The claimant was unable to show that he had a reasonable belief of imminent termination based on his union president saying that the employer was going to fire him. The union president was not an agent of the employer. Because the employer's investigation had not concluded, the record suggests it had not yet decided whether to discharge him. He also failed to show that opening the investigation was unreasonable employer conduct. Finally, his fear that disclosure of details surrounding a discharge could damage his reputation was, at best speculative, and did not constitute an urgent, compelling, or necessitous reason to quit. Held the claimant is disqualified pursuant to G.L. c. 151A, § 25(e)(1).

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Issue ID: 0078 8849 27

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 resigned from his position with the employer on November 27, 2022. He filed a claim for unemployment benefits with the DUA, effective December 25, 2022, which was approved in a determination issued on February 15, 2023. The employer appealed the determination to the DUA hearings department.[1] Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination and awarded benefits in a decision rendered on October 22, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant left his employment because he reasonably believed the employer was about to discharge him, and the record did not establish that such discharge would have been for disqualifying misconduct. Therefore, the claimant was eligible for benefits pursuant to 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 voluntarily ended his employment because he reasonably believed he was about to be discharged based on the union president's advice, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

[1] The employer's appeal was originally heard by a different review examiner, and the hearing decision, dated June 15, 2023, was appealed to the Board. On July 2, 2024, the Board remanded the case for a hearing *de novo* before another review examiner because the original review examiner was unavailable to consider additional evidence.

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

1. The claimant worked as a full-time paraprofessional for the employer, a town, between 9/9/2009 and 12/8/2022, when he separated.

2. The claimant's direct supervisor was the principal. The claimant's upper-level managers were the superintendent and the director of special education.

3. The claimant's job included working with student A. Student A is severely disabled, wheelchair bound and cannot speak or communicate. Student A is in high school, requires a diaper, and has a one-to-one aid. At the time, student A was fourteen (14) years old. The claimant's job required him to assist in changing student A's diaper.

4. The employer expected the claimant to treat students with respect. The claimant was aware of this expectation.

5. The claimant observed that when females were in the room with student A during diapering, student A was more aroused and having seizures lasting up to thirty (30) seconds (his observation).

6. The claimant was concerned about student A's safety during seizures including that his head was in a safe position, that his neck position was proper, that his eyes were covered, and that fecal matter and urine could be expelled further.

7. The claimant informed employee [B] of his observation in the presence of student A because he thought it was better to inform employee [B] in the confines of the changing room and not in open hallways around others. The claimant did not think student A would hear his observations when he shared them with employee [B]. The claimant informed employee [C] and the nursing staff of his observation in the nurse's office.

8. In the moments the claimant shared his observations, he did not think he would be disciplined for doing so because he was trying to make sure that student A was being properly cared for.

9. On one occasion, student A's legs were up in the air during a diaper change with the claimant and employee [D]. The claimant had taken off his gloves and saw student A's anus opening and closing. The claimant did not have time to get another glove and panicked. The claimant said to student A, "Don't wink your butthole at me" (his comment). Student A defecated on the claimant's bare hand.

10. In the moment the claimant made his comment, he did not think he would be disciplined because his comment was made in panic.

11. The claimant's last day worked was 11/10/2022, when he was placed on a leave of absence.

12. The employer began a Title IX investigation regarding the claimant's treatment of student A based on his observation and his comment.

13. The Title IX investigator was not present when the claimant informed employee [B], employee [C], and the nursing staff about his observation.

14. The Title IX investigator was not present when the claimant changed student A's diaper with employee [D].

15. Employee [B] informed the Title IX investigator of the claimant's observation when employee [B] was interviewed on 11/10/2022. Employee [C] informed the Title IX investigator of the claimant's observation when employee [C] was interviewed.

16. Employee [D] reported to the Title IX investigator that the claimant told student A, "Don't wink your asshole at me" when employee [D] was interviewed.

17. The Title IX investigator interviewed the claimant on 11/21/2022. Prior to beginning the investigatory questions, the Title IX investigator informed the claimant that the meeting was an investigatory interview that could result in disciplinary action, but it was not a disciplinary hearing. The claimant informed the Title IX investigator of his observation. The claimant informed the Title IX investigator of his comment and denied saying "asshole."

18. The claimant was a union member.

19. The claimant could have requested a disciplinary hearing and did not.

20. On 11/21/2022, the union president informed the claimant that the superintendent "was leaning that way" regarding terminating the claimant's employment for the claimant's treatment of student A.

21. On 11/23/2022, the union president informed the claimant that if he did not resign in lieu of termination, the claimant's interview from 11/21/2022 and the superintendent's decision would be shared with student A's family.

22. During a phone call on 11/26/2022, the union president told the claimant that if the claimant did not resign, the claimant would be terminated the Monday after Thanksgiving Break.

23. Based on the information from the union president, the claimant believed he would be terminated if he did not resign.

24. The claimant resigned on 11/27/2022 in lieu of termination. The claimant's resignation was effective 12/8/2022 after his sick days expired.

25. The Title IX investigation did not conclude because the claimant tendered his resignation.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 is eligible for benefits.

G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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.

Under this section of the law, the claimant has the burden to show that he is eligible for benefits despite having quit his employment. Following the hearing, the review examiner concluded that the claimant had carried his burden. She decided that the claimant was eligible for benefits because he quit his job in anticipation of being discharged by the employer for conduct which the employer had not proved to be disqualifying under G.L. c. 151A, § 25(e)(2).

It is well-settled that an employee who resigns under the reasonable belief that he is facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. *See* Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the separation is treated as involuntary, and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. *See* Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion); White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-599 (1981).

In this case, there is no question that the claimant was under investigation for his remarks to and about Student A, and that the investigation could result in disciplinary action. *See* Findings of Fact ## 12 and 17. However, when he submitted his resignation on November 27, 2022, the employer had not yet completed its investigation. *See* Findings of Fact ## 24 and 25. Moreover, even if the

investigation were to conclude that the claimant violated the employer's expectation to treat students with respect, the claimant could have requested a disciplinary hearing but did not. *See* Findings of Fact ## 4 and 19.

The Board has held that a claimant who resigns before the completion of a disciplinary investigation has not demonstrated a reasonable belief that he is about to be discharged. While the choice to resign as a preemptive move to avoid discharge at that point may be the correct personal decision, it is premature for purposes of proving that the discharge is imminent. *See* Board of Review Decision 0002 2960 41 (Jan. 7, 2014). Simply put, the employer had not yet decided to fire the claimant.

Here, the claimant resigned after a phone call on November 26, 2022, when the union president informed him that he would be terminated after Thanksgiving break. Finding of Fact # 22. The claimant testified that the union president told him he had received the information regarding the claimant's termination from the superintendent of the claimant's employer.[2] Although the comments of the union president may have persuaded the claimant that his termination was imminent, the employer itself made no direct communication to the claimant that his job was in jeopardy.

In Board of Review Decision 0002 2960 41 (Jan. 7, 2014), the claimant also resigned from her position based on the union's belief that the claimant was to be discharged. The Board concluded that the claimant in that case was not eligible for benefits, noting:

> The claimant was told by her union, but not by any representative of the employer, that she should quit her position based upon what had transpired thus far in the investigation. While the comments of the union president persuaded the claimant that her job could not be saved if the investigation progressed any further, the employer itself gave no indication that the claimant's job was necessarily in jeopardy. . .

Id.

An argument can be made that the information regarding the termination was from the employer and merely relayed through the union president. Considering neither the superintendent nor the union president served as witnesses, this testimony regarding the alleged termination is hearsay.

The Supreme Judicial Court has made clear that, in an administrative hearing, "[s]ubstantial evidence may be based on hearsay alone if that hearsay has 'indicia of reliability.'" Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). The claimant presented no evidence beyond his testimony that the union president told him that the employer intended to terminate him. Considering that the investigation was still ongoing, we can reasonably infer that the employer had not yet decided to terminate the claimant. The notion that the claimant would

[2] While not explicitly incorporated into the review examiner's findings, this testimony and the testimony referred to below are part of the unchallenged evidence introduced at the hearing and placed in the record. 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).

be fired may have been the union president's opinion at the time, but he was not an agent of the employer. Therefore, it is not reliable evidence of what the employer planned to do.

Although the claimant has not demonstrated that he quit in anticipation of imminent discharge, we consider whether he has shown that he left his employment for good cause attributable to the employer or for an urgent, compelling, and necessitous reason.

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. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). The findings indicate that the claimant made two statements within hearing distance of Student A, which reasonably could be viewed as disrespectful. Findings of Fact ## 5–9. Given this, we believe the employer acted reasonably in opening an investigation. Thus, its conduct did not create good cause attributable to the employer to resign.

Nor did the claimant show that he left his employment due to an urgent, compelling, and necessitous reason. 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 (1992). "[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.

Urgent, compelling, and necessitous reasons refers to personal circumstances such as sudden loss of childcare or a medical condition that render a worker unable to continue performing the job. *See* Manias v. Dir. of Division of Employment Security, 388 Mass. 201, 204 (1983) (childcare demands may constitute urgent and compelling circumstances) (citations omitted.); *see also* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 335–336 (1979) (pregnancy or a pregnancy-related disability, not unlike other disabilities, may legitimately require involuntary departure from work).

The union president informed the claimant that, if he did not resign, the claimant's interview and the superintendent's decision would be shared with the family of student A. Finding of Fact # 21. The claimant testified that he was concerned about the impact of the investigation results on his personal and professional reputation, which motivated him to resign before being terminated. Again, the results of the investigation at that point were speculative, as was any potential damage to the claimant's reputation. Inasmuch as these concerns were hypothetical, the circumstances do not rise to pressing circumstances which rendered the claimant's resignation involuntary.

We, therefore, conclude as a matter of law that the claimant failed to show that he resigned under a reasonable belief that he was about to be discharged. We further conclude that he also failed to show that he resigned for good cause attributable to the employer or for urgent, compelling, or necessitous reasons. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending December 4, 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 - January 30, 2025

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

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.

MM/rh