Stawicki, Esq.  
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

**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](http://www.mass.gov/courts/court-info/courthouses)

---

<sup>4</sup> Consolidated Finding # 25 states that the grievance was denied at step 3, however, we are not told whether there were further steps or arbitration available beyond this step.

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