Although the claimant's lack of childcare certainly can be an urgent, compelling, and necessitous reason for separation from her job, the claimant made no effort to preserve her job, even where the employer had been flexible and accommodating in granting her time off.

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Issue ID: 0021 3032 53

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by John Cofer, 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 reverse.

The claimant resigned from her position with the employer on February 27, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 7, 2017. 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 May 24, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant involuntarily left employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified, under G.L. c. 151A, § 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 claimant is eligible to receive unemployment benefits is supported by substantial and credible evidence and is free from error of law, where the claimant lacked the childcare needed to return from her maternity leave, but took no steps to preserve her employment because "she believed that the employer had already accommodated her enough with a twelve-week maternity leave."

Findings of Fact

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

1. The employer is a financial firm. The claimant worked as a full-time data analyst for the employer. She worked for the employer from 7/20/15 to 12/07/16.

2. The claimant requested maternity leave. The employer granted this request. The claimant and the employer agreed that the claimant would take maternity leave from 12/08/16 to 3/01/17.

3. The claimant gave birth on 12/09/16.

4. The claimant's mother agreed to care for the claimant's child so the claimant could return to work.

5. When the claimant left work on maternity leave, she intended to return to work when the leave ended.

6. The claimant's mother fell ill. She became unable to care for the claimant's child. The claimant and her mother determined this on 2/27/17.

7. The claimant has two sisters. Neither sister was available to provide full-time care for the claimant's child.

8. On 2/27/17, the claimant resigned from her employment. The claimant resigned because she lost her childcare. She sent a resignation note to the employer via e-mail.

9. The claimant did not ask the employer for extended leave. She did not ask for extended leave because she believed that the employer had accommodated her enough with a twelve week maternity leave. She did not want to burden the employer.

10. The claimant filed a claim for unemployment insurance benefits. The effective date of the claim is 3/12/17.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant carried her burden to show that she separated from her job involuntarily for urgent, compelling, and necessitous reasons.

The evidence in the record does not suggest that the employer took any action which caused the claimant's unemployment. Indeed, the claimant testified during the hearing that the employer had been flexible and accommodating with her. The claimant ultimately separated due to her own lack of childcare for her newly born child. G.L. c. 151A, § 25(e), 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 this section of law the law, the claimant has the burden to show that she is eligible to receive unemployment benefits.

The review examiner found that the claimant separated from her job when she determined on February 27, 2017, that she did not have childcare. Her mother had planned to care for her newborn child, but her mother became ill and was no longer able to do so. When the claimant finally realized this on February 27, 2017, she resigned the same day.

"[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). Domestic responsibilities are one such circumstance. *See* Manias v. Dir. of Division of Employment Security, 388 Mass. 201, 204 (1983).

However, even if the claimant has carried her burden to show that she had a circumstance beyond her control which led her to resign, "[p]rominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve her employment' as would indicate the claimant's 'desire and willingness to continue her employment.'" Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). Here, the review examiner found that the claimant quit on the same day that she determined that her mother was not available to take care of her child.[1] He also found that the claimant did not speak with the employer further about her childcare situation or her apparent inability to return to work on March 1, 2017, because she "did not want to burden the employer." Finding of Fact # 9. In Part III of his decision, the review examiner touched on the issue of preservation only briefly, noting that "the claimant testified about why she did not ask for more leave and her explanation was reasonable."

We disagree with this legal conclusion. As noted above, the law requires that the claimant make reasonable efforts at preserving her employment, unless those efforts would have been futile. Given the testimony provided at the hearing, we do not think that the claimant was reasonable in immediately resigning on February 27. As she stated in the testimony, the employer was flexible and accommodating. Although the claimant felt that she did not want to burden the employer, there are no findings suggesting that this would have been a burden. The claimant's subjective

[1] The claimant suggested in her testimony that she could not return to work, because she lacked childcare and also because she had to care for her mother. The review examiner did not find that the claimant resigned, in part, to care for her mother. He specifically found that the claimant resigned "because she lost her childcare." Finding of Fact # 8.

feeling about how her request could affect the employer is insufficient to show that she acted reasonably. Moreover, the employer also noted that it had offered the claimant a part-time back-to-work arrangement, which shows that the employer was trying to accommodate and work with the claimant. *See* Exhibit ## 3d and 3e. The employer's witness testified that the parties probably could have made another arrangement if there had been better communication from the claimant.

While we recognize that the claimant was having a serious issue with childcare around the time she planned to return to work, we think that she could have, at the least, spoken with her employer about her issue to see if something could have been arranged so that the claimant could keep her job. By failing to do so, the claimant failed to take reasonable steps to preserve her job. Indeed, the reason that she did not contact and work with the employer to keep her job (she "did not want to burden the employer"), suggests a choice not to contact the employer to ask for additional time off, rather than a compelling reason which forced her to separate from her job.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is not free from error of law, because the claimant did not take reasonable and sufficient steps to try to keep her job when she determined that her mother could not provide childcare for her. Thus, she did not carry her burden to show that her separation was involuntary, pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 12, 2017, 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 - August 21, 2017

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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