

The claimant's doctor instructed her to work remotely due to her substantially increased risk from exposure to COVID-19. She resigned when the employer's workplace saw a resurgence in COVID-19 infections because she was medically compromised, she could not perform her job duties remotely, and there was no indication from the record that either a transfer or a short leave of absence would have addressed the threat to the claimant's health. Held she separated due to urgent, compelling, and necessitous reasons and is eligible for benefits pursuant to G.L. c. 151A, § 25(e).

**Board of Review
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Issue ID: 0060 1543 47

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 3, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 5, 2021. 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 initial determination and denied benefits in a decision rendered on January 13, 2022. 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, was disqualified under G.L. c. 151A, § 25(e). 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 did not articulate urgent, compelling, and necessitous reasons for leaving because she could have transferred to another location or taken a leave of absence, 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. On July 14, 2014, the claimant began working, as a part time programing assistant, for the employer, an assisted living complex. Before the end of the year, she was promoted to full-time Program Director.

2. Over the course of her employment, the claimant was moved to different facilities as needed.
3. The claimant has several medical conditions that put her had high risk for complications if she were to contract [COVID]-19. On November 25, 2020, the claimant's doctor provided her with a note recommending that, given the [COVID]-19 pandemic, the claimant only work remotely due to her health issue.
4. The facility the claimant was working at in November 2021, had experienced a [COVID]-19 break out before she arrived but had been [COVID] free for an extended period. The claimant loved her job and, understanding that it could not be performed remotely, chose to continue working at the facility despite the risk. She did not immediately give the doctor's note to the employer.
5. On or about December 3, 2020, the claimant learned that [COVID]-19 had been detected in the facility where she worked. After becoming aware of this, aware of the risk it put her at, she showed the above-described doctor's letter to the regional nurse. This nurse told the claimant that she was a risk and needed to leave the building. The clamant gathered her things and left.
6. On December 4, 2020, the claimant met with a Human Resources Business Partner to discuss her options. It was confirmed that her position could not be done remotely. The Business Partner informed the claimant that could take a personal leave of absence of at least 30 days and that if she was eligible for Family Medical Leave, she could take a longer leave of absence. She also informed the claimant that the leave would be unpaid.
7. The claimant was very nervous about the high rate of [COVID]-19 in Massachusetts. She also did not believe the [COVID] situation at the facility or in Massachusetts in general would be resolve sufficiently for her to return to work before a leave of absence concluded. She therefore decided to leave her employment permanently and relocate to Florida. She believed that the rate of [COVID]-19 positive tests were lower in Florida. She also had family there, including a niece with a new baby who had request her assistance with the baby. The claimant intended to look for work in Florida that would be less risky to her health.
8. The claimant informed the employer of her decision. They recorded her as voluntarily separating, effective December 3, 2020.
9. The claimant moved to Florida and then filed a Massachusetts claim for unemployment benefits effective December 13, 2020.
10. On January 5, 2021, DUA issued Notice of Disqualification 0060 1543 47-01, stating that under MGL c. 151A, Section 25(e)(1), the claimant was subject to

disqualification for the period starting December 13, 2020, and until she worked for 8 weeks and earned an amount equal to or in excess of her weekly benefit amount.

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 ultimate 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 did not quit for urgent, compelling, and necessitous reasons.

Because the claimant resigned from her employment, her eligibility for benefits is governed by the provisions of 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 for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of the statute places the burden of proof upon the claimant.

The claimant resigned from her employment because her doctor instructed her to remain at home in order to minimize her risk of exposure to COVID-19, and she was unable to perform her job in a remote capacity. Finding of Fact # 3. As there is no indication that the claimant resigned because of any action taken by the employer, we consider only whether her separation was due to "urgent, compelling, and necessitous reasons" within the meaning of G.L. c. 151A, § 25(e).

"[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). While the review examiner concluded that the claimant did not establish urgent, compelling, and necessitous reasons for leaving, we believe that the review examiner's reasoning spoke more to the claimant's efforts to preserve her employment rather than her underlying cause of her resignation. The medical evidence of record confirms that the claimant's doctor instructed her to work remotely or otherwise remain home from work, because she had several medical conditions that substantially increased her risk from exposure to COVID-19. Finding of Fact # 3. As the claimant's resignation on December 3, 2020, was prompted by a

resurgence of COVID-19 infections in the location where she worked, we believe she articulated urgent and compelling personal circumstances for leaving. *See* Finding of Fact # 5.

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, 66 Mass. App. Ct. at 766, *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.

There was no dispute that the employer was unable to accommodate the claimant’s request to work remotely. Finding of Fact # 6. Further, while the employer did offer the claimant a 30-day leave of absence, we concur with the review examiner’s analysis that such a leave would not be sufficient for the COVID-19 situation to resolve at the employer’s location. *See* Finding of Fact # 6. Similarly, we believe that the record demonstrates that a transfer would not have addressed the claimant’s needs, as a transfer to any new location would not resolve the underlying risk to the claimant’s health. Under these specific circumstances, we believe the claimant reasonably concluded that neither option was a viable means of preserving her employment.

The review examiner also denied the claimant benefits on the grounds that she may have been available for leave under the Family Medical Leave Act (FMLA). *See* Finding of Fact # 6. However, claimants are not required to request a leave of absence, they need only show that they made a reasonable attempt to preserve their employment under the circumstances. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984). In this case, both parties’ testimony was that they were unsure as to whether the claimant would have been eligible for leave under the FMLA at the time she separated.¹ As it was unclear from the record if the claimant would have been eligible for FMLA and the law does not require that she request such a leave in order to be eligible for benefits, we conclude that the claimant took reasonable steps to preserve her employment.

We, therefore, conclude as a matter of law that the claimant left work involuntarily, for urgent, compelling, and necessitous reasons within the meaning of G.L. c. 151A, § 25(e).

¹ The parties’ testimony in this regard, while not explicitly incorporated into the review examiner’s findings, 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 13, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 25, 2022



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.

LSW/rh