Although the claimant was laid off from her home health aide work in the spring of 2016, since she had experienced seasonal layoffs twice before, the question presented in the case was really whether the claimant's failure to return to work in the fall of 2016 occurred under disqualifying circumstances. Since the claimant had no income to stay living in Massachusetts, she reasonably decided to move to Maryland to live with her daughter. Her continued lack of housing in Massachusetts constituted an urgent, compelling, and necessitous reason for not returning to her work (quitting) with the employer in the fall of 2016.

Board of Review
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Issue ID: 0019 0117 03

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by John Cronin, 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 affirm, but on grounds which differ from those given by the review examiner in his decision.

The claimant stopped working for the employer on May 20, 2016, and filed a claim for unemployment benefits. On September 13, 2016, the DUA sent the claimant a Notice of Disqualification which informed her that she was determined to be ineligible for benefits beginning May 15, 2016, pursuant to G.L. c. 151A, § 25(e)(1). 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 November 2, 2016.

Benefits were awarded after the review examiner determined that the claimant was laid off in May of 2016, and, thus, was not disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's move from Massachusetts to Maryland in May of 2016. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 permanently separated from her employment on May 20, 2016, due to a lay off is supported by substantial and credible evidence and is free from error of law, where the claimant stopped working due to a lack of work on May 20, 2016, the claimant knew that work would have been

available for her again with the employer in Massachusetts in the fall of 2016, the claimant moved to Maryland in May of 2016, due to a lack of income and place to live, and the claimant did not return to Massachusetts to take work with the employer in the fall of 2016.

Findings of Fact

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

1. From October 2013 until May 20, 2016, the claimant worked full-time (40-plus hours per week) as a home health aide (HHA), for the employer, a home healthcare agency.

2. During her employment with the employer, the claimant consistently worked as the HHA for one of the employer's clients during the fall, winter, and spring months. The claimant did not work for the employer during the summer, when the client went out-of-state with her family and did not require the employer's services.

3. Specifically, the claimant was actively performing work for the employer during the following periods: October 20, 2013 – May 16, 2014 and October 17, 2014 – May 22, 2015.

4. During the summers of 2014 and 2015, the claimant maintained other employment outside of the employer's business.

5. In the fall of 2015, the claimant again resumed her assignment as the HHA for the employer's client on October 14, 2015.

6. On May 4, 2016, the employer's office manager sent the claimant a text, stating, "FYI, [the client] is leaving for Maine May 25th. Your last shift with [the client] is May 21st, 9 am – 5 pm. Thank you for everything."

7. The employer did not offer the claimant any additional work during the summer of 2016.

8. Around the same time, the claimant learned that she would did not have other work available to her outside of the employer for the summer of 2016. The claimant understood, however, that she would have work available with her usual client commencing in the Fall of 2016.

9. Concluding that her lack of income would prevent her from being able to afford her rent during the summer of 2016, the claimant decided to move to Maryland to live with her daughter.

10. At that time, the claimant – who had no money to put down a security deposit or first month's rent for an apartment for the summer – also inquired about the

availability of a friend's garage apartment – where she could potentially live upon her return to work in the fall.

11. The claimant's friend, who the claimant knew to be flexible about the amount and timing of rent payments, and whom the claimant believed would wait to receive any monies from her until she began working in the fall, indicated that the apartment could be available sometime soon, but that it was not available at that point.

12. The claimant scheduled her move for May 22, 2016. In order to prepare for the move, the claimant decided to obtain coverage for her last scheduled shift with the employer.

13. On May 12, 2016, the claimant sent the office manager a text, informing her that a co-worker would cover her final shift on May 21, 2016.

14. On May 17, 2016, the office manager texted the claimant, stating that the employer's case manager was "looking for some help with a couple of hours of coverage for [the client] on Tuesday, May 24th at 10 am. Would you be able to help?" The claimant replied that she had already informed the case manager that she would not "be in town."

15. The claimant worked her final shift for the employer on May 20, 2016.

16. On May 22, 2016, the claimant moved to Maryland.

17. On June 7, 2016, the claimant spoke with the employer's office manager via telephone and informed the office manager that she was attempting to line up housing at a friend's apartment for the fall, but that she did not know when the apartment would be available. The claimant asked the office manager to let her know when the client would be returning in the fall and in need of the employer's services.

18. On June 13, 2016, the claimant filed a claim for unemployment insurance benefits. The effective date of the claim is May 22, 2016.

19. On July 7, 2016, the office manager texted the claimant, writing, "Hey there, how's your summer going? Wanted to give you a heads-up that [the client] is coming home early this year on September 8th."

20. On July 11, 2016, the claimant called the employer's office manager and indicated that she had not yet heard about the availability of her friend's apartment for the fall, and, for the moment, had to remain in Maryland.

21. The employer later learned that the client would be returning home, and in need of its services, beginning on September 22, 2016.

22. During August of 2016, the employer hired another employee to fill the claimant's position.

23. On September 17, 2016, the claimant received a text message from her friend, who wrote, "Hope you and your family are well. I wanted to let you that the apartment over the garage is available if you're coming to work[.]"

24. Subsequently, the claimant spoke with some of her co-workers with the employer, who informed her that her position with the employer had already been filled. As a result, the claimant did not attempt to return to her position, and instead remained in Maryland.

CREDIBILITY ASSESSMENT:

Although the testimony of the claimant and the employer's witnesses (its human resources manager and its office manager), in both the initial hearing and the remand hearing, is largely free of disagreement, there is one point on which the testimony of the parties diverged. While the claimant directly and consistently denied that she ever communicated to the employer's office manager that she would definitely not return to her position, the employer asserts that the claimant did, in fact, make such a representation. In accepting the claimant's testimony as the credible testimony on this point, I note the particular language used by the office manager in describing her communications with the claimant during the remand hearing. In particular, the Review Examiner asked the office manager whether the claimant had, in fact, stated that she was definitely not returning to her position. The office manager responded that she had done so "twice," the first time during a telephone conversation on June 7, 2016. The office manager then explained, however, that the claimant, during that conversation, stated, "that she was in Maryland and that she would not be coming back to Massachusetts for work because of her housing [. . .] she said something about a garage and that she might be able to get it but that she didn't think she would but she would let me know if she was able to come back when [the client] came back[.]" The office manager's own description of this conversation (in addition to the fact of her further contact with the claimant one month later regarding the potential for the claimant to return to her position) directly belies her initial characterization that the claimant expressed, during the June 7, 2016 telephone call, that she was "definitely" not coming back to work for the employer in the fall.

I find that the office manager's mischaracterization of this initial conversation also undermines the reliability of her characterization of the subsequent conversation of July 11, 2016, in which, she asserted, the claimant unequivocally stated that she would not return to her position in the fall. Especially in light of the further credible testimony from the claimant (i.e. that she continued to pursue her friend's apartment, which she learned was available via a text message from her in September, and that she only decided

not to return to the employer once she learned that the employer had filled her position), I accept as credible the claimant's direct and consistent assertion that she did not, at any point, tell the employer that she would definitely not return to work for it in the Fall of 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 ultimate 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. As discussed more fully below, after applying the DUA's policies regarding workers in the claimant's situation, we conclude that the claimant is eligible to receive unemployment benefits. However, we think that her ultimate separation was involuntary.

There is no dispute that in May of 2016, the claimant was told that the client she was working with would be moving to Maine and her assignment with that client would be ending for the season. Since the employer did not offer the claimant any other work at that time or for the summer, *see* Consolidated Finding of Fact # 7, the claimant stopped working in May of 2016, due to a lack of work.

The review examiner ended his decision at that point and found the claimant eligible to receive benefits beginning May 22, 2016, the effective date of her unemployment claim. As noted on the record during the remand hearing, he then created a new issue in the DUA's UI Online computer system, effective in September of 2016, to address whether the claimant refused suitable work at that time. We remanded the case so that the entire separation could be resolved together, given the testimony already on the record and the findings already made by the review examiner regarding the claimant's separation in May, her move to Maryland, and her failure to return to work in Massachusetts in September of 2016.[1]

The claimant did not return to work in the fall of 2016, even though she knew that work would be available to her based on her previous experience with this employer. Since work was available to her, and she did not take it, we conclude that the claimant initiated her own separation in the fall of 2016.[2] G.L. c. 151A, § 25(e), provides, in pertinent part, as follows:

[1] See Section 1208(K) of the DUA's Service Representative Handbook, which provides that "[a] non-union claimant who has been laid off fails to return to work when recalled" should be disqualified, effective on the date of the recall, if "(1) at the time of the layoff, a definite or approximate date of recall had been given; ***or*** (2) the layoff was a seasonal or customary one and the claimant had returned to work following a similar layoff in the past …." This contemplates that, for circumstances such as the one presented in this case, where a claimant is temporarily laid off, an ongoing employment relationship exists that can be severed if the claimant does not return to work when recalled. Guided by this provision, it seems the most effective way to deal with the claimant's ongoing eligibility for benefits after work became available with her former client is to examine why the claimant did not return to work in the fall of 2016.

[2] Although the employer did replace the claimant in August of 2016, *see* Consolidated Finding of Fact #22, we believe the separation is still attributable to the claimant. The employer had notified the claimant about the availability of work in the fall, and the claimant responded that she was unsure about her housing and that she had to

> [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.

Under these provisions of the statute, the claimant has the burden to show that she is eligible to receive unemployment benefits following her permanent separation from work.

Reduced to their minimum, the review examiner's findings indicate that the claimant did not return to work in the fall because she was living in Maryland with her daughter. The findings also indicate that the claimant moved to Maryland, knowing that work with this employer would have been available to her in Massachusetts in the fall. Thus, we must assess whether the claimant's move to Maryland was voluntary, or whether such move was involuntarily motivated by other factors.

We conclude that the move to Maryland was involuntary. First, we note that the claimant has not shown that she separated from her position for good cause attributable to the employer. Although the employer laid her off in May of 2016, and did not offer her other work for the summer of 2016, this was the usual arrangement between the employer and the claimant. Work was available again for the claimant in the fall of 2016, with the same client as she had been working with in the spring of 2016. Therefore, the employer took no action in the fall of 2016 that caused the claimant to quit or separate from her position.

Rather, the claimant moved to Maryland due to her own personal circumstance. That is, she could not afford to live in Massachusetts anymore, without any work or income following the May, 2016, layoff by the employer. A personal circumstance such as this implicates the urgent, compelling, and necessitous provision of the above-cited statute. In cases applying this standard, we must examine the circumstances and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992). "[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, 412 Mass. at 847.

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remain in Maryland, at least "for the moment." *See* Consolidated Findings of Fact ## 19 and 20. The findings suggest that the claimant was not sure about her housing situation until at least September 17, 2016, when she heard back from her friend about the garage apartment. That was only a few days before the employer's client needed services again. It was reasonable for the employer to look into replacing the claimant, where the claimant had given no indication that she was going to return to Massachusetts to work. The employer's actions were reasonable and taken based on the claimant's lack of clarity about her plans to work in the fall.

Here, the review examiner has plainly found that following her lay off and her inability to obtain other work for the summer (which she had obtained in prior years), the claimant "[c]onclud[ed] that her lack of income would prevent her from being able to afford her rent during the summer of 2016 . . . ." Therefore, she decided to move to Maryland to live with her daughter. When she made her decision to move, the claimant had no income, no money saved for a deposit or first month's rent for an apartment, and no immediate opportunity to stay anywhere rent-free. Thus, the claimant was faced with moving to Maryland (and potentially not being able to work for the employer in the fall) and becoming homeless in Massachusetts. We think that she was reasonable in deciding to move to Maryland when she did.

Moreover, the findings indicate a reasonable effort on the part of the claimant to seek out a way to stay in Massachusetts and, thus, prevent herself from separating from her job with the employer. *See* Norfolk County Retirement System, 66 Mass. App. Ct. at 766 (noting that a prominent factor to be considered when determining if a claimant separates involuntarily is if the person took reasonable means to preserve her job). Here, the claimant "learned" (and so must have inquired about) that she would have no other work during the summer of 2016. *See* Consolidated Finding of Fact # 8. She also asked if she could stay in a garage apartment owned by her friend. Although she wouldn't be able to stay for free, the claimant and the owner of the apartment were friends and the claimant "believed [the owner] would wait to receive any monies from her until she began working in the fall." Consolidated Findings of Fact ## 10 and 11. However, the friend told the claimant that the apartment was not available. Indeed, the friend did not tell the claimant about the availability of the apartment until September 17, 2016, far after the claimant had indicated to the employer that her return was not certain and the employer replaced her. *See* Consolidated Findings of Fact ## 19, 20, 22, and 23. Given her limited options, we think that the claimant did what she could to try to stay in Massachusetts, close to her job. However, she was forced to move due to her housing situation.[3]

We, therefore, conclude as a matter of law that the review examiner's initial conclusion to award benefits is supported by substantial and credible evidence. However, our decision analyzes the claimant's failure to return to work when recalled in the fall of 2016 as a quit, which was involuntary in nature, pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits, pursuant to G.L. c. 151A, § 25(e). Based on our discussion above, the agency need not adjudicate or pursue any further Issue ID 0020 0371 76, which had been created by the review examiner following the initial hearing in this case. Our decision here covers the same set of

[3] We do not think it reasonable to require the claimant to move back to Massachusetts in the fall to try to start work again with the employer. Once she was in Maryland, and once she had learned that the employer had replaced her, her separation was complete. She was not required to seek housing again or try to move back to Massachusetts.

circumstances which would have been addressed by that issue, and further adjudication is not necessary.[4]

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 31, 2017

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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

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.

SF/rh

[4] Because the review examiner has found that no work was offered to the claimant during the summer, we see no reason to create any new issues dealing with the summer period. The review examiner also did not create any issues to be addressed for the summer.