

The claimant demonstrated urgent, compelling, and necessitous reasons for stepping away from her job providing services for elderly clients, where her seven-year-old son was home from school learning remotely, and she lost her child-care for her one-year-old during the COVID-19 pandemic. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0070 2728 42

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 affirm.

The claimant resigned from her position with the employer on February 15, 2021. She had filed a claim for unemployment benefits with the DUA, effective June 7, 2020, which was approved. However, the DUA denied her benefits beginning February 14, 2021, in a determination issued on August 17, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 3, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily 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 remanded the case to the review examiner to obtain clarifying evidence regarding the claimant's separation. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 lack of child-care constituted urgent, compelling, and necessitous reasons to leave her employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The employer provides services for elderly people. The claimant worked as a full-time caretaker for the employer. The claimant worked for the employer from July 2019 to 1/5/2021.

2. The employer's supervisor (Supervisor 1) supervised the claimant.
3. The claimant has two children. The children are two and eight years old.
4. The claimant's mother cared for the claimant's children while the claimant worked. The claimant's mother cared for the children at her home. The claimant's older child attended remote school due to the COVID-19 pandemic.
5. The claimant tested positive for COVID-19 in January 2021. The claimant told Supervisor 1 that she had tested positive for COVID-19. Supervisor 1 told the claimant to return to work. The claimant remained away from work for fourteen days. The claimant then underwent another COVID-19 test. The claimant again tested positive. The claimant continued to remain away from work.
6. The claimant was separated from her children for weeks due to her own COVID-19 infection. The claimant's children stayed with the claimant's mother while the claimant remained ill and continued to test positive for the illness.
7. The claimant's sister lived with the claimant's mother. The claimant's sister fell ill with COVID-19. The claimant did not want to continue to send her children to her mother's home because her sister had COVID-19. The claimant did not have anyone else to watch her children.
8. The claimant resigned from her employment in order to care for her children. The claimant told Supervisor 1 that she must cease work in order to care for her children.
9. The employer does not offer paid leave. The claimant did not ask for a leave of absence because she would not receive any pay for any such leave.
10. The employer rehired the claimant in August 2021. The claimant has worked for the employer since August 2021.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We accept the January 5, 2021, date in Consolidated Finding # 1 only insofar as it reflects the claimant's last physical day of work, as the parties' testimony and Consolidated Finding # 8 provide that the claimant did not separate until weeks later, February 15, 2021.¹ Finally, we note that the age of the children stated in Consolidated Finding # 3 is accurate as of the date of the

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

remand hearing, which took place a year after the claimant's separation from the employer. Based upon the record, we also accept the portion of Consolidated Finding # 9 which states that the employer does not offer paid leave to mean only that the employer does not offer a paid vacation or paid leave of absence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's conclusion that the claimant is eligible for benefits.

In this case, the parties disagreed about whether the claimant had actually resigned on February 15, 2021. The employer reported to DUA that she quit, but the claimant insisted in her request for a hearing and during the hearing that she did not quit. *See* Exhibits 4 and 9, respectively. The review examiner found that the claimant resigned from her employment. Consolidated Finding# 8. Such assessments are within the scope of the fact finder's role and unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627-628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted.) We believe this finding is reasonable in relation to the evidence presented.

Accordingly, we review her separation as a resignation and her eligibility for benefits pursuant to the following provisions under G.L. c. 151A, § 25(e), which state 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 assign the burden of proof to the claimant.

"[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). Domestic responsibilities, such as the need to provide care for a family member, may be sufficient to show such urgent and compelling circumstances as to render a claimant's separation involuntary. *See Manias v. Dir. of Division of Employment Security*, 388 Mass. 201, 204 (1983) (citations omitted).

In February, 2021, the claimant had a one-year-old and a seven-year-old, and the older child was home from school learning remotely due to the COVID-19 public health emergency. *See* Consolidated Finding # 4. Her mother cared for the children until the claimant's sister, who lived with her mother, contracted COVID-19. There was no one else who could watch her children.

See Consolidated Findings ## 4 and 7. Given the age of her children and their obvious need for supervision, the lack of child-care constituted an urgent, compelling, and necessitous reason to leave her employment. The claimant could not be at home to care for them and also perform caretaking services for the employer's elderly clients. *See Consolidated Finding # 1.*

However, our inquiry does not end there. 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, a claimant does not have to establish that she had no choice but to resign; she merely needs to show that her actions were reasonable. Norfolk County Retirement System, 66 Mass. App. Ct. at 766.

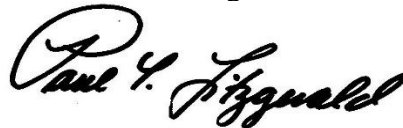
The record shows that the claimant did not have any other daycare options. Her sister had contracted COVID-19, and, as the claimant explained during the hearing, her mother had gone to the Dominican Republic. *See Consolidated Finding # 7.* Moreover, she returned to work for the employer in August, 2021, when her mother returned from the Dominican Republic and could once again watch the claimant's children.²

Although the claimant did not request a leave of absence, a claimant is not required to request a leave of absence. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984) (to be eligible for benefits, an employee is expected to make reasonable attempts to preserve her employment, but she is not required to request a transfer to other work or a leave of absence). The review examiner found that she did not request a leave because she would not receive any pay during the leave. Consolidated Finding # 9. Given the claimant's insistence that she did not intend to permanently leave her job, the fact that she returned to work as soon as child-care again became available, and the absence of any available paid leave from the employer, we decline to penalize her for not formally pursuing a leave of absence. We believe that she acted reasonably under the circumstances.

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

² This testimony also part of the unchallenged evidence in the record.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning February 14, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 15, 2023



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