

Where the claimant resigned because she lost her transportation and the employer declined to change her shift to enable her to use public transportations, held her need to resign was due to urgent, compelling, and necessitous circumstances, and she made reasonable efforts to preserve before leaving.

**Board of Review
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Issue ID: 0033 0671 48

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 separated from her position with the employer on December 14, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 25, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on March 24, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to establish that she voluntarily left employment with 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 remanded the case to the review examiner to take testimony from the claimant. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. 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 failed to establish either that she lost her transportation or had no choice but to resign, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The employer is a hospital. The claimant worked as a part-time pharmacy technician for the employer. The claimant worked for the employer from 9/10/18 to 12/14/19.

2. The claimant worked thirty-two hours per week.
3. The claimant lived in [City A], MA when she worked for the employer. The claimant worked at the employer's [City B], MA location.
4. The claimant worked two different shifts. The claimant worked 7:00 a.m. to 3:30 p.m. shifts and 2:30 p.m. to 11:00 p.m. shifts.
5. The employer paid the claimant approximately \$15.75 per hour.
6. The claimant had a vehicle (Vehicle 1). Vehicle 1 was a 2003 Volkswagen. The claimant used Vehicle 1 to travel to and from work.
7. Vehicle 1 broke down in the week of Thanksgiving 2019. A mechanic assessed Vehicle 1. The mechanic told the claimant that a repair would cost around two thousand dollars. The mechanic warned the claimant that the vehicle might not work after the repair. The mechanic told the claimant that it was not worthwhile to attempt to fix Vehicle 1.
8. The claimant did not buy another vehicle after Vehicle 1 broke because she could not afford to pay for another vehicle.
9. A public transportation bus ran between [City A], MA and [City B], MA. After vehicle 1 broke, the claimant used this bus to travel to and from work for her 7:00 a.m. to 3:30 p.m. shifts. The claimant could not use this bus to travel home from the 2:30 p.m. to 11:00 p.m. shift because the bus did not run that late. The claimant also used Uber to travel to and from work. The claimant found that a one-way Uber trip cost twenty-five to thirty dollars.
10. The claimant asked three coworkers to help her with her transportation to and from work. These three coworkers lived in [City B], MA. The three coworkers declined to help the claimant.
11. The claimant told her supervisor about her transportation limitations after Vehicle 1 broke. The claimant asked the supervisor to not schedule her to work the 2:30 p.m. to 11:00 p.m. shift because she could not use public transportation. The supervisor told the claimant that the employer must continue to schedule her to work the 2:30 p.m. to 11:00 p.m. shift on some days.
12. On 11/26/19, the claimant told the employer that she must resign due to transportation issues.
13. The claimant did not ask the employer for a leave of absence to address her transportation issues. The claimant did not know that a leave of absence was available to her. The claimant did not ask the employer's human resources unit for a schedule adjustment.

14. The employer had a leave of absence available for the claimant.

15. Prior to the claimant's resignation, the employer did not have any plans to discharge the claimant.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. However, as discussed more fully below, we disagree with the review examiner's conclusion that the claimant did not meet her burden.

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 of such an urgent, compelling and necessitous nature as to make his separation involuntary.

By its terms, the statute specifies that the claimant bears the burden to show that she is eligible for unemployment benefits. The record here does not indicate that the claimant left her employment as a result of any action taken by the employer. We, therefore, need not consider whether the claimant had good cause for leaving attributable to the employing unit or its agent under G.L. c. 151A, § 25(e)(1).

Our standard for determining whether a claimant has demonstrated urgent, compelling, and necessitous reasons for leaving work has been set forth by the Supreme Judicial Court. To make such a determination, we must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1991).

The claimant here was a pharmacy technician who worked both first and second shift on a rotating schedule in the employer's hospital. Consolidated Finding # 4. In November, 2019, she informed her employer that she had to resign due to issues with transportation. Consolidated Finding # 12. Loss of transportation has been recognized as an urgent, compelling, and necessitous reason for leaving employment where a claimant demonstrates that no reasonable transportation alternative is available. See Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–

98. (1974). In this case, when the claimant's vehicle broke down, she took it to a mechanic who told her the vehicle was not worth repairing, and she could not afford to purchase another vehicle. Consolidated Finding # 7. She was unable to commute via public transit when she worked second shift because the bus that she used stopped operating before her shift ended. Consolidated Findings ## 8 and 9. Using a ride-sharing application was prohibitively expensive, and the claimant was unable to carpool with co-workers. Consolidated Findings ## 7 and 10. Thus, the record shows there was no reasonable transportation alternative that would have allowed the claimant to continue working second shift at the hospital. However, we cannot award benefits on these grounds alone.

Where a claimant has shown that circumstances beyond her control have forced her to resign, she must also show that she "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 (2006), *quoting* Raytheon Co., 364 Mass. at 597-98. The review examiner misapplied this principle in his decision, finding the claimant ineligible for benefits in part because she failed to show that she had no choice but to leave her job. It is not necessary that the claimant show she had no choice but to leave her job, only that she took reasonable steps to preserve her employment. Norfolk County Retirement System, 66 Mass. App. Ct. at 766.

We consider whether the record shows the claimant took reasonable means to preserve her employment. As discussed above, the claimant was unable to find alternate transportation that would allow her to work her second shift at the hospital. *See* Consolidated Findings ## 7,8, 9 and 10. Upon discovering this, the claimant asked her supervisor not to schedule her to work second shift. Consolidated Finding # 11. However, the claimant's supervisor informed her that she must continue to work the second shift. Consolidated Finding # 11. Under these circumstances, we conclude the claimant had taken reasonable steps to preserve her employment.

We, therefore, conclude as a matter of law that the claimant is entitled to benefits pursuant to G.L. c. 151A, § 25(e)(1), because she left work due to urgent, compelling, and necessitous circumstances.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 8, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS

Stawicki, Esq.

DATE OF DECISION - June 5, 2020

Charlene A.

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**

(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020¹. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

LSW/rh

¹ See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.