

Claimant abruptly quit her physically demanding job because she experienced vaginal bleeding, learned she was pregnant, and did not want to have another miscarriage. However, an emergency room physician had merely advised her to take a few days off. Board held that because the claimant failed to make a reasonable effort to preserve her employment, she is disqualified pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0064 0272 50

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. Benefits were denied on the ground that the claimant resigned from her job without showing good cause attributable to the employer or urgent, compelling and necessitous circumstances pursuant to G.L. c. 151A, § 25(e)(1).

The claimant had filed a claim for unemployment benefits, which was initially approved, and then denied in a determination issued by the agency on April 8, 2021. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's determination in a decision rendered on May 20, 2021. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On October 27, 2021, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the claimant's reason for leaving her employment. Only the claimant attended the remand hearing, where she was represented by counsel. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant failed to demonstrate that she had an urgent, compelling, or necessitous reason to leave her job due to her pregnancy, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant works as a Certified Nursing Assistant (C.N.A.) for a retirement community. She began the job in 2010. Her duties include providing companionship to elderly residents. She typically works 24-32 hours per week and earns about \$16.00 per hour.
2. The claimant worked for the instant employer as a Residential Counselor in a home for individuals with disabilities from 11/04/19 through 03/11/20. She worked full-time and earned about \$12.00 per hour.
3. This job entailed assisting the individuals with their daily living activities. Most of her work duties included heavy lifting or pushing. She often had to lift one individual, who weighed over 200 pounds, into [a] Hoyer Lift. She also would bathe and dress individuals and push them in their wheelchairs. She also did chores such as laundry. Some of the individuals smoked cigarettes and exposed the claimant to second-hand smoke.
4. On 03/04/20, the claimant left work early to go to the hospital because she was experiencing vaginal bleeding. At the hospital, the claimant learned she was pregnant. She was advised to take [a] few days off to rest.
5. On 03/10/20, at 7:37 a.m., the claimant texted the instant employer, "Hi. I won't be coming to work anymore."
6. The claimant quit her job because she had previously suffered a miscarriage and was afraid that her work duties with the instant employer would affect her pregnancy and possibly cause another miscarriage.
7. The claimant's job was not in jeopardy at the time of her resignation. She was not on a final warning at the time.
8. Prior to resigning, the claimant did not ask the employer for a leave of absence.
9. Prior to resigning, the claimant did not request a transfer because she believed they did not have light duty work because their houses all had individuals with disabilities who needed physical assistance with their daily activities.
10. The claimant's resignation was not related to the COVID-19 pandemic.
11. After the claimant resigned from her job with the instant employer, she continued to work as a C.N.A. with her other employer. She did reduce her weekly hours after she discovered she was pregnant.

Credibility Assessment:

Although the claimant testified the COVID-19 pandemic was a reason for her resignation, this testimony is not credible considering there was no mention of it in her resignation text, medical record, or prior hearing testimony. Additionally, she continued to work for her other employer during the pandemic and while she was pregnant.

It is clear from the credible testimony and evidence in the record that she resigned because she was fearful of having a miscarriage while performing her duties with the instant employer. Her belief was reasonable considering her prior medical history, the requirements of her job, and the work environment. Her job with her other employer at the retirement home was much less physical and she was not exposed to second-hand smoke.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, and we deem 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 except to note as follows. The portion of the credibility assessment which states that the claimant's belief was reasonable is a mixed question of law and fact which, at this stage of the proceedings, is for the Board to decide. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979). Based upon the new consolidated findings, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits, as outlined below.

Because the claimant resigned from her employment, we must decide her eligibility 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 . . . [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.

These statutory provisions expressly place the burden of proof upon the claimant.

In this case, because there is no suggestion that the employer's actions caused the claimant to resign, the claimant has not shown that she left her job for good cause attributable to the employing unit. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). Instead, she asserts that she left due to urgent, compelling, and necessitous circumstances.

“[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) (pregnancy or a pregnancy-related disability, not unlike other disabilities, may legitimately require involuntary departure from work).

In this case, the consolidated findings provide that the claimant first learned about her pregnancy when she went to the emergency room for vaginal bleeding on March 4, 2020. *See* Consolidated Finding # 4. She resigned on March 10, 2020, because she was pregnant and did not want to have another miscarriage. *See* Consolidated Findings ## 4-6. The claimant's concern is understandable, and we do not challenge her decision to leave her job. However, we must decide whether she has presented circumstances which meet the urgent, compelling, and necessitous standard under G.L. c. 151A, § 25(e).

In Carney Hospital v. Dir. of Division of Employment Security, the Supreme Judicial Court held that an employee's reasonable belief that her recurrent, severe skin infection was caused by her working conditions was sufficient to establish an urgent, compelling, and necessitous reason for leaving employment. 382 Mass. 691 (1981) (rescript opinion). The employee did not have to prove that the working environment, in fact, caused the infection. *Id.*

As in Carney Hospital, there is no proof here that the claimant's working environment caused the incident of vaginal bleeding. Unlike in Carney Hospital, however, the claimant had not experienced recurrent similar incidents before making the decision to leave. It happened once. Moreover, as the claimant conceded during the hearing, the emergency room physician did not advise her to quit her job.¹ She was discharged with instructions to take a few days off to rest. *See* Consolidated Finding # 4. This medical evidence indicates that severing her employment was not necessary. Rather than take a few days off to rest as recommended, it appears that the claimant decided on her own to end her employment, because she has a history of miscarriage and the claimant believed that the physical labor of her job duties would put her at risk of it happening again. *See* Consolidated Finding # 6.

Even if the claimant had carried her burden to show that circumstances beyond her control were forcing her to resign, "[p]rominent 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). "The mere fact of pregnancy does not relieve an employee of the need to show that pregnancy or a pregnancy-related disability was the cause of her termination of employment . . . [N]ot every 'urgent, compelling and necessitous' absence requires termination." Dohoney v. Dir. of Division of Employment Security, 377 Mass.

¹ 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).

333, 336 (1979) (by failing to request a leave of absence until after giving birth, held claimant failed to take reasonable means to preserve her job).

In this case, the claimant made no effort to preserve her employment. We are also not convinced that efforts to preserve would have been futile. *See Guarino v. Dir. of Division of Employment Security*, 393 Mass. 89, 93 (1984). Although the claimant states that she did not request a transfer because she believed that all of the other houses had individuals who needed physical assistance, the fact is that she did not ask. *See Consolidated Finding # 9*. Nor did she inquire about a leave of absence or any other available alternatives before abruptly texting her employer that she would not be coming to work anymore. *See Consolidated Findings ## 5 and 8. Compare Board of Review Decision 0014 0858 45 (July 16, 2015) (pregnant laborer/polisher, who experienced nausea symptoms and a fainting spell due to fumes at work, asked for a different position or time off from work prior to resigning).*²

We, therefore, conclude as a matter of law the claimant has not met her burden to demonstrate either good cause attributable to the employer or urgent, compelling, and necessitous circumstances for her resignation. She is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning March 10, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 14, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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:

² Board of Review Decision 0014 0858 45 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

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