

The claimant resigned due to reasonable concerns over the spread of COVID-19 given her age and medical conditions. However, she did not inform anyone at the employer of the reason she was resigning, and as such did not have reason to support her belief that any efforts to preserve her employment would have been futile.

**Board of Review
19 Staniford St.
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0046 4208 87

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 January 26, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 17, 2020. 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 September 25, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for urgent, compelling, and necessitous reasons and, thus, was not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant reasonably believed continuing her work would be hazardous to her health and believed any attempts to preserve her employment would be futile, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a part time receptionist for the employer, a nursing home, between 10/03/2017 and 01/26/2020, when she separated.

2. The claimant's immediate supervisor was the manager of reception (manager). The claimant's upper level manager was the director of human resources (director).
3. On 01/10/2020, the claimant tendered her notice of resignation, effective 01/26/2020. The claimant did not inform the employer of the reason for her resignation.
4. The claimant resigned because she was terrified of COVID-19.
5. The manager did not accept the claimant's letter of resignation and encouraged the claimant to meet with the director. The claimant did not meet with the director because she was embarrassed and did not think the employer would take her concerns about COVID-19 seriously.
6. The claimant heard news about COVID-19 having the potential to be a global pandemic. The claimant heard reporting from the World Health Organization about the ease of COVID-19 spreading from person to person.
7. The claimant lives alone and had no one to care for herself, her pets or her home if she became hospitalized.
8. The claimant made some errors at work for which she was reprimanded.
9. As of 01/10/2020, the claimant was seventy (70) years old and was a high risk for contracting COVID-19 based upon her age.
10. The claimant had cancer three (3) times between 2013 and 2017, which included several surgeries and treatments. As of 01/10/2020, the claimant was taking medication that is a form of chemotherapy. It is unknown if the medication is an immunosuppressant.
11. The claimant's oncologist left the practice in late 2019 and the claimant was in the process of getting a new oncologist at the time she resigned. A doctor did not recommend that the claimant resign from her employment.
12. The employer did not have any known cases of COVID-19 at the facility in January 2020. The facility had known cases of COVID-19 at the facility beginning in late March or early April 2020.
13. The employer did not have any positions that did not require the claimant's physical presence at the facility.
14. The employer "probably would have" [sic] the claimant's request for a leave of absence "in some shape or form."

15. The claimant did not request a leave of absence because the claimant did not know when it would be safe to return to work in light of COVID-19 and such a leave would be for an indefinite period.
16. Beginning in mid-February 2020, the employer complied with Center for Disease Control guidelines including wearing masks, social distancing, taking temperatures, and COVID-19 testing.
17. Receptionists were responsible for checking temperatures. The claimant would not have been comfortable checking temperatures (and not maintaining social distancing) had she continued working for the employer.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant made reasonable efforts to preserve her employment.

As the claimant resigned from employment, her separation is properly analyzed under under 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

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

Under the foregoing provisions, the claimant has the burden to show that she left employment for good cause attributable to the employer or for urgent, compelling, and necessitous reasons.

As the claimant resigned for reasons unrelated to the employer's conduct, we need not consider whether the claimant resigned for good cause attributable to the employer. *See* Finding of Fact # 4.

A claimant may also be eligible for benefits if she shows that she reasonably believed her work environment posed a threat to her health or safety. *See Carney Hospital v. Dir. of the Division of Employment Security*, 382 Mass. 691 (1981) (rescript opinion) (resigning under a reasonable belief that her skin infection was caused by her work environment was sufficient to support a

conclusion that the claimant's separation was involuntary). Such reasonable belief would constitute urgent, compelling, and necessitous reasons for leaving, rendering the claimant's separation involuntary. *See id.* Because claimant in this case is seventy years of age and undergoing a form of chemotherapy treatment, she is at an increased risk from COVID-19 infection. Findings of Fact ## 9 and 10. Under these circumstances, we believe the record is sufficient to establish that she resigned due to a legitimate health concern. *See* Finding of Fact # 4. However, a claimant will not be eligible for benefits on this basis alone.

To be eligible for benefits, a claimant must also show that she made reasonable efforts to preserve her employment prior to resigning. Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (1979). When the claimant tendered her resignation to her manager on January 10, 2020, she did not discuss the reasons behind her decision to leave. Findings of Fact ## 3 and 4. Further, despite her manager's suggestion, the claimant declined to address her concerns with the employer's human resources director. Finding of Fact # 6. As the claimant made no efforts to explain her health concerns to her employer prior to resigning, we concur with the review examiner's conclusions that the claimant did not take any reasonable steps to preserve her employment.

The review examiner excused this omission, finding that any preservation efforts would have been futile because the employer's witness testified that the only work available to the claimant required her presence at the employer's facility. Finding of Fact # 14. We do not believe this testimony is sufficient to support a conclusion that the claimant reasonably believed any efforts to preserve her employment would have been futile. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93–94 (1984). The record establishes that the claimant failed to disclose her COVID-19 concerns to the employer prior to quitting. Because the employer was unaware of the claimant's health concern, it could not consider and discuss with the claimant any potential means of addressing this concern through some type of workplace accommodations. Because the claimant did not attempt to address her concerns about COVID-19 with the employer before resigning, she did not have any reason to conclude that either the employer could not have addressed her concerns, or that any attempt to resolve these concerns would have been futile. *See* Findings of Fact ## 3 and 5. Absent this information, the claimant could not articulate a foundation for her belief that any efforts to preserve her employment would have been futile. We, therefore, conclude as a matter of law that the claimant is not eligible for benefits because she failed to make reasonable efforts to preserve her employment.

The review examiner's decision is reversed. The claimant is denied benefits for the week of January 26, 2020 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.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 16, 2020



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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 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.

LSW/rh