**The claimant preschool teache, resigned because she was concerned about COVID-19 exposure after the employer decided to increase her classroom size by two. As the employer's decision comported with state rules, the claimant did not show good cause attributable to the employer to resign. Nor did the claimant show that her health condition and risk of exposure rendered her work unsuitable. She had worked for the employer throughout the height of the pandemic and the additional students did not impact the employer's ability continue maintaining COVID health and safety protocols. The claimant also did not take reasonable steps to preserve her employment. She is disqualified pursuant to G.L. c. 151A, § 25(e)(1).**

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**Issue ID: 0065 6355 94**

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 22, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 3, 2021. 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 April 12, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant involuntarily 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 articulated urgent, compelling, and necessitous reasons for resigning because the employer's decision to increase the number of children in her classroom was intolerable to the claimant, 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 preschool teacher for the employer, a large provider of childcare and preschool services.

2. The claimant worked full-time and was paid approximately fourteen to fifteen dollars per hour.

3. The claimant was employed before the [COVID]-19 public health emergency temporarily shut the employer's programs in March of 2020.

4. Before the shut-down, the claimant had upwards of twenty students in her classroom.

5. The claimant resumed working full-time once the employer reopened its operations in July of 2020.

6. Once the claimant returned to work in July of 2020, she had, as mandated by the State, a maximum of ten students in her classroom.

7. The claimant was assisted by another teacher.

8. The claimant did not have consistent help in the classroom because some employees left their employment and others had to quarantine because of [COVID]-19 exposures.

9. The claimant had about a half dozen people help her during the last half of 2020.

10. The rotating personnel created a lack of stability and uncertainty for the claimant that was stressful.

11. The claimant suffered from asthma and used an inhaler as needed.

12. From the time the claimant resumed teaching in June of 2020, she was scared about the possibility of catching [COVID]-19.

13. The claimant was burdened by extensive cleaning protocols mandated by the State.

14. The State heavily regulated the employer's operations during the pandemic, and the employer undertook both to comply with all State requirements and to keep its community and staff informed about its efforts and about its knowledge of [COVID]-19 cases within the community.

15. Over time, the State gradually relaxed its requirements.

16. In December of 2022, the employer announced plans to increase the number of students in the claimant's classroom to a maximum of fifteen students, as now allowed by the State.

17. The thought of increasing the number of students in her classroom was overwhelming to the claimant because she was already suffering from extensive anxiety with her current situation.

18. The claimant expressed her concerns about the enrollment increase to other staff and to her immediate supervisor.

19. The claimant rightly understood that the capacity increase was unavoidable.

20. Once the claimant learned of the planned enrollment increase, she started looking for nanny positions.

21. By letter dated January 18, 2021, the claimant submitted her resignation to the employer, a week or two before the enrollment numbers were slated to increase.

22. The claimant gave the employer one week's notice but worked only four of the five days remaining in that week.

23. In communicating with the director and the assistant director of the program about her planned resignation, the claimant did not announce that she was leaving because of concerns related to [COVID]-19.

24. The director and the assistant director were both left with the impression that the claimant was leaving for better pay in a nanny position.

25. The director attempted to entice the claimant to stay by offering her more money, but the claimant declined.

26. If the director had known that the claimant was leaving because of concerns that the enrollment numbers were increasing, she would have worked with the claimant to find suitable alternatives.

27. The employer was not able to cap enrollment at ten students in the claimant's classroom.

28. However, the employer would have been open to re-assigning the claimant to a toddler classroom, which had lower numbers of students.

29. The claimant would have been open to working in a toddler classroom with fewer students.

30. By Notice of Disqualification, dated November 3, 2021, the claimant was denied benefits as of January 22, 2021.

31. The employer appealed the disqualification.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 17 as unsupported by the evidence of record. In adopting the remaining findings, we deem 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 was 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 . . . [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 terms of this provision place the burden of proof upon the claimant.

The claimant resigned her employment because she was concerned about her increased risk of exposure to COVID-19 resulting from the employer's decision to increase the number of students in her classroom. Findings of Fact ## 11–12, 16, and 22–23. As the claimant articulated health concerns related, at least in part, to a decision made by the employer, we analyze the case under both the "good cause attributable" and the "urgent, compelling and necessitous" provisions of G.L. c. 151A, § 25(e).

When a claimant contends that their separation was for good cause attributable to the employer, the focus is on the employer's conduct, not on the employee's personal reason for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). To determine if the claimant has carried her burden to show good cause under G.L. c. 151A, § 25(e), we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985).

When the claimant returned to work in July 2020, state restrictions promulgated in response to the COVID-19 pandemic limited the number of students in each of the employer's classrooms to a maximum of ten. *See* Findings of Fact ## 4 and 6. In late 2022, however, the state loosened these restrictions and allowed preschools such as the employer to increase enrollment and class size. Findings of Fact ## 15 and 16. As there was no indication that the employer's decision to increase class size violated any state rules or regulations, we conclude that the claimant's concern with this increased class size was not a reasonable workplace complaint that might entitle her to benefits under the "good cause" provision of G.L. c. 151A, § 25(e)(1).

We also conclude the claimant failed to show that she resigned her employment involuntarily for urgent, compelling, and necessitous reasons.

"[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). In cases such as this, the standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous requires the Board to focus on "the strength and effect of the compulsive pressure of external and objective forces" so as to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep, 412 Mass. at 848, 851.

The claimant expressed concerns about her potential exposure to COVID-19 in the classroom because she had been diagnosed with asthma. Findings of Fact ## 11 and 12. However, she did not present any testimonial or documentary evidence indicating that her doctor had advised her to remain out of work because of her medical condition. Additionally, the findings show that the claimant made the decision to return to work as soon as the employer re-opened in June, 2020, and continued working in the same capacity for a year and a half despite the ongoing COVID-19 public health emergency. *See* Findings of Fact ## 6, 8, and 21. The claimant's decision to continue working during this period detracts substantially from a conclusion that she believed the risk of exposure to COVID-19 in the classroom posed a substantial risk to her health or safety.

While we acknowledge that an increase in enrollment and classroom size could create some increased risk of exposure to COVID-19, the employer's program director testified that its plan was to increase the claimant's class size by only two students. Such allowed the employer to continue enforcing COVID-19 safety protocols such as social distancing, contact tracing, and testing requirements.[1] Further, as noted above, the employer's decision to increase enrollment and classroom size comported with then-current state public health rules and regulations. Finding of Fact # 16. As the claimant worked for the employer under substantially similar circumstances for a year and a half prior to her resignation, we do not believe that she has shown that her health concerns were so compelling as to render her separation involuntary. Consequently, we cannot conclude that the claimant separated for urgent, compelling, and necessitous reasons.

Even assuming, *arguendo*, that the claimant had presented a reasonable workplace complaint or had shown that she resigned for urgent, compelling, and necessitous reasons, we still do not believe the claimant would be entitled to benefits. The Supreme Judicial Court has held that a claimant who resigns from her 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). Upon review

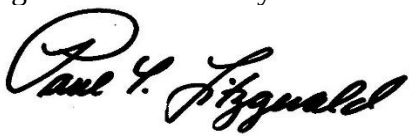
[1] The employer's uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

of the record, we disagree with the review examiner's conclusion that the claimant took reasonable steps to preserve her employment.

While the claimant recalled stating her apprehensions to her supervisor, she conceded that she did not take any additional steps to fully explain these concerns to her employer. Findings of Fact ## 18 and 23. The claimant also acknowledged that a transfer to a toddler classroom likely would have addressed her concerns about exposure to COVID-19. Findings of Fact ## 28 and 29. As the claimant had originally been hired to work in a toddler classroom, she was aware that such a transfer was a feasible option.[2] However, she never requested a transfer or otherwise afforded the employer the opportunity to address the reason she was resigning. Findings of Fact ## 23, 24, and 26. Absent specific evidence indicating the employer was either unable or unwilling to address the claimant's concerns, we cannot conclude that any further attempt by the claimant to preserve her employment would have been futile.

We, therefore, conclude as a matter of law that the claimant has failed to carry her burden to show that she left her job for good cause attributable to the employer or for urgent, compelling, and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is denied benefits for the week of January 22, 2021, 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 - June 12, 2023**

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:
www.mass.gov/courts/court-info/courthouses

[2] This is also part of the unchallenged testimony in the record.

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