A claimant who quit her job because she lost her childcare is eligible for benefits under the urgent, compelling, and necessitous provision of G.L. c. 151A, § 25(e), where she made attempts to find viable childcare and sought out more suitable shifts to work with the employer, but was unable to find a suitable option which would allow her to continue working.

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Issue ID: 0030 3440 16

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 benefits following her separation from employment. Benefits were denied on the ground that the claimant voluntarily resigned her employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, therefore, was not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits with an effective date of December 23, 2018. On April 23, 2019, the DUA issued a Notice of Disqualification to the claimant, which informed her that she was denied benefits. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on May 30, 2019. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On November 20, 2019, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the circumstances surrounding the claimant's reasons for resigning her employment. Both parties attended the remand hearing, which took place over the course of two sessions. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision to deny benefits pursuant to G.L. c. 151A, §25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant lost her childcare on the weekends, which was when she worked for the employer.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a part-time Unit Coordinator for the employer, a health care provider. She worked at the employer's hospital in the [Location A] section of [City A], MA. She worked in the labor and delivery unit.

2. The claimant began work for the employer on April 4, 2016. She worked Saturday and Sunday from 7 a.m. to 7 p.m. and earned $16.80 per hour.

3. The claimant lives in [City B], MA. She commuted to work on the MBTA. It took her between one and one and one-half hours each way to commute.

4. The claimant worked during the weekend because she is a full-time student. She has attended classes at North Shore Community College since 2017. She is completing an associate's degree in health sciences.

5. The claimant has a daughter who was 2 years old in the fall of 2018. Her son was 9 years old. Most weekends, while the claimant worked, the father of her daughter cared for her children. The father of her son also spent every other [sic] with their son. The claimant's mother also assisted with childcare if needed.

6. During the summer of 2018, all of the claimant's classes were on-line. The claimant's mother is a teacher, had the summer off, and was available to provide childcare. The claimant asked her supervisor, the Operations Manager, if she could work one weekend day and one weekday. The Operations Manager scheduled the claimant to work Sundays from 7 a.m. to 7 p.m. and one day during the week, usually Wednesdays, from 7 a.m. to 7 p.m.

7. The claimant's son attends school Monday through Friday from 8:15 a.m. to 2:15 p.m. He also has some challenging behavioral issues. The claimant wants to be available for any issues that arise during the week.

8. The claimant has a babysitter who cares for her daughter when she is in class.

9. For the spring semester of 2019, the claimant enrolled in three classes. She enrolled in an anatomy class on Mondays, from 8:30 a.m. to 10:20 a.m., from January 15, 2019, to May 6, 2019. She enrolled in a math class on Tuesday and Thursday, from 11 a.m. to 12:20 p.m., from March 18, 2019, to May 6, 2019. She also enrolled in an on-line sociology class.

10. In November, 2018, the father of the claimant's son was incarcerated. Her mother also became less available for childcare because of family issues.

11. The father of the claimant's daughter is a union employee. During the second week of December, 2018, he was told that because of a lack of seniority he was assigned a shift that included weekends. His new shift, beginning January 1, 2019, would include Saturdays and Sundays, from 1 p.m. to 9 p.m., plus the possibility of additional weekend hours.

12. The claimant looked into commercial childcare but there was none available on weekends. She also looked into private health [sic] care on Care.com. She was not able to find any childcare for less than $16 per hour. Because she was earning $16.80 per hour, this was not a practical option.

13. The claimant considered her child-care needs and her school schedule. She thought that the type of employment that would best suit her would be *per diem*. She thought that if she had *per diem* work, she could work when work was available and she had child-care.

14. The claimant asked the Operations Manager if there were any *per diem* shifts available. The Operations Manager told her there were not.

15. The claimant looked on the employer's web site for *per diem* employment at the employer's [City C], MA hospital, but there was none available.

16. Because the claimant lost her childcare on the weekends, she could not work on the weekends. Because of her school schedule, her childcare needs and the length of her commute, she could not work consistently or permanently during the work week. The claimant did not further attempt to preserve her employment because her availability was too limited.

17. On December 17, 2018, the claimant provided the employer with her written resignation with two-week notice. In her resignation, she states she is leaving for personal reasons and to pursue her education.

18. The claimant last performed work for the employer on January 1, 2019.

Credibility Assessment:

The only conflicting testimony at the hearing was with regard to the issue of the claimant's asking the Director about working *per diem*. The claimant testified she did ask. The Director testified she did not recall. Because the claimant's testimony was more definitive, it is more credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 original 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. As discussed more fully below, we conclude that the claimant should not be disqualified from receiving benefits under G.L. c. 151A, § 25(e).

Because the claimant quit her position, her eligibility 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.

By its terms, the statute provides that the claimant has the burden to show that she is eligible to receive unemployment benefits.

Initially, we conclude that the claimant has not shown that she resigned her job for good cause attributable to the employer. The good cause provision focuses on the employer's conduct, rather than on a claimant's personal reasons for leaving a job. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). In this case, the claimant's separation resulted not from anything that the employer did to the claimant, but due to the claimant's lack of stable and reliable childcare. In other words, the separation resulted from a personal circumstance, and, therefore, the good cause provision is not applicable.

The claimant's personal situation triggers the urgent, compelling, and necessitous provision quoted above. "[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 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Issues related to childcare can certainly constitute a situation which renders a separation involuntary. *See* Manias v. Dir. of Division of Employment Security, 388 Mass. 201, 204 (1983) (child care demands may constitute urgent and compelling circumstances) (citations omitted).

As far as her job with the employer was concerned, the claimant required childcare on the weekends, when she worked for the employer. Consolidated Finding of Fact # 2. The claimant has two children, a son and a daughter. Three people had assisted the claimant with looking after her children: the son's father, her mother, and the daughter's father. Consolidated Finding of Fact # 5.

Following the remand hearing, the review examiner made consolidated findings of fact showing that, as of early 2019, none of the three people who had been helping the claimant with childcare were going to be able to consistently assist her going forward. The son's father was incarcerated, beginning in November of 2018, and, thus, was not able to provide any childcare as of that time.

Consolidated Finding of Fact # 10. Moreover, the claimant's mother had to spend more time with, and was looking after, the claimant's sister.[1] Consolidated Finding of Fact # 10. Finally, beginning January 1, 2019, the work schedule of the daughter's father was changing such that he would not be able to look after the children on a consistent basis during the weekends. Consolidated Finding of Fact # 12. Thus, each person who helped the claimant care for her children could no longer do so. As a result, "she could not work on the weekends" for the employer. Consolidated Finding of Fact # 16. These childcare circumstances certainly implicate the urgent, compelling, and necessitous language of G.L. c. 151A, § 25(e).

Faced with this unanticipated situation, the claimant made attempts to obtain stable childcare and a change to her work schedule. *See* Norfolk County Retirement System, 66 Mass. App. Ct. at 766 (noting that preservation efforts are prominent factor to consider when determining whether the circumstances were so compelling as to make the separation from employment involuntary). She researched other childcare options. However, she found them to be unaffordable. Consolidated Finding of Fact # 12. She inquired as to whether there was any purely *per diem* shift work with the employer, as that type of varied schedule would work best for the claimant's childcare and school needs. None was available. Consolidated Findings of Fact ## 13 and 14.[2] Despite this, she still looked on the employer's website for suitable *per diem* work but found nothing which met her scheduling needs. Consolidated Finding of Fact # 15. Knowing that other potential preservation efforts would probably not result in a viable solution, the claimant decided to resign from her position. Consolidated Finding of Fact # 17.[3] Given the options available to her, it was reasonable for her to resign at that time. The claimant has demonstrated that the separation was involuntary.

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 not supported by substantial and credible evidence or free from error of law, because the claimant has carried her burden to show that she separated from her job involuntarily for urgent, compelling, and necessitous reasons, when she lost her childcare.

[1] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

[2] The claimant testified at some length as to how difficult it would be to maintain a fixed schedule of work with the employer on weekdays, given her childcare needs and her commute to work. *See* Consolidated Finding of Fact # 16.

[3] During the remand hearing, the parties discussed a leave of absence. The employer's witnesses were unsure as to the claimant's eligibility for a leave under the Family and Medical Leave Act. The employer's witnesses also indicated that the employer has a personal leave of absence policy, but that an employee could take such a leave for only up to two weeks. Such a leave would not have helped the claimant, given her ongoing lack of childcare.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 30, 2018, and for subsequent weeks if otherwise eligible.[4]

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 3, 2020

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.

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[4] During the remand hearing, the review examiner discussed with the claimant that she has another indefinite disqualification on her claim, which could prevent her from receiving benefits. In Issue ID 0030 5028 14, the DUA initially found the claimant eligible for benefits under G.L. c. 151A, § 24(b). However, on June 27, 2019, the DUA issued a new determination on that issue, finding the claimant ineligible, beginning December 30, 2018. The claimant appealed that determination on December 2, 2019. The DUA then determined that the request for a hearing was late, and issued the claimant a disqualification pursuant to G.L. c. 151A, § 39, on December 21, 2019. As of the date of this decision, the claimant has not appealed the determination issued under G.L. c. 151A, § 39.