Employer gave its staff training to de-escalate potentially violent situations and its transportation protocol allowed employees to refuse to transport a client if they felt unsafe. Claimant quit after being attacked while driving an agitated client by herself. Held resignation was not for good cause attributable to the employer because its policy was reasonable and the claimant was given the option to refuse to drive the client. She also quit before making reasonable efforts to preserve.

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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 resigned from her position with the employer on March 8, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 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 August 28, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer, and, thus, she was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 is eligible for benefits under G.L. c. 151A, § 25(e)(1), when she resigned after being physically attacked while driving alone with a patient, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer provides supportive housing and other services to those in need. The claimant began working for the employer in August 2016 as a medical case manager helping clients to obtain medical care and remain connected to medical services. The claimant worked full-time.

2. The medical case manager coordinated client care with and through other programs. Part of the job was transporting clients to medical appointments.

3. Many of the employer's clients have significant behavioral or mental health issues.

4. If the employer was unable to provide transportation to a client, it would call a cab for the client.

5. When transporting clients, the employer's protocol was to have clients sit in the front seat of the van so as not to increase a client's feeling of being ostracized or not valued by society. The transport van was not fitted with any safety measures such as protective barriers between clients and driver, or panic buttons.

6. The claimant raised the issue of whether the employer transported clients in a manner that adequately addressed employee safety during at least one safety meeting and during at least one conversation with her supervisor.

7. The employer does not require staff members to transport clients if they feel unsafe in doing so. The employee would have to inform the employer she or he was refusing to transport due to safety issues and either arrange other transportation for the client or allow the client to leave the employer's facility by walking.

8. The employer felt its transport policies were safe since it allowed an employee to opt out of driving a client if the employee felt unsafe.

9. The employer provided crisis training to the claimant. This training focused on how to de-escalate potentially violent situations.

10. On March 7, 2018, a client was being discharged from the employer's residential program due to non-compliance. Over the prior weekend, the claimant had overdosed and was believed to have shared drugs. This client had a traumatic brain injury as well as substance abuse issues.

11. The client had a regularly scheduled medical appointment which needed to be cancelled since she was being discharged. The clinical director asked the claimant to cancel that appointment and contact [Organization A] to develop a plan for the client upon her release.

12. [Organization A] determined the client should be taken for evaluation by a group known as the BEST team. The BEST team could commit the claimant temporarily if it decided she was a danger to herself or others.

13. The client became agitated when informed her appointment was being cancelled and she was being discharged from the program. The client understood an evaluation by the BEST team meant she could be committed to a hospital. Although she complied with the clinical director's order to pack her things, she yelled and swore while doing so. The clinical director judged the client to be agitated but not dangerous. The clinical director did not feel the need to call security to help escort the client out of the building.

14. The claimant left messages for her supervisor that she was transporting the client, who was agitated, to the BEST team for evaluation. The supervisor had the morning off and did not receive the messages until the claimant was transporting the client.

15. When the claimant came to get the client, the client yelled and swore at the claimant. The client told the claimant "You're a bitch." The client yelled she was not crazy.

16. The clinical director asked the claimant if she felt safe transporting the client. The claimant replied she did.

17. On the morning of March 7, the claimant and the client both entered the transport van. In accordance with the employer's normal practice, the client sat in the front seat next to the claimant.

18. During the ride, the client remained agitated. The claimant tried to de-escalate the situation by calmly talking with the client. The client became increasingly agitated and began to scream she was not crazy and that she was going to "fuck up" the claimant. The client then grabbed the claimant's right arm and started shaking the claimant while she drove.

19. The claimant was frightened at being physically attacked by the client. She feared she would lose control of the van. The claimant pulled over to the side of the road and let the client out of the van. The claimant then called her supervisor to let her know what had happened.

20. The claimant's actions in pulling over, releasing the client, and calling the employer conformed with the employer's expectations on how the claimant would handle a situation such as this.

21. The claimant was very shaken by the client's attack. The attack caused the claimant to no longer feel safe being alone with clients.

22. The claimant felt it was futile to ask the employer to change the way it transported clients since she had previously raised the issue and the employer took no action to change its protocols.

23. On March 8, 2018, the claimant quit this job because she no longer felt safe being alone transporting clients and the thought of returning to work caused her overwhelming anxiety.

24. After the client attacked the claimant in the van on March 7, the employer took no action to change the way in which clients were transported. The employer believed its current procedures sufficiently ensured the safety of its employees.

[Credibility assessment:]

The parties' testimony differed in several respects. For example, the claimant testified her supervisor told her she did not have anyone to help transport on March 7 and directed the claimant to take the client by herself. The supervisor consistently testified she had the morning off and did not learn of, or get involved in, the final incident until the claimant was already in the van transporting the client. Because the supervisor checked attendance records before testifying she was not present at work that morning, her testimony on this point is more credible than the claimant's testimony; and the claimant's allegations about the supervisor specifically ordering her to drive the client is not credible.

There was considerable testimony at hearing on whether the employer knew, or should have known, that allowing a driver to transport a client without a second staff member being present was unsafe. The claimant testified she frequently asserted that having a lone driver transport clients was unsafe. According to the claimant, she raised this at quarterly safety meeting [sic] as well as at weekly supervisions and other staff meetings. The employer witnesses had no knowledge of what had been said at safety meetings. The claimant's supervisor confirmed the claimant raised the safety of transport with her on one prior occasion, but denied the claimant ever raised the issue at their regular supervision meetings. It is concluded the claimant raised the issue of safe transport during at least one safety meeting and at least once with her supervisor.

The claimant also argued she never told the clinical director on March 7 she felt safe transporting the client by herself. The clinical director testified she specifically asked the claimant if she felt safe on March 7 and the claimant indicated she did. Although I find the clinical director's testimony credible, it is noted her testimony was not consistent. At the initial hearing, the clinical director testified she asked the claimant if she felt safe and the claimant stated she did. At the continued hearing, the clinical director testified that, on March 7, she asked the claimant if the claimant felt safe and the claimant replied "No." She was asked to repeat what she had said. The clinical director repeated the same testimony two more times. When the contradiction in her testimony was then

> pointed out to her, she indicated she made an error and meant to convey the claimant informed her she felt safe. "Safety" is a core concept for social workers. It would be anathema for a social worker to allow the claimant to transport the client if she had just said she felt unsafe in doing so. Due to the importance of safety in a clinical setting, the clinical director's testimony that she had simply misspoke on the second day was persuasive. I conclude the clinical director asked the claimant if she felt safe and the claimant replied she did.
>
> It is clear from the testimony of both parties it was normal for a single person to transport clients in the van. The claimant's supervisor testified she had worked there 8 years and never had a problem. I conclude that, although the employer would not require an employee to transport a client if feeling unsafe, there was an unspoken expectation that employees were trained and capable of handling clients and would transport clients when asked. So, while there was no explicit directive to always transport clients, there was implicit pressure to do so.
>
> The claimant was not immune to the employer's presumption [that] its system of transporting clients was safe. Rather, the claimant usually felt quite competent to safely transport clients in the van by herself because the claimant accepted the employer's belief she, like other employees, was trained and capable of effectively dealing with the clients. It is, therefore, concluded the claimant had not *constantly* argued the way the employer transported was unsafe. I further conclude the claimant left with the client on March 7 feeling she was safely in control and could calm the client.

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 original 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. We further believe that the review examiner's credibility assessment[1] is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant resigned from her job, we consider her eligibility for benefits pursuant to the following provisions under G.L. c. 151A, § 25(e):

> [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

[1] The review examiner's credibility assessment is actually in the Conclusions and Reasoning section of her decision. We have placed it under the findings of fact for ease of reference in this decision.

> satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of these provisions assigns the burden of proof to the claimant.

The review examiner concluded that the claimant had good cause attributable to the employer to resign. Finding of Fact # 23 provides that the claimant quit because she no longer felt safe transporting clients alone and the thought of returning to work caused overwhelming anxiety. However, in analyzing whether the separation was for good cause attributable to the employer, 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, the findings show that the employer expected its staff members to transport clients in its van by themselves with the client sitting next to them in the front seat. Finding of Fact # 5. Recognizing that its clients may have significant behavioral or mental health issues, the staff are given crisis training, focusing on de-escalating potential violent situations. *See* Findings of Fact ## 3 and 9. As an additional safeguard, if an employee feels unsafe with driving a client, the employer permits the staff member to opt out of driving and it will arrange alternate transportation. *See* Findings of Fact ## 4 and 8. Because the employer trains its staff members before assigning them to transport clients, and it allows the employee to opt out, we believe the employer's client transportation policy is reasonable. Moreover, inasmuch as the clinical director checked to see if the claimant felt safe before transporting the client on March 7, 2018, and the claimant replied that she did, we see nothing unreasonable about the employer's behavior in this instance. *See* Finding of Fact # 16.

As it happened, transporting this particular client on this day was not safe; she physically assaulted the claimant while driving. *See* Finding of Fact # 18. There is no question that the claimant was frightened by this experience and felt overwhelming anxiety at the prospect of returning to work and having to transport clients alone again. *See* Findings of Fact ## 21 and 23.[2] However, because we conclude that the employer did not act unreasonably, the claimant's resignation is not for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

Alternatively, we consider whether the claimant left her job under urgent, compelling, and necessitous circumstances, as the claimant asserts in her written comments to the Board. There is some evidence that the claimant's experience with this client exacerbated a pre-existing mental health condition of anxiety and stress. *See* Exhibit 15.[3] "[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

[2] Although there is some suggestion in the findings and conclusions section of the review examiner's decision that the claimant did not feel safe being alone with the employer's clients, period (*see, e.g.*, Finding of Fact # 21), other more specific findings indicate that the reason the claimant quit was because she did not want to be alone while transporting a client (s*ee* Findings of Fact ## 22 – 24).

[3] Exhibit 15 is a letter from the claimant's primary care physician, dated June 28, 2018. While not explicitly incorporated into the review examiner's findings, this document is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

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). Medical conditions are recognized as one such reason. *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). However, because the claimant's medical note was written more than three months after the claimant resigned and it simply states that the claimant should not return to her job with the employer, it has little probative value in establishing that at the time the claimant resigned, she needed to stop working there due to her emotional health.

Even if the we were persuaded that the claimant's emotional reaction to the March 7, 2018, incident created urgent, compelling, and necessitous circumstances to leave, "[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 v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009), *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). In this case, we do not believe the claimant took reasonable steps to preserve her employment before quitting.

It is true that the claimant voiced concerns about the safety of the employer's transportation protocol at least twice before March 7, 2018. *See* Finding of Fact # 6. The findings also show that after the incident, the employer did not make any changes. Finding of Fact # 24. This does not mean that, after the incident and before quitting, it would have been futile to talk to the employer about ways to make her own job safer. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). Because the employer's protocol already allowed an employee to refuse to transport a client alone if she felt unsafe, it would not necessarily have to overhaul the whole policy. The claimant could have returned to work and declined to transport clients alone or asked the employer if, going forward, she could continue in her job without being expected to transport clients by herself. Given that the nature of employer's existing policy already contemplated staff choosing not to transport clients, we disagree that such efforts would have been futile.

We, therefore, conclude as a matter of law that the claimant is ineligible for benefits under G.L. c. 151A, § 25(e)(1), because she has not shown that she quit for good cause attributable to the employer or that she made reasonable efforts to preserve her employment before tendering her resignation.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning March 4, 2018, 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 20, 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.

AB/rh