

Where lack of childcare drove the claimant's decision to move to another state to join her spouse, held the claimant had an urgent, compelling, and necessitous reason for leaving her job. She may not be disqualified pursuant to G.L. c. 151A, § 25(e).

**Board of Review
19 Staniford St., 4th Floor
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 5977 15

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 her position with the employer on March 11, 2020. She filed a claim for unemployment benefits with the DUA, effective March 29, 2020, which was initially approved, but then, in a determination issued on August 4, 2020, the DUA denied benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's determination and denied benefits in a decision rendered on February 18, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons, and, thus, she 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant 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 was not eligible for benefits because she resigned in order to join her spouse in another state and not due to the COVID-19 public health emergency, 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 full time as a nurse practitioner for the employer, an adult primary care office, from 9/14/2018 to 3/11/2020.

2. The claimant was on a leave of absence from approximately 11/25/2019 until she left her employment with the employer. The claimant was on maternity leave. The claimant was supposed to return to work on or about 3/11/2020 from her maternity leave.
3. The claimant informed the employer around the end of February 2020/beginning of March 2020 that she would not be returning to her job with the employer.
4. The claimant's husband was living in Hawaii. The claimant's husband was going to move to Massachusetts and provide childcare so the claimant could return to work. The claimant's husband had a daughter in Hawaii and it was decided that the claimant would move to Hawaii.
5. The claimant left her job with the employer to move to Hawaii to live with her husband.
6. The claimant gave notice that she was leaving her job to move to Hawaii prior to the COVID-19 public health emergency.
7. The claimant did not request a leave of absence before she left her employment with the employer.
8. The claimant did not request any remote work.
9. Due to the COVID-19 public health emergency, the claimant's move to Hawaii was delayed. The claimant was unable to get a flight out of the state until July 2020.
10. Due to the COVID-19 public health emergency, as of the middle of March 2020, the claimant had no childcare.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. To the extent that Finding of Fact # 5 provides only one reason for the claimant leaving her job, we believe it is incomplete, as discussed below. In adopting the remaining findings, we deem 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 her employment, we analyze her eligibility for benefits pursuant to G.L. c. 151A, § 25(e)(1), 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. . . .

Notwithstanding the provisions of this subsection, no waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . . after having left work to accompany or join one's spouse or another person at a new locality.

The claimant bears the burden to prove good cause attributable to the employer or urgent, compelling, and necessitous circumstances. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993).

At the time the claimant gave her notice that she planned to resign from the employer, she was on a maternity leave. *See* Findings of Fact ## 2 and 3. Although her last date of employment was March 11, 2020, the record shows that she gave her notice around March 1, 2020, prior to the declared state of emergency in response to the COVID-19 public health emergency. *See* Finding of Fact # 3.¹ Thus, it is evident that the pandemic did not trigger her resignation.

There is also nothing in the record to indicate that the employer had done anything which caused her to leave. For this reason, we agree that the claimant's separation was not for good cause attributable to the employer as meant under G.L. c. 151A, § 25(e)(1). *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980) (to determine good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

Alternatively, the claimant will be eligible for benefits if her reason for leaving was due to urgent, compelling, and necessitous circumstances. Finding of Fact # 4 explains that the claimant's husband was to come to Massachusetts to watch her son when she returned to work, but her husband had a daughter in Hawaii and it was decided that the claimant would instead move to Hawaii. On this basis, the review examiner concluded that the claimant was ineligible for benefits, because she left her job to join her spouse in another state. However, the review examiner failed to appreciate that the driving factor behind the claimant's move to Hawaii to join her husband was the lack of childcare here in Massachusetts.

During the hearing, the claimant testified that, after her son was born on November 25, 2019, the original plan for her husband to move to Massachusetts was upended when the mother of the husband's daughter changed her mind and did not want the daughter moving to Massachusetts. *See* Findings of Fact ## 2 and 4. The claimant tried to get another family member to watch her

¹ On March 10, 2020, the Governor of Massachusetts declared a state of emergency due to the outbreak of the 2019 novel Coronavirus (COVID-19).

infant, but that also fell through, and she could not return to work without childcare. It was for this reason, lack of childcare, that “it was decided that the claimant would move to Hawaii.” See Finding of Fact # 4.²

Our standard for determining whether a claimant’s reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. 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 (1992). Childcare responsibilities may constitute such circumstances. Manias v. Dir. of Division of Employment Security, 388 Mass. 201, 204 (1983). Because lack of childcare, not simply the desire to join her spouse, was the impetus for moving, we are satisfied that the claimant has demonstrated an urgent, compelling, and necessitous reason for leaving her job.

However, our analysis does not stop there. “Prominent among the factors that will often figure in the mix when the agency determines whether a claimant’s personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant 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 (2009), quoting Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–98 (1974).

Although Finding of Fact # 7 provides that the claimant did not request a leave of absence, the record shows that the claimant discussed her situation with her immediate supervisor and the practice manager. The supervisor suggested she try to get a sabbatical, but she was not eligible for one. During the hearing, the employer’s witness also testified that remote work was also a possibility, however he did not mention that to the claimant when they spoke.³

To be eligible for benefits, an employee is expected to make reasonable attempts to preserve her employment but is not required to request a transfer to other work or a leave of absence. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984). Given that the claimant was caring for an infant, we also question whether working remotely was even a practical option. In short, the claimant tried unsuccessfully to find alternative childcare, discussed her predicament with her supervisor and practice manager, and pursued the suggestion to inquire about a sabbatical. We believe the claimant made a reasonable effort to preserve her employment before leaving.

We, therefore, conclude as a matter of law that the claimant separated from her job for urgent, compelling, and necessitous circumstances pursuant to G.L. c. 151A, § 25(e).

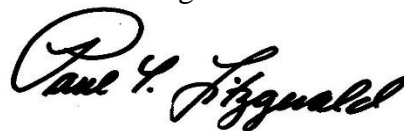
² While not explicitly incorporated into the review examiner’s findings, this portion of the claimant’s testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

³ This is also part of the unchallenged evidence in the record.

We also note that, where a claimant has been determined to have separated involuntarily due to urgent, compelling, and necessitous circumstances, the employer's account may not be charged for benefits pursuant to G.L. c. 151A, § 14(d)(3).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 11, 2020, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 2022



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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 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.

AB/rh