

Where employer granted the requested light duty to accommodate a medical restriction, the claimant did not show that urgent, compelling, and necessitous circumstances caused her to resign. She is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0029 8867 40

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 March 7, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 30, 2019. 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 June 12, 2019.

Benefits were awarded after the review examiner determined that the claimant left employment involuntarily 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer 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 resigned her position 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 found that the claimant was under a medical restriction to perform only light duty work, which the employer was complying with.

Findings of Fact

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

1. The claimant worked full-time for the employer, a medication compound manufacturer, from May 30, 2016 to March 7, 2019 as a Certified Pharmacy Technician.
2. The claimant's daily cleaning and disinfection duties consisted of: preparing correct concentration of disinfectant solution; documents the disinfection completion; flows garbing procedures; cleans all ISO Class 5 devices prior to compounding, which consisted of walls, IV bar, and work surface; uses lint free wipe soaked with sterile 70% IPA or other approved disinfectant solution and allows to dry completely; removes all compounder components and cleans all ISO Class 5 areas; cleans all counters and easily cleanable work solutions; and, cleans sink and all contact surfaces and floor with disinfectant solution. The claimant's monthly cleaning and disinfection duties consisted of: cleans buffer area and ante-area ceiling and walls and storage shelving with a disinfectant solution and a mop or uses a microfiber cleaning system; cleans compound room ceiling followed by walls and ending with floor using mop designated for each area; cleans all buffer area and ante-area totes and storage shelves by removing contents and using a germicidal detergent soaked lint free wipe, cleans inside surfaces of the tote and then the entire exterior surfaces of the tote, allows totes to dry, wipes totes with sterile 70% IPA to remove disinfectant residue, uses new wipe as needed; cleans all buffer area and ante-area carts by removing contents and using germicidal detergent soaked lint free wipe, cleans all carts starting at the top shelf and top of post, working down to the wheels, cleans the underside of the shelves in a similar manner, allows to dry, wipes carts with sterile 70% IPA wetted lint free wipe to remove any disinfectant residue, uses new wipe as needed; cleans buffer area chairs, the interior and exterior of trash bins, and storage bins using disinfectant solution soaked lint free wipe; and, documents all cleaning activities as to who performed such activities with date and time noted.
3. The claimant was diagnosed as having three herniated discs and on October 3, 2018, provided a note from her provider restricting her to light duty. Specifically, the claimant's light duty consisted of no strenuous activity, which was defined as "no lifting, pushing, pulling above 25lbs," and "no cleaning of ceiling and walls."
4. The employer did not require the claimant to clean the ceilings and walls or lift, push or pull anything that could potentially be close to 25 lbs.
5. The claimant felt compelled to lift items over 25 lbs. though not directed to do so.
6. The claimant believed the remaining job duties to be strenuous.
7. On February 20, 2019, the claimant refused to clean [sic] to go into the lab and clean the hoods, flat surfaces, shelving ad floors. The Director of Quality

Assurance and a Compounding Pharmacist met with the claimant to discuss the issue. The claimant stated, “I can’t do this anymore,” “I don’t want to do this anymore,” and, “If you make me go in there and clean, I don’t know what will happen but we will all find out the consequences.” The Director of Quality Assurance offered to perform the cleaning if the claimant supervised. The claimant declined and said that if she had to enter the lab, she would end up cleaning and get hurt. The Director of Quality Assurance and Compounding Pharmacist ultimately sent the claimant home for the day.

8. On February 22, 2019, the claimant met with the Human Resources representative regarding her work and expressed that she cannot do it anymore and that she had a lot of family issues that were very overwhelming, namely her son’s father desiring to leave the state and the custody issues that accompanied it.
9. On February 25 and 26, 2019, the claimant was absent.
10. The claimant’s provider recommended that the claimant change her work duties to less physically strenuous activities.
11. On February 27, 2019, the claimant submitted her resignation dated February 25, 2019. The claimant stated that her final day will be March 22, 2019 and that the reasons were related to home. The claimant gave the reason after researching how to write a resignation letter on the internet.
12. The claimant was absent on March 4, 5, and 6, 2019.
13. The claimant reported to work on March 7, 2019, left during her meal period, and never returned.

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. After such review, the Board adopts the review examiner’s findings of fact. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant resigned her position involuntarily.

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.

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). Although the claimant indicated that the employer compelled her to perform work that violated the light duty restrictions, the review examiner found that the claimant herself felt personally compelled to perform duties contrary to the restrictions. We agree with the review examiner that this personal compulsion is not attributable to the employer.

The more applicable provision here is whether the claimant separated from her position involuntarily for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e). “[A] ‘wide variety of personal circumstances’ have been recognized as constituting ‘urgent, compelling and necessitous’ reasons” under the above statutory provision. 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). To evaluate whether the claimant's reasons for leaving work were urgent, compelling, and necessitous, we must examine the circumstances and evaluate “the strength and effect of the compulsive pressure of external and objective forces” on the claimant to ascertain whether the claimant left her job involuntarily. Reep, 412 Mass. at 848.

The findings show that the claimant met with the employer's Human Services representative on February 22, 2019, and expressed her inability to work because she had family issues that were overwhelming. Finding of Fact # 8. The claimant further submitted her resignation on February 27, 2019, citing her home situation as her reason for leaving. Finding of Fact # 11. Despite this, the review examiner concluded that the claimant's separation was due to her health and her inability to perform cleaning activities, which became too strenuous for her. We disagree.

The findings and record establish that the employer became aware of the claimant's health restrictions in a physician's letter, dated October 3, 2018. This letter specifically restricted the claimant to light duty work with no strenuous activity, including “no lifting, pushing, pulling above 25 lbs.,” and “no cleaning of ceilings and walls.” Finding of Fact # 3. The review examiner found that the employer fully complied with these restrictions. Findings of Fact ## 4, 5, and 7. On the record before us, this letter of October 3, 2018, constitutes the physician's medical evaluation of the nature and scope of the work the claimant was capable of performing at the time she submitted her resignation. We further note that, in the letter dated March 25, 2019, less than a month after the claimant submitted her resignation, the same physician reaffirmed his opinion that the claimant was able to work under a light duty restriction until further re-evaluation. Exhibit 12.¹

¹ Exhibit 12, while not explicitly incorporated into the review examiner's findings, 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

As noted above, the findings establish at the time the claimant submitted her resignation, the employer was not requiring the claimant to clean any walls or ceilings or lift, push or pull anything that was close to weighing 25 lbs. When the claimant declined to perform cleaning duties related to hood, flat surfaces, and floor shelving in order to avoid the potential of injury, the employer offered to perform these duties, provided the claimant supervised the work. Despite the employer's compliance with the relevant light duty restrictions and its apparent willingness to perform some of the claimant's other cleaning duties, the claimant believed her remaining job duties were strenuous. On the record before us, we cannot conclude that any such belief was reasonable. Nor do we believe that the review examiner's conclusion that any cleaning activities became too strenuous for the claimant is supported by the findings and record before us.

In reaching his conclusion to award benefits, the review examiner specifically cites to and relies on a physician's letter, which recommends that the claimant change her work duties to less physically strenuous activities. Such reliance on this physician's letter is in error. The letter, marked at Exhibit 16, is dated April 25, 2019, which is almost two months after the claimant submitted her resignation.² For this reason, we believe it has less probative value than this physician's letter of March 25, 2019, which was closer in time to her resignation. We further observe that the April 25, 2019, letter does not recommend that the claimant quit her job. Rather, it states the claimant was physically capable of returning to work with the employer but with a change in her prior job duties. Thus the letter does not amount to a recommendation that the claimant "change to a job that is less strenuous than that which is found in a sterile compounding laboratory" as the review examiner concluded. Lastly, we observe that there is no evidence in the record to suggest that the employer was ever shown or made aware of the issues contained in this letter, and thereby afforded the further opportunity to modify the claimant's job duties.

Therefore, on the record before us, we conclude that at the time of the claimant's separation, she was capable of performing the light duty work that was assigned to her and, as a result, has failed to meet her burden to show that her separation was for urgent, compelling and necessitous reasons.³

Even assuming *arguendo*, that the claimant had established urgent, compelling, and necessitous reasons for quitting, she has failed to meet her burden under Massachusetts law to show that, prior to quitting, she made a reasonable attempt to preserve her employment, or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984). While the review examiner is silent on the issue of preservation, there are no findings or evidence in record to suggest that the claimant made any such attempts prior to submitting her resignation or that any such attempt would have been futile. Rather, the employer's compliance with the claimant's light-duty restrictions and willingness to have others perform some of the claimant's duties suggests the contrary.

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).

² Exhibit 16 is also part of the unchallenged evidence in the record.

³ We note that, in her resignation letter, the claimant stated she was quitting to focus on issues related to her family. Exhibit 8, Finding # 11. At the hearing, however, the claimant denied that she quit for family reasons. Consequently, we decline to consider whether any such family issues constituted urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e).

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits under G.L. c. 151A, § 25(e), is not supported by substantial and credible evidence.

The review examiner's decision is reversed. The claimant is denied benefits from March 7, 2019, and for subsequent weeks, until such time as she has had 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 - September 25, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
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.

MJA/rh