

The claimant resigned due to reasonable concerns that COVID-19 posed a serious health risk given her age and medical condition. As she had previously taken a medical leave in an attempt to preserve her employment and, when her leave expired, had been told by the employer’s human resources director that she either had to return to work in person or resign, she reasonably believed that further efforts to preserve her employment would have been futile. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0054 3861 01

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 September 20, 2020. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 23, 2021. 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 October 25, 2022. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant had voluntarily left employment without 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 obtain additional evidence pertaining to the reason for the claimant’s separation. Both parties attended the remand hearing. Thereafter, the review examiner issued her 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’s absence from the initial hearing precluded her from meeting her burden to show that she resigned her employment for good cause attributable to the employer, or for urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law after remand.

Findings of Fact

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

1. The claimant worked part-time as a pharmacist for the employer, a rehabilitation hospital, from 01/04/2010 until 09/20/2020. The claimant worked approximately 16 hours per week and earned \$55.16 an hour.
2. The claimant reported directly to the director of pharmacy (director).
3. At the beginning of the COVID-19 pandemic, the employer was considered an essential business and remained open to patients.
4. The claimant is over 60 years old and has diabetes. The claimant was first diagnosed with diabetes in 2015.
5. The claimant lives next door to her 80-year-old uncle and is his primary caretaker. Her uncle also has diabetes. There are no family members or friends who could help care for her uncle.
6. The claimant and her uncle were at increased risk of developing dangerous symptoms from the COVID-19 virus due to their age and existing health condition.
7. The claimant felt it was in the best interest of her and her uncle's health that she remains home from work.
8. Beginning 03/16/2020, the claimant went on a leave of absence from work because she was worried about potential exposure to the COVID-19 virus, given their increased health risk.
9. The claimant expected to return to work once the COVID-19 pandemic improved.
10. During her leave, the claimant communicated with the director on a weekly basis to "check-in."
11. During one of their weekly conversations, the director told the claimant that due to a mask shortage, they were recycling masks used by employees. The director told the claimant that they collectively sterilized the used masks and then randomly assigned them back to employees. This protocol concerned the claimant because it increased the risk of potential exposure to the COVID-19 virus since employees were wearing masks previously used by other employees.
12. In September 2020, the director of human resources (director of HR) reached out to the claimant and informed her that she had to return to work because she exceeded the maximum allowed leave of six months.
13. The director of HR told the claimant she had to "resign or return to work."

14. At the time, the claimant did not feel ready to return to work because the COVID-19 pandemic had not improved and there were no available vaccines. The claimant felt that returning to work would put her and her uncle's health in jeopardy.
15. The employer did not have any remote work available.
16. The claimant felt she had no choice but to quit her employment.
17. The claimant quit her employment on 09/20/2020 because she did not feel comfortable returning to work from her leave of absence since she was at increased risk of developing dangerous symptoms if she contracted the COVID-19 virus.
18. The claimant would not have quit her employment if not for the COVID-19 pandemic.
19. The claimant filed an unemployment claim on 06/22/2020 with an effective date of 06/21/2020.

Credibility Assessment:

After the conclusion of the hearings, the claimant's testimony is deemed more credible than that of the employer witnesses. During the original hearing, the employer witnesses testified that the claimant quit her employment because she did not want to return to work during the COVID-19 pandemic because of a medical condition. The employer witnesses did not have any specific information on the claimant's medical condition.

In the remand hearing, the claimant provided specific details about the circumstances that led to her decision to quit her employment. The claimant credibly testified that as a 60-year-old diabetic, she was [sic] increased risk for COVID-19. The claimant provided a letter from her doctor confirming her diabetes diagnosis and a print screen indicating that individuals who are older and suffer from serious health problems such as diabetes, are at increased risk of developing dangerous symptoms from the COVID-19 virus. The claimant further testified that at the time, she was the primary caregiver for her 80-year-old uncle who was also a diabetic. Given both their ages and medical condition, the claimant went on a leave of absence at the beginning of the COVID-19 pandemic because she was worried about potential exposure to the virus.

The claimant's testimony regarding her reason for not returning to work from her leave of absence remains unrefuted and thus, is deemed credible. The employer witnesses both testified that they were aware that the claimant was worried about the COVID-19 virus because she had an existing medical condition and cared for an elderly family member.

Furthermore, it is undisputed that in September 2020, the director of HR called the claimant and advised her that she had exceeded the maximum allowed leave of six months and had to choose between returning to work or resigning. The claimant directly and credibly testified that at the time she did not feel comfortable returning to work because the COVID-19 pandemic had not improved, and vaccines were not yet available. Additionally, the claimant stated she did not feel comfortable returning because she learned from the director of pharmacy that the employer was recycling used masks due to mask shortages.

Overall, the claimant's testimony as to why she quit her employment is deemed 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 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to benefits.

As the claimant resigned from employment, her separation is properly analyzed 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 Consolidated Finding # 17.*

A claimant may 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 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 the claimant in this case was sixty years of age at the time that she resigned and is a diabetic, she is at an increased risk from COVID-19 infection. Consolidated Findings ## 4, 6, and 8. Under these circumstances, we believe that the record establishes that she resigned due to a legitimate health concern. *See* Consolidated Finding # 17. However, a claimant will not be eligible for benefits on this basis alone.

In order to qualify for benefits, a claimant who resigns from employment 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. v. Dir. of Division of Employment Security*, 364 Mass. 593, 597–598 (1974). To satisfy the reasonable preservation requirement, claimants do not have to establish that they had no choice but to resign; they merely need to show that their actions were reasonable. Norfolk County Retirement System, 66 Mass. App. Ct. at 766.

The claimant initially went on a leave of absence in March, 2020, in the hope that she would be able to safely return to work when the COVID-19 pandemic had been sufficiently controlled. Consolidated Findings ## 8 and 9. However, COVID-19 remained an ongoing threat to the claimant’s health when her leave of absence expired in September, 2020. Consolidated Findings ## 12 and 14. When her leave expired, the employer’s human resources director informed the claimant that her options were either to return to work or to resign her position. Consolidated Findings ## 12 and 13. As the employer’s human resources director informed the claimant her only options were to return to work or to resign, and as the employer did not have any remote work available to the claimant, we believe the consolidated findings support a conclusion that the claimant reasonably believed any further steps to preserve her employment with the instant employer would have been futile. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93–94 (1984).

We, therefore, conclude as a matter of law that the claimant met her burden to show that she resigned her employment for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e), and that she took reasonable steps to preserve her employment.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week of September 24, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 13, 2023



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
(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