

0031 0496 64 (Oct. 15, 2019) – Full-time employee quit due to urgent, compelling, and necessitous reasons when the employer could not accommodate his medical need for part-time hours. Held claimant made sufficient efforts to preserve his job before resigning. Refusing a 6-month unpaid leave of absence was reasonable where he remained capable of working part-time.

Board of Review
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Issue ID: 0031 0496 64

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 reverse.

The claimant resigned from his position with the employer on April 11, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 5, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 2, 2019. We accepted the claimant's application for review.

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, he was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant quit his employment without either good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law, where the record shows that the claimant became medically restricted to a part time work schedule that the employer was unable to accommodate.

Findings of Fact

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

1. The claimant worked as a full time field support representative for the employer from January, 2019, until April 11, 2019.
2. The claimant's supervisor was the employer's site manager.
3. The claimant suffers from shoulder, knee and ulnar nerve injuries. The claimant has frequent medical appointments to address these injuries. Due to the frequency of his appointments, the claimant was unable to work a full time schedule.
4. The claimant was scheduled to have shoulder surgery on May 1, 2019.
5. On or around March 2019, the claimant asked for leave of absence. The employer informed the claimant, due to his length of employment, at that time, he was not eligible for a leave of absence.
6. On March 19, 2019, the claimant made an accommodation request under the Americans with Disabilities Act (ADA). The claimant requested to reduce his work schedule from 40 hours per week to 16 hour per week.
7. The employer sent the claimant an ADA questionnaire to be completed by his physician.
8. As of March 20, 2019, the employer accommodated the claimant by temporarily reducing his work schedule until a determination on his request for accommodation was made.
9. The claimant's physician completed the ADA questionnaire indicting [sic] the claimant should be reduced to a temporary part time schedule for a 6–9 month period.
10. On April 1, 2019, the claimant returned the ADA questionnaire to the employer.
11. On April 10, 2019, the employer informed the claimant it could not accommodate his request for a part time schedule because it would remove essential job functions from his position. The employer did however, offered [sic] the claimant unpaid leave time for up to 6 months.
12. The claimant was not interested in taking an unpaid leave because he believed it would prohibit him from being eligible for monetary assistance. While working for the employer, the claimant received social security disability insurance in the amount of \$937 per month.
13. On April 11, 2019, the claimant resigned from his employment effective immediately. The claimant resigned to address his health concerns.

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. However, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant resigned from his employment, his eligibility for benefits must be analyzed under the following provisions of G.L. c. 151A, § 25(e), which provide, in pertinent part:

[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.

The express language in these statutory provisions places the burden of proof upon the claimant.

The review examiner found that the claimant resigned from his employment to address his health conditions. “[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). 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). In this case, the claimant established that he was suffering from shoulder, knee, and ulnar nerve injuries. *See* Finding of Fact # 3. He provided the employer with documentation from his physician requiring him to be placed on a temporary part-time work schedule due to his medical condition. *See* Finding of Fact # 9. Because the employer was unable to accommodate the claimant with a part-time work schedule, he resigned. Thus, the claimant’s reason for separating was due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e).

To qualify for benefits, a claimant who resigns from employment must also show that he had “taken such ‘reasonable means to preserve [his] employment’ as would indicate the claimant’s ‘desire and willingness to continue [his] employment.’” Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–598 (1974).

Here, the record shows that in March of 2019, the claimant requested a leave of absence, which the employer denied due to his length of employment.¹ Shortly thereafter, the claimant made another request to the employer, through the Americans with Disabilities Act, seeking a part time work schedule. This request was further supported with medical documentation from the claimant's physician requiring that the claimant be placed on a temporary part time work schedule. Although the employer did temporarily reduce the claimant's work schedule in March of 2019, pending the outcome of the ADA request, the employer denied the claimant's request for accommodations as a part time schedule would remove essential job functions from his position. Rather, the employer offered the claimant a six-month unpaid leave of absence. Because the claimant declined the unpaid leave of absence, the review examiner concluded that the plaintiff failed to preserve his employment. We disagree.

We note at the outset that a claimant's duty to undertake reasonable preservation efforts does not require him to request or take a leave of absence in every circumstance. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984) ("We reject the notion that in order to be eligible for benefits an employee must request a transfer to other work or a leave of absence.").

To satisfy the reasonable preservation requirement, a claimant does not have to establish that he had no choice but to resign. He merely needs to show that his actions were reasonable. Norfolk County Retirement System, 66 Mass. App. Ct. at 766. Usually, a claimant can show that he desired to stay employed by making affirmative efforts to keep his job. Thus, the Board has held that prior to separating from employment a claimant must pursue a feasible course of action, which would enable him to remain employed. *See, e.g.*, Board of Review Decision 0014 8749 27 (Feb. 17, 2016).² As detailed above, the findings of fact in this case demonstrate that the claimant pursued such a course of action. Ultimately, the only means the employer afforded the claimant to preserve his employment was to take a six-month unpaid leave of absence. The record fails to show how an unpaid leave of absence was a reasonable option for this claimant, who was still capable of working, albeit on a part time basis. Therefore, in light the circumstances presented in the record before us, we cannot conclude that the claimant acted unreasonably in quitting his employment rather than accept the lengthy unpaid leave offered by the employer.

Based on the foregoing, we conclude as a matter of law that the claimant's separation was involuntary due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c.151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 13, 2019, and for subsequent weeks if otherwise eligible.

¹ Although not specifically referenced in the findings, the record indicates this leave of absence would have been through the Family Medical Leave Act.

² Board of Review Decision 0014 8749 27 is an unpublished decision, available upon request. For privacy reasons, identifying information has been redacted.

Benefits shall not be charged to the employer's account but shall be charged to the solvency account pursuant to G.L. c. 151A, § 14(d), if appropriate.

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 15, 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.

CAS/rh