Although a loss of transportation and lengthy commute to work may have constituted an urgent, compelling, and necessitous reason for quitting, the claimant failed to make reasonable efforts to preserve his employment. Therefore, he is disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0074 7691 49

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 his position with the employer and filed a claim for unemployment benefits with the DUA, effective January 2, 2022, which was approved in a determination issued on May 26, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on May 19, 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant quit for urgent, compelling, and necessitous reasons due to a loss of transportation that caused his inability to report to work, 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 February 7, 2020, the claimant began working as a full-time support specialist for the employer, an agency that provided residential housing and assistance to disabled adults. The claimant's schedule was Wednesday through Saturday, overnight shifts, 40 hours a week. He was paid every two weeks.

2. The employer had an attendance policy which disallowed more than 3 absences, or 3 occurrences of tardiness, in a 90-day period. Violation of the policy could lead to discipline, depending on the situation.

3. In March 2021, the claimant received a written warning for poor attendance. The warning required that, going forward, the claimant be in attendances [sic] for 90% of his shifts for the following 90 days.

4. The claimant required a car to get to work. He had three cars over the course of his employment. Each car had issues.

5. The claimant had irregular attendance from November 1, 2021, to November 17, 2021. The 17th was the last day he was at work. He called out for November 18, 19, 20 and 24th due to transportation issues.

6. The claimant was paid 40.5 hours for the 2-week pay-period ending November 20, 2021.

7. The employer placed the claimant on suspension starting November 25, 2021.

8. A meeting was held, by phone on December 1st to discuss the claimant's attendance issues. The claimant explained that he could not get to work because the clutch on his car broke, and he was waiting for a new one to be delivered. The employer accepted this as a mitigating circumstance for absence and removed the claimant from suspension. The claimant was told that the employer would need to hear from him regarding his intentions to return to work by December 9, 2021. The claimant was expected to use this time to resolve his transportation issued [sic]. The claimant was told that if the employer did not hear from him by December 9th, they would consider him to have voluntarily resignation [sic]. This phone discussion was reviewed in a letter sent to the claimant on December 1, 2021.

9. The claimant did not have the funds to fix or replace his car. As of December 9, 2021, he still had no means of return to work. He therefore did not contact the employer regarding returning to work, understanding that this would result in his employment terminating.

10. On December 10, 2021, the employer terminated the claimant's employment, recording it as a resignation, based on the claimant's failure to contact the employer by December 9, 2021, regarding intentions to return to work.

11. On December 10, 2021, the claimant was paid 6 hours of personal leave and 8 hours of holiday pay for the two-week pay period ending December 4, 2021.

12. On December 24, 2021, the claimant was paid 9 hours of personal time for the pay period ending December 18, 2021.

13. On January 6, 2021, the claimant filed a claim for unemployment benefits effective January 2, 2022.

14. On May 26, 2022, DUA issued a Notice of Approval 0074 7691 49-01 stating that, under MGL c. 151A, Section 25(e)(2), the claimant was eligible to receive benefits starting November 21, 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except that portion of Finding of Fact #4 which states that the claimant required a car to get to work. Nothing in the record supports this statement. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's conclusion that the claimant is eligible for benefits.

Although the claimant initially reported to DUA that he had been discharged by the employer, the record establishes that he failed to report for work or contact the employer. *See* Findings of Fact ## 8 and 9. Therefore, we treat the separation as a voluntary resignation. *See* Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)). The review examiner appropriately analyzed his separation pursuant to the following provisions under G.L. c. 151A, § 25(e), which provide, in relevant 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 of showing that he left employment for good cause attributable to the employer or for urgent, compelling, and necessitous reasons.

Because the claimant did not participate in the hearing, he did not present any testimony regarding the circumstances surrounding his separation from employment. There is nothing in the record showing that claimant alleged that he separated due to the employer's conduct towards him. There is also nothing in the record to suggest that the employer ever acted unreasonably towards the claimant, or that it engaged in any other type of conduct that could constitute good cause for the claimant to leave his employment. *See* Conlon v. Dir. of Division of Employment Security, 382

Mass. 19, 23 (1980) ("[when] a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving."). We, therefore, need not consider whether the claimant had good cause for leaving attributable to the employing unit or its agent under G.L. c. 151A, § 25(e)(1).

Instead, the claimant reported in his DUA fact-finding questionnaires that he became unable to report to work and ultimately separated from work, because his car broke down, and he did not have the funds to fix or replace his car. *See* Findings of Fact ## 8–9; Exhibits 3 and 6.

Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1991). "[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, 412 Mass. at 847. The requisite assessment is whether the claimant reasonably believed that he left his job for compelling reasons. Norfolk County Retirement System, 66 Mass. App. Ct. at 766 (further citations omitted).

As such, we consider whether the claimant's personal reasons for leaving his job were so compelling as to make his departure involuntary. The record establishes that the claimant experienced issues relating to a lack of transportation beginning in November, 2021. During the hearing, both employer witnesses acknowledged that this was the reason that he provided to his supervisors to explain his absenteeism. Loss of transportation may be an urgent, compelling, and necessitous reason. *See* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-598 (1974). However, according to Raytheon Co., the claimant must also have demonstrated that no reasonable transportation alternative is available.

There is nothing definitive in the record to suggest that the claimant required a vehicle to go to work. Based on the claimant's own fact-finding questionnaire responses, he had regularly relied on "rides and transportation from family" to report to work. Exhibit 6. Nothing in the claimant's other responses to DUA or elsewhere in the record shows that he was no longer able to rely on these methods of transportation to go to work after November 17, 2021. *See* Exhibits 3 and 6.[1] On the other hand, the same record also indicates that the claimant lived over an hour away from the employer's work location, as he lived in [City A], MA, while the employer's site was in [City B], MA. Exhibits 3 and 9. We also note that public transportation is not as readily available in the Western part of the state as it is in other parts of Massachusetts. Thus, in considering the totality of the evidence, the claimant's circumstances may have created an urgent, compelling, and necessitous reason to resign.

[1] While not explicitly incorporated into the review examiner's findings, Exhibits 3 and 6 are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

However, to be eligible for benefits, a claimant must also show that he made reasonable efforts to preserve his employment prior to resigning, or that such attempts would have been futile. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984); Norfolk County Retirement System, 66 Mass. App. Ct. at 766.

There is nothing in the record to support a conclusion that the claimant made reasonable efforts to preserve his employment. The claimant participated in the telephone meeting of December 1, 2021, with the employer and explained his situation to the employer at that time. Findings of Fact ## 8–9. This could be viewed as an effort to preserve. However, it is insufficient. There is also nothing in the record to suggest that further attempts to preserve would have been futile, since the employer met with the claimant by phone on December 1, 2021, to work with him and afford him additional time to resolve his transportation issues. Further, there is nothing in the record to show that the claimant explored the option of taking a leave of absence to resolve his issues. Inasmuch as the claimant had taken "rides and transportation from family," there is also nothing in the record to explain why the claimant could not continue to avail himself of these options after November 17, 2021.

We, therefore, conclude as a matter of law that the claimant has not met his burden to establish urgent, compelling, and necessitous reasons for leaving his employment within the meaning of G.L. c. 151A, § 25(e), because he failed to make reasonable efforts to preserve his employment before resigning.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning December 5, 2021, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 24, 2024

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.

JMO/rh