Where the review examiner found that the claimant decided not to return to work so that she could care for her newborn baby personally, rather than due to the unaffordability of childcare options, the claimant has not shown that she separated from her job involuntarily for urgent, compelling, and necessitous reasons.

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Issue ID: 0026 8141 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on or about August 3, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 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 affirmed the agency's initial determination and denied benefits in a decision rendered on November 20, 2018.

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 accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's testimony that she was unable to afford childcare after the birth of her child. Both parties 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 issues before the Board are: (1) whether the review examiner's decision to deny benefits is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the overriding reason that the claimant decided to resign her position was so that she could take care of her child; and (2) whether the effective date of any disqualification should be in September of 2018, when the claimant wanted to separate from her job, rather than in August of 2018, when the employer decided to end the employment relationship.

Findings of Fact

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

1. The claimant worked full-time as a service coordinator for the employer's non-profit organization from 6/23/14 until 8/3/18. The claimant worked from 8:00 a.m. until 4:00 p.m. on Monday, Tuesday, Thursday, and Friday; she worked from 7:00 a.m. until 3:30 p.m. on Wednesday. The claimant was paid approximately $16 per hour. While working for the instant employer, the claimant also worked evening hours for a second employer at a residential facility.

2. The claimant's duties involved providing service at three buildings run by the employer.

3. The claimant delivered a baby on 4/13/18. The claimant was on a leave covered by the Family Medical Leave Act (FMLA) through 7/16/18. During her leave, the claimant responded to messages for the employer on thirty-five days. The claimant did not ask the employer about being paid for the time spent responding to these messages. The claimant was scheduled to return to work full-time on 7/16/18.

4. During her leave, the claimant researched childcare options by visiting daycare centers in her area and by calling community non-profit organizations. The claimant found that the daycare centers she visited charged $400 per week or more for full-time care. The claimant considered $400 per week unaffordable. The claimant was willing to pay $100–$200 per week for full-time childcare; she considered this amount affordable due to her family's other financial commitments, including child support, mortgage payments, and expenses for her other children who are 9 and 14 years old. The claimant applied for a childcare voucher and was told there was a 6-month wait for vouchers. The claimant is unaware of the financial guidelines necessary to receive a childcare voucher, and has not received any response to her application. The claimant's husband works full-time at [Employer A] and earns approximately $75,000 per year.

5. The claimant visited the homes of two home-based care providers recommended by [Organization A] in [Town A]. The claimant considered the home-based providers affordable. The claimant was dissatisfied with the two home-based providers she visited because one had a dog and broken fence, and exhibited a lack of hygiene. The second provider told the claimant that the baby would be kept in a bassinette or stroller because the provider was unable to lift. The claimant didn't feel comfortable with the places she visited; the claimant considered herself "picky" about who she would leave her child with because she lost a baby a year earlier. The claimant concluded that she needed to make arrangements that would allow either herself or her husband to take

care of the baby. The claimant continued working at her other work during evening hours because her husband is at home and cares for the baby while the claimant works.

6. The claimant spoke with her supervisor, the Director of Service Coordination (Director), prior to the end of her leave. The claimant and the Director of Service discussed the expense involved with childcare and the claimant's desire to have either herself or her husband provide care for the child while the other parent worked. The claimant and Director agreed that the claimant would be best off by resigning her full-time position and working her evening job while her husband was at home to care for the baby. The claimant felt that this arrangement would allow her to spend more time with her baby. (Claimant testimony recorded at 10:47–11:35 of 11/8/18 recording).

7. On 7/9/18, the claimant sent her supervisor an email message that reads: "I am writing to inform you of my resignation as an RSC in [Town A] and [Town B]. My last day of employment will be September 14 so that I can help train the new RSC that is hired in the position. I will be able to work starting July 16 on Monday's and Friday's only." The claimant requested to work on Monday and Friday only because her husband would be at home on those days to care for the baby. The claimant's husband was gradually returning to his work following a paternity leave. In addition, the claimant was breastfeeding and did not want to be away from her baby for too long. The claimant submitted a resignation and did not request an indefinite reduction in hours because she wanted to take care of her baby at home while her husband was working.

8. The claimant worked 4 hours on Monday and Friday through 8/3/18. The employer notified the claimant on 8/3/18 that 8/4/18 would be her last day. The employer could not allow the claimant to continue working only 8 hours per week because she spent 4 hours at each of two properties and did not provide any services to the third building. The employer's funding did not allow it to hire a full-time employee while the claimant continued working 8 hours per week. The employer did not offer the claimant a 28-hour per week position because the employer was aware of the claimant's concerns with leaving her baby in childcare and concluded that she would not be willing to accept the 28-hour position. The employer also learned of issues with the claimant's work, while the claimant was on leave, and the employer did not wish to have the claimant return.

9. The claimant filed an initial claim for unemployment insurance benefits, effective 8/12/18.

Credibility Assessment:

The claimant testified that she quit her job because she was unable to afford childcare. The claimant's credibility on this point was diminished by inconsistencies and conflicting testimony offered during the remand hearing.

During the first hearing, the claimant initially testified that at the time of having her baby, she could not afford childcare. The claimant later testified that after researching childcare providers, she did not feel comfortable with any of the places she viewed and decided that either she or her husband needed to provide care for the child, while the other parent worked.

The claimant testified at the second hearing session that her decision to resign was entirely due to a lack of affordable childcare. The claimant testified that she considered homebased childcare providers affordable; however, she was very picky about who she would leave her child with, due to having lost a child one year earlier. The claimant's testimony was that she could afford $100–$200 per week for childcare but was dissatisfied with the quality of the providers she considered affordable. The weight of the evidence supports a conclusion that the claimant and her husband are capable of affording childcare, based upon their combined income; however, they are unwilling to leave their child with a childcare provider. This conclusion is supported by the claimant's direct testimony that she "decided" that she "wanted it so either me or my husband could take care of the baby".

Likewise, the testimony of the claimant's former supervisor confirms that prior to the claimant submitting her resignation, the two discussed the expense involved with childcare; the claimant's desire to spend more time with her baby; and the idea that the claimant and her husband would work different shifts and take turns caring for their baby. The claimant's current situation, where she works part-time during evening hours while the husband is at home, and he works during the day while the claimant is at home, is the outcome that the claimant chose for herself and her family.

The claimant's contention that she did not request a permanent reduction in hours because she was aware the employer needed someone full-time was without merit. The claimant spoke with the supervisor about her personal situation and never inquired about making a permanent reduction in her schedule. The claimant's failure to make such an inquiry further supports the conclusion that she was unwilling to leave her child with a childcare provider, even on a part-time basis, since the expense of part-time care would have been much less than that of full-time care. The weight of the evidence supports a conclusion that the claimant did not make any such inquiry because she was unwilling to work even part-time during the day and preferred to work only part-time with her second employer during the evening when her husband could care for their baby.

In light of the above, it cannot be concluded that the claimant's separation was due to her inability to afford childcare.

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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented, except for one portion of the assessment. The review examiner wrote, in part, that the evidence supported "a conclusion that the claimant and her husband are capable of affording childcare, based upon their combined income; however, they are unwilling to leave their child with a childcare provider." There are insufficient findings of fact for the review examiner to state that the claimant was "capable of affording childcare." Although the claimant testified to various expenses she had, no specific figures were provided. *See* Consolidated Finding of Fact # 4. Thus, we reject that portion of the credibility assessment as unsupported by the full record. We do, however, adopt the portion of the credibility assessment that states that "[t]he weight of the evidence supports a conclusion that the claimant and her husband . . . are unwilling to leave their child with a childcare provider." As discussed more fully below, we conclude the claimant has not shown that she is eligible for benefits following her separation from the employer. However, for the reasons noted, we think that the disqualification should begin in September, rather than in August of 2018.

Because the claimant tendered her resignation to the employer, her qualification for benefits is governed by G.L. c. 151A, § 25(e), 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] . . . (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 satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

These legal provisions specifically place the burden upon the claimant to show that she is eligible to receive unemployment benefits.

The underlying circumstances of the separation are relatively straightforward. After delivering her baby on April 13, 2018, the claimant was on leave covered by the Family Medical Leave Act. She was scheduled to return to work full-time on July 16, 2018. However, while she was on her leave, the claimant told the employer's Director of Service Coordination that she had a desire to stay home with her child. The claimant and the Director agreed that the best course of action would be for the claimant to resign her position, so that she could spend more time with her baby. Consolidated Finding of Fact # 6. On July 9, 2018, the claimant sent the employer an e-mail stating that she would resign her job effective September 14, 2018. Until September 14, 2018, she could work two days per week. After her return to work, the claimant worked two days per week until early August of 2018, when the employer told her that it could no longer employ her in a part-time capacity. Consolidated Finding of Fact # 8.

As stated, the claimant's separation may be qualifying if she shows, through substantial and credible evidence, that urgent, compelling or necessitous reasons caused her to resign, or that there was good cause attributable to the employer. In determining 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). It is clear from the sequence of events noted in the consolidated findings of fact that the overriding reason for the claimant's resignation from her full-time position was the claimant's concerns about childcare for her new baby and not the employer's actions. In her decision, the review examiner noted the following:

> In her written responses, the claimant alleged that her leaving was due, at least in part, to stress caused by the employer. The claimant also suggested that her job was not stable. The claimant did not make any such contention in her direct testimony. Likewise, the claimant did not offer any testimony to suggest that her leaving was due to unresolved workplace issues. The claimant testified that she quit due to a lack of affordable child care and an unwillingness to leave her baby in child care after suffering the loss of a baby during the previous year.

This conclusion is supported by a reasonable view of the record. Because the employer was not responsible for the claimant's separation, the claimant has not shown that she separated from her job for good cause attributable to the employer or its agent.

The more applicable provision here is whether the claimant separated from her position involuntarily for urgent, compelling, and necessitous reasons. "[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under G.L. c. 151A, § 25(e)(1), 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 (2006), *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).

In her decision, the review examiner concluded that the desire to stay home with her baby was the primary reason for the claimant's resignation. Such a reason does not constitute an urgent, compelling, and necessitous reason for resigning. However, the inability to find appropriate, affordable childcare could. We remanded the matter for the review examiner to give further consideration to whether childcare affordability was behind her decision to quit.

The review examiner's consolidated findings of fact again focus on the desire to stay home with the baby as the overriding reason for the resignation. This time, however, the review examiner offered a detailed credibility assessment, explaining why she did not find it credible that the affordability of childcare was the claimant's motivating concern.

Since the Board did not hold a hearing in this matter, we cannot make findings of fact. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) (the "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary

hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence."). To satisfy the substantial evidence requirement, the review examiner's findings, conclusion, and decision "need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon reasonable evidence, that is, 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Gupta v. Deputy Dir. of Department of Employment and Training, 62 Mass. App. Ct. 579, 582 (2004). We also cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the substantial evidence before her. *See* School Commission of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Because the review examiner appears to have weighed all of the evidence and testimony before her, having cited to specific testimony offered by the claimant over the course of the two hearings, and because her view of the events was not unreasonable in relation to the evidence before her in its totality, we have accepted the review examiner's credibility assessment and associated findings of fact, except for the one phrase noted earlier, as being supported by the record.

In sum, the claimant decided to stay home with her child following the birth. The claimant's decision constituted a personal choice, rather than a compelled, involuntary action. There are insufficient findings of fact for us to conclude that the claimant needed to stay home either because of financial necessity or because the claimant wanted to place her child in daycare but was unable to find suitable daycare.[1] Thus, she has not carried her burden to show that she needed to resign her position for urgent, compelling, and necessitous reasons.

We now move to the period of disqualification. The review examiner made the effective date of the claimant's disqualification July 29, 2018, which was the week in which she last performed services for the employer. We disagree with this date, because the employer ended the claimant's employment during her notice period, and substantial evidence does not support a conclusion that the claimant did anything to cause her employment to be ended on or about August 3, 2018.

On July 9, 2018, the claimant gave her notice that her "last day of employment will be September 14." She continued, "I will be able to work starting July 16 on Monday's and Friday's only." Consolidated Finding of Fact # 7. The claimant was giving notice to the employer that she could work part-time when she returned from her leave of absence, and that she would totally separate as of September 14. The employer then allowed the claimant to work a reduced schedule until early August. Although it is clear that the employer needed a full-time employee in the claimant's position, the fact that the claimant was allowed to do the job for almost one month shows that employer essentially agreed to the reduction in hours as her new

[1] If the claimant had decided to stay home with her child, because she was not able to find suitable childcare, she may have carried her burden in this matter. She testified to two home-based providers, both of which were not suitable locations to leave her child. *See* Consolidated Finding of Fact # 5. However, it does not appear that the review examiner found credible further testimony offered by the claimant that there were no other locations at which she could place her child. The claimant testified that all the other places she looked at were full. It was not unreasonable for the review examiner to disbelieve that the claimant only located two home-based care providers in the [Town A]-[Town C] area. The claimant offered no evidence, other than her own testimony, to support this contention. Moreover, the lack of a sincere effort to find more places suggests that the claimant preferred to stay home with her child, rather than find a suitable daycare option.

terms of employment. When it then cut the claimant's employment short on or about August 3, 2018, it ended her employment prematurely and involuntarily.

Involuntary terminations are analyzed under G.L. c. 151A, § 25(e)(2). Here, there is no indication that the claimant engaged in misconduct or violated any rule. Therefore, she is eligible for benefits under G.L. c. 151A, § 25(e)(2), from the date of her termination until the date that she originally planned to resign.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and free from error of law. However, the effective date of the claimant's disqualification should be September 16, 2018, which is the Sunday following the date in which she planned to quit her position.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning September 16, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION – May 21, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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