

A claimant, who traveled to Portugal for four weeks to see her ill father, did not carry her burden to show that she separated involuntarily for urgent, compelling, and necessitous reasons, because she did not explain the alleged compelling nature of her father's illness, did not show why she needed to be gone from her job for one month, and did not show that she made reasonable efforts to preserve her job prior to purchasing her tickets and traveling to Portugal.

**Board of Review
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Issue ID: 0023 1032 08

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 separated from her position with the employer on or about July 24, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 19, 2018. 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 July 25, 2018.

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 accepted the employer's application for review and remanded the case to the review examiner to take additional evidence regarding the reason why the claimant traveled to Portugal and what efforts she made to preserve her job. Only the employer 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 decision, which concluded that the claimant separated from her job involuntarily for urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant traveled to Portugal to see her ill father, but it is not clear what illness he had, why she needed to be away for almost four weeks, and why she did not discuss with the employer her need to be away from work for so long prior to purchasing her tickets.

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 part time as a maintenance worker for the employer from September 1, 2016 through July 24, 2017 when the claimant became separated from the employer.
2. The claimant's work schedule was 9:00 p.m. to 4:30 p.m., Monday to Friday.
3. The employer's Maintenance Director was the claimant's immediate Supervisor (Supervisor).
4. Typically, the claimant informs the Supervisor of any absences or time off requests.
5. On Friday, July 14, 2017, the claimant informed the Supervisor that her father was ill in Portugal. She further informed the Supervisor that she would let him know the dates she will travel to Portugal.
6. The medical conditions of the claimant's father are unknown.
7. The claimant waited over two weeks to travel to Portugal after the initial conversation with the supervisor on July 14, 2017 for unknown reasons.
8. On July 22, 2017, the claimant informed the Supervisor that she purchased a ticket to travel to Portugal from July 27, 2017 through August 24, 2017.
9. On July 25, 2017, the Supervisor informed the claimant that the employer's Senior Director did not approve the claimant's request for time off. Supervisor [sic] further stated to the claimant that he believed the claimant would be absent from work for a week. The claimant explained that the ticket to Portugal was expensive and she wanted to stay for as long as she could. The claimant admitted in a text message to the Supervisor that she was aware that the employer was shorthanded.
10. The claimant was aware that the employer did not have enough coverage to accommodate the duration of the claimant's time off request.
11. The claimant's Supervisor did tell her that he could not guarantee that her job would be available for her if she went to Portugal for the month.
12. On August 27, 2017, when the claimant returned from Portugal, the claimant contacted the employer for work. The Supervisor replied that the claimant separated when she left to Portugal without an approval of her request for time off.

13. The claimant separated from the employer upon her travel to Portugal to visit her father.

Credibility Assessment:

The claimant contends that she did not believe there would be a problem with the length of her trip because there was coverage at work. The claimant also offered that she would have cut her trip short by a week had she been aware of the lack of coverage. However, the claimant also admitted that in a text message she stated to the Supervisor that she was aware that the employer was shorthanded.

Given the claimant's conflicting testimony regarding whether she was aware of the employer being shorthanded, it is concluded that the claimant's testimony is less credible than the employer's testimony. In addition, it cannot be concluded that the claimant credibly established that her trip to Portugal for one month was urgent and necessitous.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence.¹ As discussed more fully below, we reject the review examiner's legal conclusion that the claimant has carried her burden to show that she separated from her job involuntarily for urgent, compelling, and necessitous reasons.

The claimant testified that she believed that she had been discharged in late August of 2017 when she returned to work and was told by the employer that there was no job for her. *See Consolidated Finding of Fact # 12.* The review examiner concluded, however, that she quit her position in July of 2017. We see no legal error with the review examiner's view of the evidence. The claimant caused her own separation when she decided to go to Portugal for approximately four weeks without sorting out with the employer a plan for her absence. Indeed, she was told that her job could not be guaranteed to her if she was gone for so long. *See Consolidated Finding of Fact # 11.* The claimant chose to go to Portugal anyway, thereby causing her separation. Therefore, it was legally correct for the review examiner to conclude that G.L. c. 151A, § 25(e)(2), which applies to discharge situations, is not applicable here.

Similarly, the provision of law allowing benefits to a claimant who quits a job for good cause attributable to the employer does not apply. *See G.L. c. 151A, § 25(e)(1).* In good cause cases,

¹ We note that Consolidated Finding of Fact # 1 indicates that the claimant separated on July 24, 2017, but Consolidated Finding of Fact #9 speaks of communication between the claimant and her supervisor on July 25, 2017. The substantial and credible evidence in the record is that the claimant last physically worked on July 24, but last had contact with her supervisor on July 25. During the first hearing, the claimant testified that the communication with the supervisor on July 25 was via text message.

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). In this case, the employer did not create a situation which led to the claimant's separation or forced her to resign. The claimant separated, because she traveled to Portugal for several weeks to visit her father. Consolidated Finding of Fact # 13. This reason could not have been remedied or addressed by the employer. Consequently, the good cause provision is inapplicable.

The most relevant statutory provision is the one addressing whether the claimant separated from her job for urgent, compelling, and necessitous reasons. 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 claimant has the burden to show that she is eligible to receive unemployment benefits. Following the first hearing, the review examiner concluded that the claimant had carried her burden. After reviewing the entire record, including the consolidated findings of fact, we disagree.

“[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). Our standard for determining whether a claimant’s separated from employment due to urgent, compelling, and necessitous reasons has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, 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, 412 Mass. at 848, 851 (1992).

As noted, the claimant’s separation resulted from her decision to travel to Portugal to visit her father. While we can conceive of an urgent situation in which a child must visit an ailing parent, or other family member, the claimant in this case did not present substantial evidence to show why it was urgent and necessary for her to visit her father in Portugal in July and August of 2017. During the first hearing, the claimant testified that her father was ill, she had not seen him in three years, she wanted to spend as much time in Portugal as possible due to the expensive nature of the plane tickets, and she wanted to spend time with her father before he was “gone.” In her initial statement to the agency, she offered that she went to Portugal to “visit very sick father.” *See* Exhibit # 3, p. 4. This evidence, in its totality, does not support a conclusion that the claimant needed to go to Portugal when she did. Nor does it support a conclusion that she needed to go for about four weeks. The review examiner found that the claimant first told her supervisor on July 14, 2017, that she was going to visit her ill father. She then left the United States on July 27, 2017. The fact that she waited two weeks to visit him indicates that the situation was not dire, severe, or urgent, even if her father was, in fact, quite ill. Thus, we cannot

conclude that the claimant's situation in this case was of such an urgent, compelling, and necessitous nature as to render her separation from work involuntary.²

Moreover, even if the claimant showed that she urgently needed to go to Portugal for involuntary, rather than voluntary, reasons, she failed to make reasonable efforts to preserve her employment.³ "Prominent 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 (2009), *quoting Raytheon Co. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597-98 (1974). In this case, the first time that the claimant told the employer that she was going to Portugal for four weeks was on July 22, 2017, after she had already purchased tickets for the trip. She had not received any approval at all to leave her job for a month. Although the claimant initially told her supervisor on July 14, 2017, that she needed to go to Portugal, no specifics about the trip were given to him. It was not reasonable for the claimant to believe that she could take as much time away as she wanted, or that the month-long trip had somehow been approved, where she had not told the employer about the actual length of the trip prior to July 22, 2017, no dates of the trip were discussed with the employer, and the claimant knew that the employer did not have coverage to accommodate a month-long trip. *See Consolidated Finding of Fact # 10*. Her failure to communicate with the employer about her trip, prior to purchasing the tickets and making all of the arrangements, supports a conclusion that the claimant did not make reasonable efforts to preserve her employment.

"Normally, a worker who anticipates a legitimate absence from work can take steps to preserve her employment." Dohoney v. Dir. of Div. of Employment Security, 377 Mass. 333, 336 (1979). Here, nothing in the record suggests that the employer was unwilling to work with the claimant to try to accommodate her alleged need to take time off for an extended period of time. The record indicates that the claimant did not communicate well with the employer regarding her need to take time off. "When a worker fails to take such [preservation] steps and severance results, it is the worker's own inaction rather than compelling personal reasons that causes the leaving." *Id.* Such is the case here.

We, therefore, conclude as a matter of law that the review examiner's decision is not based upon substantial and credible evidence or free from error of law, because the claimant did not carry her burden to show that the trip to Portugal in July and August of 2017, was an urgent, compelling, and necessitous reason which rendered her separation from employment involuntary.

² We note that the claimant testified that, if she thought that the four weeks of time off would have been a problem, she could have cut the trip back by one week. This shows that the claimant did not need to take off as much time as she did.

³ Without any discussion, the review examiner concluded in Part III of her decision that the claimant "made reasonable attempts to preserve her employment." It is not clear at all what the review examiner considered those attempts to be.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning July 23, 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 - November 29, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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