

A claimant was on approved leaves of absence due to her pregnancy and complications of her recovery, but was ultimately separated due to her failure to return medical paperwork sufficient for the employer to continue to hold her job for her. Since the claimant did what she could to get the paperwork, and her doctor did not return the required paperwork to the claimant or the employer, the claimant's separation is deemed to be involuntary for urgent, compelling, and necessitous reasons.

**Board of Review
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Issue ID: 0020 2095 20

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Marielle Abou-Mitri, 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 on November 18, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 19, 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 January 27, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or 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 allow the claimant an opportunity to provide evidence regarding her separation from employment. Only the claimant 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 that the claimant is subject to disqualification, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant could not return to work due to complications from her pregnancy and the birth of her child and she did what she could to obtain medical documentation for the purpose of extending her leave of absence, but the employer never received it.

Findings of Fact

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

1. The claimant began working for the employer, a hospital, on February 9, 2015 as a full-time medical assistant.
2. The claimant's direct supervisor was the Nurse Manager.
3. The claimant was granted a leave of absence under the Family and Medical Leave Act (FMLA) from February 11, 2016 through February 29, 2016 due to pregnancy complications. The claimant had a history of miscarriages and was required to have an abdominal cerclage inserted when she was three months pregnant.
4. The claimant was out of work from March 21, 2016 through April 1, 2016. This time off was not approved under FMLA.
5. The claimant's last physical day of work was July 11, 2016. The claimant was granted a leave of absence under FMLA from July 12, 2016 through September 13, 2016.
6. The claimant had her baby on August 25, 2016.
7. The claimant's FMLA expired on September 14, 2016.
8. The claimant was granted an 8 week leave of absence under the Massachusetts Parental Leave Act (MPLA) from August 25, 2016 through October 25, 2016.
9. On September 30, 2016, the claimant was issued ADA accommodation paperwork with an October 7, 2016 due date.
10. On October 6, 2016, the claimant called the FMLA Specialist to request additional time to have her doctor return the required paperwork. The claimant's deadline was extended to October 13, 2016.
11. The employer did not receive the documentation from the claimant's doctor by October 13, 2016. The Nurse Manager tried reaching the claimant but was unsuccessful.
12. On October 17, 2016, the FMLA Specialist left the claimant a message that her paperwork had to be returned by the end of the day and she had to notify the Nurse Manager and the human resources department of her expected return to work date.

13. The claimant contacted the FMLA Specialist and notified her that she had a doctor's appointment on October 24, 2016 and that the doctor would fax the paperwork by October 25th.
14. The claimant was having complications with her recovery. When the claimant went to her doctor's appointment on October 24th, the claimant's doctor notified her that she needed to take more time off from work. The claimant provided her doctor with the required paperwork. The claimant's doctor was responsible for submitting the paperwork to the FMLA Specialist, as he had done previously.
15. The claimant believed that her doctor submitted the required paperwork to the FMLA Specialist by October 25, 2016.
16. The employer did not receive the paperwork on October 25, 2016.
17. On October 27, 2016, the FMLA Specialist reached the claimant and notified her that the employer needed the doctor's paperwork by the morning of October 28, 2016. The FMLA Specialist asked the claimant if the doctor was keeping her out of work. The claimant indicated that the doctor was keeping her out of work and that she had to see her primary care physician and chiropractor for physical therapy. The claimant told the FMLA Specialist that she gave her doctor all of the required paperwork.
18. The claimant called her doctor's office in November of 2016 and left messages requesting that the doctor's office call her back. The claimant did not receive a response from the doctor's office until several days later. The claimant was notified that the doctor would submit the required paperwork to the FMLA Specialist.
19. On November 10, 2016, the FMLA Specialist emailed the claimant a letter indicating that the claimant would be terminated on November 17, 2016 if medical paperwork was not received by November 17th.
20. On November 14, 2016, the FMLA Specialist left the claimant a message on her cellular phone indicating that a letter was sent certified mail and email and that she would be terminated on November 17, 2016 if she did not submit the paperwork.
21. The claimant emailed the FMLA Specialist and received an automatic reply which stated that the FMLA Specialist was out of the office on November 17 and November 18. The claimant attempted to call the FMLA Specialist but did not receive a response.
22. On November 17, 2016, the claimant emailed the FMLA Specialist and stated that she called her doctor's office and did not receive a response. The claimant also stated, "I have done my part there is nothing more that I could do

[beyond] this point.” The claimant also stated that she would like to receive an email stating her employment was terminated.

23. The employer did not receive any medical documentation from the claimant. The claimant was considered to have abandoned her position effective November 18, 2016. The claimant believed that it was her doctor’s responsibility to submit the paperwork to the FMLA Specialist as he had done throughout the course of her time off requests.
24. The claimant’s doctor cleared the claimant to return to light duty work on November 22, 2016.
25. The claimant filed a claim for unemployment benefits effective November 20, 2016.

CREDIBILITY ASSESSMENT:

Only the employer’s Human Resources Business Partner attended the first hearing and only the claimant attended the remand hearing. The parties did not have an opportunity to cross-examine each other. However, at the first hearing the Human Resources Business Partner did not have any first-hand knowledge regarding any of the communications between the claimant and the FMLA specialist. This Review Examiner relied primarily on the FMLA Specialist’s notes regarding the claimant’s requests for time off and communications. At the remand hearing, the claimant credibly testified that she believed that her doctor submitted the required paperwork to the FMLA Specialist in mid-October of 2016. The claimant further provided that she contacted the doctor’s office and requested that they submit her paperwork but they continued to fail to do so. The entirety of the claimant’s testimony was consistent and direct. Therefore, the claimant’s testimony was determined to be credible by this Review Examiner.

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, we conclude that the claimant has carried her burden to show that she separated from her position involuntarily for urgent, compelling, and necessitous reasons.

The DUA initially resolved this case under G.L. c. 151A, § 25(e)(2), the section of law pertaining to discharges. Exhibit # 5. The review examiner, after hearing testimony from the employer at the first hearing, concluded that the claimant had caused her own separation and applied G.L. c. 151A, § 25(e)(1), the section of law pertaining to quits or voluntary separations. Remand Exhibit # 1. The review examiner’s consolidated findings of fact indicate that, as of

October 24, 2016, the claimant was not able to return to work. Consolidated Finding of Fact # 14. Thereafter, the claimant attempted to get medical documentation which would be sufficient to further extend her leave of absence from work. The employer never received this paperwork and ultimately separated the claimant from her job, as she did not return to work and had not provided documentation to show that she needed to remain out of work. *See* Consolidated Findings of Fact ## 19 and 23. Because the claimant did not return to work, and because it was her own physical ailment that prevented her from returning to work, we agree with the review examiner that G.L. c. 151A, § 25(e)(2), does not apply in this case. Although the employer ultimately separated the claimant, it did so only after waiting several weeks for the claimant to return to work and she failed to do so. Therefore, we conclude that the claimant initiated her separation from employment. Consequently, we analyze the claimant's eligibility for benefits under G.L. c. 151A, § 25(e)(1), 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 for . . . [T]he 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

Also relevant to our analysis is G.L. c. 151A, § 25(e), which provides in pertinent part, as follows:

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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 both of these statutory provisions, the claimant has the burden to show that she is entitled to benefits.

Under the good cause standard noted above, 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). Here, however, the consolidated findings of fact clearly indicate that the reason for the claimant's ultimate separation from employment related to her inability to return to work due to complications with her pregnancy and recovery. The findings do not support a conclusion that the employer did something to affect the claimant's employment situation which could have given rise to good cause to quit. Thus, we conclude that the good cause standard is not applicable in this case.

The more appropriate question to be addressed here is whether the claimant separated from her job involuntarily for urgent, compelling, and necessitous reasons. "A 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under the above statutory provision." 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). To evaluate whether the claimant's reasons for leaving work were urgent, compelling, and necessitous, 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 left her job involuntarily. *See Reep* at 848.

Based on the findings, the claimant’s testimony, and the documentary evidence in the record, we conclude that the claimant’s situation did present a circumstance covered by the urgent, compelling, and necessitous language of G.L. c. 151A, § 25(e). “[I]t is clear that pregnancy or a pregnancy-related disability (e.g., a miscarriage) may be a compelling personal circumstance not unlike other disabilities that legitimately require absence from work, neither of which condition is viewed as causing a ‘voluntary’ departure from work.” *Dohoney v. Dir. of Division of Employment Security*, 377 Mass. 333, 335–336 (1979). Here, the claimant was not able to return to work until November 22, 2016, due to her medical situation following the birth of her child. *See* Remand Exhibit # 2F and Exhibit # 4A. In short, she was out of work for reasons beyond her control.

The separation occurred, because the employer did not receive sufficient documentation for it to be satisfied that the claimant needed to remain out of work on an approved leave of absence. Reduced to unemployment law terminology, the employer argues that the claimant did not make sufficient efforts to preserve her job. Making reasonable efforts to preserve a job, especially in cases of a potential involuntary separation, is an important factor to consider when deciding whether the separation was for urgent, compelling, and necessitous reasons. *See Norfolk County Retirement System*, 66 Mass. App. Ct. at 766, *quoting Raytheon Co. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597–598 (1974). Indeed, the claimant at the center of the *Dohoney* case did not inquire about or attempt to take a leave of absence to preserve her employment while she was pregnant, and the Supreme Judicial Court upheld the agency’s decision to deny her unemployment benefits on that basis. *See Dohoney*, 377 Mass. at 337–338.

Here, the claimant last worked on July 11, 2016. From July 12, 2016, onward, the claimant was covered by various types of time off which preserved her job with the employer. *See* Consolidated Findings of Fact ## 5 (FMLA leave of absence) and 8 (Massachusetts Parental Leave Act leave of absence). After October 25, 2016, however, she was not covered by any type of approved time off. From late October through her separation on November 18, 2016, the claimant and the employer had an ongoing series of communications, the substance of which was that the claimant needed to obtain further medical documentation to justify her continued absence from work.

The findings indicate that the claimant made sustained and bona fide attempts to obtain the paperwork. On October 24, 2016, the claimant had a doctor’s appointment and provided her doctor with the appropriate paperwork on that day. Consolidated Findings of Fact ## 13 and 14. She informed the employer about her appointment on October 27 and indicated that she had given the doctor the paperwork to fill out. Consolidated Finding of Fact # 17. The claimant then believed that the doctor would take care of submitting the paperwork; however, the doctor did not complete it. Consolidated Findings of Fact ## 15 and 16. Although the claimant called the doctor’s office in November of 2016 to inquire about the paperwork, the employer never received any documentation. Consolidated Findings of Fact ## 18 and 23. We conclude that the failure of the claimant’s doctor to properly fill out her paperwork and return it to the claimant or the employer is a circumstance beyond the claimant’s control which prevented her from being able to keep her job. The claimant made a good faith effort to preserve her job, but was unable to

maintain her employment relationship due to the failure of her doctor to return the necessary paperwork.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because the claimant has carried her burden to show that she separated from her position involuntarily for urgent, compelling, and necessitous reasons.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 20, 2016, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 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