Although the claimant experienced childcare challenges which prevented her from returning to work when the employer altered her work schedule, she did not initiate her separation from employment. She maintained communication with her immediate supervisor and sought a leave of absence through the employer's human resources department in an attempt to address her childcare challenges. It was the employer who abruptly ended her employment. Therefore, it was improper for the review examiner to award benefits under G.L. c. 151A, § 25(e)(1). However, because the employer did not provide any evidence of misconduct, the claimant is eligible for benefits pursuant to § 25(e)(2).

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Issue ID: 0075 2354 46

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 separated from her position with the employer on August 15, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 9, 2022. 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 February 7, 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). 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 initiated her separation from employment when she was unable to return to work after receiving a newly assigned schedule of hours due to a lack of childcare, 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. In 2016 or 2017, the claimant was addicted to opiates. The claimant has not used opiates since 2016 or 2017.

2. The claimant worked as a full-time direct support professional with the employer, a group home for developmentally disabled adults from May 2010 to August 15, 2020, when she separated.

3. At the time of her separation, the claimant was a single mother of two children (children), ages four (4) and five (5). The claimant's fiancé, the father of the children, passed away on August 4, 2017.

4. The claimant's immediate supervisor was the residential director (Director).

5. The claimant worked three (3) overnight shifts per week, from 9:00 p.m. to 10:00 a.m. or 6:00 p.m. to 8:00 a.m. or 9:00 a.m.

6. The claimant's father and her late fiancé's parents provided childcare for the children when the claimant worked overnight shifts.

7. In May 2020, the claimant was placed on a leave of absence after the employer found suboxone, which was medication used for opiate addiction, in the claimant's sweater that she left at work. The claimant was not discharged for this behavior.

8. In May 2020, the claimant was not prescribed suboxone films.

9. In May 2020, the claimant was not addicted to opiates. The claimant was self-medicating by taking suboxone so that she would not take opiates.

10. On July 24, 2020, the claimant was cleared to return to work after the leave of absence.

11. On July 24, 2020, the claimant met with the Director to discuss her return to work. The Director informed the claimant that her new schedule (new schedule) was Sundays from 8:00 a.m. – 4:00 p.m., Wednesdays, Thursdays, Fridays, and Saturdays from 2:00 p.m. – 9:00 p.m. The claimant's schedule was changed to day shifts because the employer needed to ensure the claimant was working with a supervisor present due to what occurred in May 2020. The claimant informed the Director that she had to secure childcare to accommodate the new schedule.

12. On July 24, 2020, the Director and the claimant agreed that the claimant would inform the employer when she secured childcare and could return to work.

13. On July 26, 2020, the Director and the claimant sent a series of text messages to each other. The Director asked the claimant when she was returning and the claimant informed the Director she went to the emergency room the night before due to impetigo, which is a contagious infection. The Director requested a doctor's note. The claimant informed the Director that she was seen at the

emergency room, and she had the discharge paperwork and prescription. The Director told the claimant that the employer might need a copy of the discharge paperwork and would get back to the claimant.

14. On July 27, 2020, the Director and the claimant sent a series of text messages to each other. The Director told the claimant the employer needed the claimant's return date as soon as possible and requested a doctor's note. The claimant told the Director that she was still trying to figure out childcare. The Director requested a doctor's note from the claimant with when the claimant would be cleared to return to work.

15. On July 29, 2020, the Director and the claimant sent a series of text messages to each other. The Director asked the claimant if she obtained a doctor's note. The claimant informed the Director that she was not sure how to obtain a doctor's note because she did not have a primary care doctor. The claimant asked the Director if she could take an additional leave of absence using the Family Medical Leave Act (FMLA) to allow her time to obtain childcare.

16. On August 2, 2020, the Director sent a text message to the claimant. The Director told the claimant she needed to contact human resources (HR) to discuss FMLA. The Director also told the claimant she could obtain a note from the emergency room doctor or go into a "walk-in" to get a doctor's note. The Director instructed the claimant to get back to the Director as soon as possible with her progress.

17. On August 3, 2020, the Director and the claimant sent a series of text messages to each other. The Director told the claimant that she would be "marked no return" if the claimant did not get back to the Director. The Director asked the claimant if she contacted HR or obtain a doctor's note. The claimant asked who she should speak to at HR. The Director sent an audio message with the information about who she should speak to at HR.

18. On August 11, 2020, the Director and the claimant sent a series of text messages to each other. The Director asked the claimant if she was returning to work. The claimant informed the Director that she spoke to HR and was told they would call the claimant back. The claimant did not hear back from HR and told the Director that she would follow-up with HR the following day. The Director said she would follow-up with HR as well.

19. On August 12, 2020, the employer's Area Director issued a letter to the claimant that was mailed to the claimant. The letter informed the claimant that she was expected to return to work with the new schedule on August 15, 2020, by 2:00 p.m. The letter informed the claimant that the employer would accept her voluntary resignation if she failed to arrive for her shift.

20. On August 15, 2020, at 2:45 p.m., the claimant received the employer's letter, dated August 12, 2020.

21. On August 15, 2020, the claimant resigned from her position with the employer because she was unable to obtain childcare to accommodate the new schedule.

22. The claimant did not have family or friends that could help provide childcare for her children. The claimant asked her parents, her late fiancé's parents, and her two (2) brothers if they could help provide childcare to accommodate her new schedule and they were not able to because they had work obligations.

23. The new schedule did not allow the claimant to send her children to daycares because daycares closed between 5:00 p.m. and 6:00 p.m., which was when the claimant was scheduled to be working.

24. At the time the claimant quit, she was not at risk of being fired.

25. At the time the claimant quit, the employer still had work available for her.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact, except Findings of Fact ## 21, 24, and 25, to the extent they contain a mixed question of fact and law. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. Although we agree that the claimant is eligible for benefits, we affirm on other grounds.

Because the review examiner concluded that the claimant quit her job, she analyzed the claimant's separation under G.L. c. 151A, §§ 25(e) and (e)(1), which provide, 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.

Pursuant to the above statutory provisions, it is the claimant's burden to establish that she left her job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons. Here, the review examiner concluded that the claimant initiated her separation from the employer, albeit for urgent, compelling, and necessitous reasons due to ongoing childcare challenges.

We disagree. There is no evidence in the record that the claimant initiated her separation from employment. Instead, the findings establish that the claimant maintained communication with her immediate supervisor and sought to obtain a leave of absence through the employer's human resources department in an effort to address her childcare challenges. Findings of Fact ## 12–15, 17–18. It was the employer who abruptly ended communication with the claimant. Finding of Fact # 19.

Therefore, the claimant's separation is appropriately analyzed under G.L. c. 151A, § 25(e)(2), 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Since the record contains no information that demonstrates that the claimant engaged in any wrongdoing while at work or while she communicated with the employer about returning to work, the employer has not met its burden to establish misconduct.

We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interests or for a knowing violation of a uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning August 9, 2020, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 8, 2023

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