Claimant stopped working due to her pregnancy. Although the employer subsequently told her not to return because of lack of business, Board concludes that claimant is eligible for benefits because her separation was due to urgent, compelling, and necessitous circumstances.

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Issue ID: 0021 8045 28

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Danielle Etienne, a review examiner of the Department of Unemployment Assistance (DUA), to award the claimant benefits following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41. We affirm the review examiner's conclusion that the claimant is eligible to receive unemployment benefits.However, we do so for reasons which differ from those articulated by the review examiner.

The claimant separated from her position with the employer on May 6, 2017. On September 19, 2017, the agency initially determined that the claimant was entitled to unemployment benefits. The employer appealed and both parties attended the hearing. In a decision rendered on December 20, 2017, the review examiner affirmed the agency determination, concluding that the claimant was laid off due to a lack of work, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). The Board accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's analysis of this separation as a layoff is supported by substantial and credible evidence and is free from error of law, where the findings show that the claimant separated due to pregnancy-related complications.

Findings of Fact

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

1. The claimant worked as a receptionist for the employer from July 22, 2016 until May 6, 2017, when the employer discharged the claimant.

2. The claimant's last physical day at work was March 22, 2017.

3. On March 28, 2017, the claimant was informed that she would have to be induced due to complications.

4. The claimant delivered her baby on March 30, 2017.

5. In February 2017, the claimant informed the employer's Dentist that she was due to deliver in April 2017.

6. In January 2017, the claimant requested maternity leave from the employer. The claimant expected her last day at work to be the first week of April 2017.

7. The Owner admittedly replied that "when you leave you leave, there is no guarantee". The Owner admittedly expected the claimant to reapply for her position when she was ready to return to work.

8. The Owner admittedly allows employees to be absent a maximum of six day[s] per week.

9. The employer does not provide any leave of absence to employees.

10. The claimant expected to take six weeks of maternity leave and return to work on May 21, 2017.

11. The claimant's return to work date was noted in the employer's computer as May 21, 2017.

12. On May 6, 2017, the employer notified the claimant via text message that due to lack of business she could not return to work.

13. The employer discharged the claimant due to lack of work.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we conclude that the review examiner's findings of fact, except for Findings of Fact ## 11 and 13, are based on substantial and credible evidence in the record. Finding of Fact # 11, which refers to a return to work date in the employer's computer, is based on the claimant's testimony that she has text messages from former co-workers stating that she was in the employer's computer system as returning to work on or about May 21, 2017. The employer's witness disputed that there was a return to work date. The text messages are not a

part of the record. This evidence, if it had been submitted into the record, would have constituted hearsay.[1] Where the point about a return to work date was disputed, and where the review examiner did not explain why she credited the claimant's testimony, which was the basis for Finding of Fact # 11, and because the record does not contain the text messages or any other evidence tending to corroborate the claimant's assertions about the text messages or the computer system,[2] we conclude that the finding is not supported by substantial and credible evidence in the record.

We also conclude that the review examiner's finding that the claimant was laid off is not supported by her other findings. The review examiner found that the employer does not offer leaves of absences. *See* Finding of Fact # 9. Therefore, when the claimant stopped reporting to work in late March of 2017, her employment was severed then, not in May of 2017.

It follows that the review examiner's reasoning in Part III of her decision is unsupported and incorrect as a matter of law. When the claimant could no longer work due to her pregnancy complications and the birth of her child, she separated from her job. Separating due to pregnancy is normally considered an urgent, compelling, and necessitous reason for severing an employment relationship. *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). In this case, the findings suggest that the claimant tried to preserve her job by requesting a leave of absence, *see* Findings of Fact ## 6 and 10, but the employer did not approve such a leave.[3] Given the nature of a pregnancy, no other preservation efforts would have been reasonable under these circumstances. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984); Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009). Therefore, we conclude that the claimant separated from her position for urgent, compelling, and necessitous reasons, as provided for under G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning March 26, 2017, and for subsequent weeks if otherwise eligible.

Pursuant to G.L. c. 151A, § 14(d), as long as the employer has complied with all of the reporting requirements of the law, benefits paid as a result of this separation shall not be charged to the employer's account, but shall be charged to the solvency account. If the employer has an inquiry as to what this means for the charges to its account, it may contact the Employer Charge Unit at (617) 626-6350.

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[1] Hearsay evidence is admissible in informal administrative proceedings, and it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988).

[2] In other words, the text messages, even if they had been submitted into evidence, do not contain indicia of reliability.

[3] We note that the employer's refusal to grant the claimant a maternity leave of absence may be in violation of G.L. c. 149, § 105D. However, there is insufficient evidence in the record to make a definitive conclusion about this.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

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