The claimant's tardiness and absences as a result of his inability to obtain childcare may have constituted urgent, compelling, and necessitous reasons for his resignation within the meaning of G.L. c. 151A, § 25(e)(1). However, he failed to take reasonable steps to preserve his employment because he did not contact the employer's HR department despite being told that they were responsible for transfers and scheduling changes. Further, there was no indication from the record that the claimant reasonably believed such steps would have been futile.

Board of Review
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Issue ID: 0077 8066 20

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 on July 15, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 24, 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 January 7, 2023. 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 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 resigned his position with the employer for urgent, compelling, and necessitous reasons because he was believed he might be terminated because of attendance issues related 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. On November 11, 2019, the claimant began working as a full-time medical assistant for the employer, an outpatient medical clinic.

2. The outpatient medical clinic is open from 8:00 a.m. to 5:00 p.m. The claimant worked from 8:00 a.m. to 5:00 p.m.

3. The claimant's direct supervisor was the employer's clinic practice manager.

4. The claimant is a father to a 15-month-old girl.

5. The claimant co-parents his daughter with the daughter's mother.

6. The daughter's mother does not have a car

7. During his employment with the employer, the claimant sometimes missed days of work, or did not report to work on his scheduled time.

8. The claimant missed work or failed to report on scheduled time whenever his daughter was sick, or when he had to pick up his daughter from the daycare center.

9. The employer was concerned about the claimant's attendance.

10. On June 22, 2022, the claimant's supervisor called the claimant into a meeting.

11. In the meeting, the supervisor explained the employer's corrective action plan to the claimant. The first step is a verbal warning, the second step is a written warning, and the final step is a termination.

12. The supervisor explained that if the claimant continued to have attendance issues, the supervisor was going to escalate his attendance issue to the human resources department, whereby the claimant would get a written warning, followed by a termination.

13. In the meeting, the claimant informed the supervisor that his attendance issues were because of childcare related issues.

14. The claimant asked the supervisor if a per-diem schedule was a possibility. He stated that a per-diem schedule would work for him because it was more flexible. The supervisor informed the claimant that the employer did not offer a per-diem option.

15. On June 29, 2022, the claimant missed work because his child was sick.

16. On June 30, 2022, the claimant emailed a resignation notice to the supervisor, quitting his job effective July 8, 2022. After a discussion with his supervisor where he was informed that he had to give a 2-week notice if he wanted to

remain eligible for rehire by the employer, the claimant extended the effective date of his resignation to July 15, 2022.

17. In the resignation notice, the claimant stated that he was open to a per-diem option.

18. In the resignation notice, the claimant further stated that he could not continue working his normal schedule at the employer "due to ongoing family complication and I want to avoid being terminated for reason out of my hands I want to leave on great terms instead…"

19. The claimant quit his job with the employer effective July 15, 2022 due to childcare related issues, and because he was afraid that he would get terminated because of his attendance issues that related to his childcare issues.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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 as inconsistent with the evidence of record the portion of Finding of Fact # 14 that indicates the claimant's supervisor told the claimant that the employer did not have per diem positions available. 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 met his burden to show he took reasonable steps to preserve his employment.

Because the claimant initiated his separation from employment, this case 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 language of the statute places the burden of proof upon the claimant.

There is no indication from the record that the claimant resigned because of any action taken by the employer. Therefore, we consider only whether her separation was due to "urgent, compelling, and necessitous reasons" within the meaning of G.L. c. 151A, § 25(e).

The review examiner found the claimant eligible for benefits in part because his supervisor had warned him about previous incidents where the claimant was either late to work or called out of

work. *See* Finding of Fact # 19. The Supreme Judicial Court (SJC) has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981). While the claimant's supervisor had given him a verbal warning about his absences and had indicated that she might have to continue to escalate her concerns human resources department if the attendance issues continued, there is no indication that the employer was planning to imminently discharge the claimant. *See* Findings of Fact ## 10–12. Therefore, the claimant's belief that she was about to be discharged was not reasonable.

The review examiner also concluded that the claimant had resigned his employment for urgent, compelling, and necessitous reasons because he occasionally would need to provide childcare for his daughter. *See* Findings of Fact ## 7, 8, 18, and 19. "[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).

Prior to separating from his employment, the claimant had either missed work or been tardy on a number of occasions because his daughter was sick and either could not go to daycare or had to be picked up early from daycare. Findings of Fact ## 4–8. As the review examiner found that the claimant was unable to obtain alternative childcare coverage, we conclude that he articulated urgent, compelling, and necessitous reasons for resigning.

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 his employment' as would indicate the claimant's 'desire and willingness to continue his 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 he had no choice but to resign; he merely needs to show that her actions were reasonable. Norfolk County Retirement System, 66 Mass. App. Ct. at 766.

After the claimant's supervisor cautioned the claimant about continued issues with attendance, the claimant inquired into the possibility of changing to a more flexible, *per diem* schedule. Findings of Fact ## 12–14. Both parties testified that the supervisor responded by explaining that she did not have control over changes to schedule, as that was the determined by the employer's human resources department.[1] Therefore, the review examiner erred in finding that that the claimant's

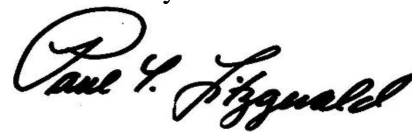
[1] The parties' uncontested testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir.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

supervisor had informed him that a *per diem* position was not an option. Both parties' testimony demonstrates that the claimant understood such requested needed to be addressed by the employer's human resources department.

When asked why he did not speak to human resources about a change in schedule, the claimant explained that he did not think to check because he did not think it was an option. The claimant similarly contended that he did not check to see if a transfer to a different department or location might accommodate his scheduling needs because he did not think a transfer was available. [2] However, there is no evidence in the record to support a conclusion that the claimant reasonably believed that it would have been futile to contact the human resources department either to request a schedule change or to request a transfer. Accordingly, we believe that the review examiner erred in concluding that the claimant took reasonable steps to preserve his employment.

We, therefore, conclude as a matter of law that the claimant did not meet his burden pursuant to G.L. c. 151A, § 25(e)(1) to show that he took reasonable steps to preserve his employment before quitting.

The review examiner's decision is reversed. The claimant is denied benefits for the week of July 10, 2022, 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.



BOSTON, MASSACHUSETTS
DATE OF DECISION - March 24, 2023

Paul T. Fitzgerald, Esq.
Chairman

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

[2] The claimant's uncontested testimony is also part of the unchallenged evidence placed 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