

The claimant's unexpected loss of childcare may have constituted urgent, compelling, and necessitous reasons for resigning. However, he did not inform the employer of the reason he was resigning or make any effort to preserve his employment before doing so. Therefore, he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0080 2886 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 reverse.

The claimant separated from his position with the employer on April 27, 2023. He filed a claim for unemployment benefits with the DUA, effective May 14, 2023, which was approved in a determination issued on July 11, 2023. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on October 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). 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 additional evidence about the circumstances surrounding the claimant's separation and his attempts to preserve his employment. Only the employer attended the remand hearing. Thereafter, the review examiner issued her 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 resigned for urgent, compelling, and necessitous reasons because he unexpectedly lost childcare and the employer was unable to adjust his schedule, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked as a tire technician for the employer, a tire business, from October 24, 2022, until becoming separated from employment on April 25, 2023.
2. The claimant was hired to work full-time, 38 or more hours per week. As a full-time employee, the claimant was eligible for benefits when working at least 38 hours per week.
3. The claimant worked a set schedule with the employer. The claimant was initially working full-time from Monday through Saturday from 8:00 a.m. to 4:00 p.m. (The claimant frequently worked beyond 4:00 p.m.) The claimant was paid \$15 per hour in his position with the employer.
4. The claimant was provided with the Employee Handbook containing the employer policies when hired. The employer's time off policy indicates that when taking time off, employees must notify the "appropriate management personnel." When the claimant was hired, the Store Manager had gone through the policies of who to contact when reporting to work late or taking time off, informing the claimant that he needed to speak directly with him.
5. The employer also had a policy, whereby an employee being absent from work without notification for three days would be considered to have abandoned their position.
6. The claimant and the Service Technician Manager were personal friends and sometimes drove to work together. The claimant was receiving rides to work because he did not have his own transportation to work.
7. The Service Technician Manager was not authorized to grant time off requests from employees. If the claimant requested time off from the Service Technician Manager, he would be directed to speak with the Store Manager.
8. During his employment, on a few occasions when the claimant was late and notified the Service Technician Manager via text message of his anticipated late arrival to work, the Service Technician Manager notified the Store Manager. The Store Manager then spoke to the claimant and instructed him to notify him directly.
9. The claimant resides with his partner, their 3-year-old child, and two other children aged 6 years old and 9 years old.
10. The claimant's second child was then born on January 8, 2023.
11. After the birth of his child, the claimant spoke to the Store Manager and requested time off from work due to the birth of his child. The Store Manager granted the claimant's request to take January 9th through January 16th off from work.

12. Thereafter, the claimant again spoke to the Store Manager and requested to take time off from work due to his newborn child. The Store Manager granted the claimant's request to take January 23rd through February 6, 2023, off from work.
13. Sometime after the birth of his child, the claimant notified the employer that he may be late for work because he had to drop off his child with the childcare provider.
14. On unknown dates, the claimant made a request of the Store Manager to come in late due to ride share issues and was allowed to do so on those dates.
15. After his child was born on January 8, 2023, the claimant's partner (the biological mother of the child) was placed on bed rest until May 17, 2023.
16. The claimant and his partner were having problems obtaining childcare. The claimant was unable to find childcare for the newborn child.
17. While on bedrest, the biological mother had some help watching the children by her mother and her grandmother.
18. At no time in February 2023 did the claimant make a request of the Store Manager for an increase in pay. It is unknown if the claimant spoke with the Service Technician Manager about an increase in pay. The Service Technician Manager does not have the authority to grant an employee's request for a wage increase.
19. On February 9, 2023, the claimant made a verbal request for a reduction in hours to the Store Manager. The claimant was looking to report to work later, working a mid-morning shift, instead of his 8 a.m. shift for which he was hired. The claimant informed the Store Manager that he was having an issue with rides and that he needed the time off due to his newborn child. The Store Manager believed that the request for a reduction in hours had something to do with childcare. The Store Manager approved the request for a change in schedule/reduction in hours.
20. After the reduction in hours, the claimant was working a total of 30 hours per week for the employer.
21. On or around February 14, 2023, the claimant made a verbal request of the Store Manager to change his afternoon schedule to a morning schedule due to his availability of rides. The claimant did not provide any other reason for his request for a change in scheduled hours. The Store Manager received that request directly from the claimant and granted that request.

22. The oldest children were in school from 9:00 a.m. to 3:30 p.m. The claimant would sometimes need to drop them off and/or pick them up from school.
23. The two younger children were being watched at the grandmother's house. The children would be dropped off at the grandmother's house, then the grandmother would take the 3-year-old to daycare. (The claimant's 3-year-old child was in daycare until March 2023 when they were no longer able to afford it.)
24. At the end of March 2023, the claimant spoke to the Service Technician Manager and informed him that he was having problems with childcare and getting to work on time and wanted to change his schedule. The claimant did not speak with the Store Manager directly at that time.
25. In April 2023, the Service Technician Manager informed the claimant that they had hired someone, and he could not change his shift. The claimant continued to work for the employer thereafter.
26. On unknown dates between the end of March 2023 and April 26, 2023, the claimant made requests of the Store Manager to report to work late. The Store Manager understood that the main reason the claimant was unable to report as scheduled was due to issues with ride sharing.
27. On or around April 1, 2023, the claimant requested an increase in pay from the Store Manager. (The employer felt that the claimant was not meeting the scheduled times and his performance was lacking.) The Store Manager informed the claimant that they would not provide the claimant with an increase in pay until he had a few "good weeks" at work.
28. The claimant was not provided with an increase in pay from the instant employer any time thereafter up to his last day of work on April 25, 2023.
29. The claimant last reported to work for the employer on Friday April 25, 2023. The claimant was on the schedule to work thereafter.
30. The grandmother was hospitalized on April 26, 2023, and was no longer able to watch the children. (She was hospitalized for a one-month period with a diagnosis of congestive heart failure.)
31. The claimant could not afford childcare on his salary and there was no other income coming into the household. The claimant did not have access to any type of assistance for childcare. The claimant was unable to return to work after April 25, 2023, due to the lack of childcare.
32. The claimant informed the Service Technician Manager of what was taking place and his need for time off. The claimant did not speak with the Store Manager about what was taking place at that time.

33. The claimant did not tell the Store Manager that he unexpectedly lost childcare on or around April 26, 2023. The Store Manager would have approved of time off for that issue if the claimant had notified him of what was taking place.
34. The claimant did not report to work for the employer after Friday April 25, 2023. The claimant remained out of work thereafter.
35. On the second day he did not report to work, the Store Manager tried to reach the claimant by telephone. When the claimant did not answer, the Store Manager sent the claimant a text message indicating “I encourage you please to finish up your two weeks that way I can be used as a referral to you and perhaps we can come to an understanding.”
36. The claimant responded the next day by text message indicating that he knew his worth and was not coming back to work. The Store Manager understood the claimant was resigning because he was dissatisfied with the Store Managers response to his request for a raise.
37. Thereafter, when speaking with the Service Technician Manager, the claimant was informed his position was no longer available with the employer.
38. The claimant filed his claim for unemployment benefits on May 17, 2023. The effective date of the claim is May 14, 2023.

Credibility Assessment:

The claimant did not attend the remand hearing and as such, did not refute the testimony presented by the employer witness at that hearing.

At the remand hearing, the Store Manager provided direct testimony that only he could grant a change in schedule or time off and when the claimant spoke to him directly, he understood the claimant’s requests for changes in his schedule was mainly due to his not having a ride to work for his scheduled shift and were not for any ongoing childcare issue. The claimant’s testimony at the initial hearing that after his child was born, he was able to obtain his own transportation to work and was not relying upon others to get to work, is deemed not to be credible considering the employer’s direct and consistent testimony.

The employer witness did not present the text message communications between the claimant and the Store Manager, occurring after the claimant’s last day at work leading up to the claimant’s separation, which was requested within the Board Remand Order. The employer witness testified that he no longer had access to those communications.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

As the claimant resigned his position with the employer, his eligibility for benefits is properly analyzed under the following provisions of G.L. c. 151A, §§ 25(e), which state, 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 these provisions places the burden of proof upon the claimant.

The claimant resigned his position because of unexpected issues with childcare, not as a result of any decision made or action taken by the employer. Consolidated Findings ## 29–31. As such, we need not consider whether the claimant resigned for good cause attributable to the employer.

We next consider whether the claimant showed that he separated from his position with the employer for urgent, compelling, and necessitous reasons. “[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 position with the employer, the claimant was relying on his partner’s mother and grandmother to provide childcare while his partner was on bedrest. Consolidated Findings ## 15–17, and 23. However, on April 26, 2023, the partner’s grandmother was hospitalized and was no longer able to watch the claimant’s children. Consolidated Finding # 30. As the claimant was unable to obtain alternative childcare coverage, we believe that he presented urgent, compelling, and necessitous reasons for resigning. *See* Consolidated Finding # 31.

However, our inquiry does not end there. To qualify for benefits, a claimant who resigns from employment must also show that he 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, merely that his actions were reasonable. Norfolk County Retirement System, 66 Mass. App. Ct. at 766. In effect, a claimant must pursue a feasible course of action, which would enable him to remain employed.

At the initial hearing, the claimant testified that the Service Technician Manager had previously granted his request for time off or changes to his schedule. *See Consolidated Findings ## 31 and 32.* Following remand, the review examiner accepted as credible the Store Manager’s testimony that the claimant had brought those requests to him because the claimant understood that the Store Manager was the only one with authority to grant those requests. *See Consolidated Findings ## 4, 7, 11, 19, and 21.* 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).

While the claimant contended that he believed that the Service Technician Manager could unilaterally approve requests for time off and changes to the terms of his employment, he also conceded that the Service Technician Manager had told the claimant such requests needed to be brought to the Store Manager. *See Consolidated Finding # 24.* As there was no dispute the claimant had gone directly to the Store Manager to request a raise, his testimony and actions detract from his contention that he believed the Service Technician Manager. *See Consolidated Finding # 27.* We have, therefore, accepted the review examiner’s credibility assessment as being supported by a reasonable view of the evidence.

Consistent with the review examiner’s credibility assessment, the Consolidated Findings confirm that the claimant repeatedly brought his requests for time off or schedule changes to the Store Manager. *See Consolidated Findings ## 7, 11, 12, 19, 21, and 26.* Further, while not in the Consolidated Findings, the claimant’s uncontested testimony from the initial hearing was that he understood the Store Manager had supervisory authority over the Service Technical Manager.¹ Thus, it is self-evident that the claimant understood that the Store Manager made the final decision about requests for either time off or schedule changes.

Despite this understanding, the claimant did not speak with the Store Manager about his childcare issues or ask the Store Manager for either a change in schedule or additional time off prior to separating. *Consolidated Findings ## 32, 33, and 36.* From previous discussions with the Service Technician Manager, the claimant may have reasonably believed changing his schedule again was not an option. *See Consolidated Findings ## 24 and 25.* However, as the Store Manager had repeatedly accommodated the claimant’s requests for time off and had evidenced a clear willingness to work with the claimant on schedule changes, the record does not support a conclusion that further requests for time off would have been futile. *See Consolidated Findings*

¹ The claimant’s testimony in this regard is part of the unchallenged evidence introduced at the hearing and placed in to 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).

11, 12, 14, 19, 21, 26, and 27. Under such circumstances, the claimant has not shown that he took reasonable steps to preserve his employment.

We, therefore, conclude as a matter of law that the claimant did not meet his burden to show that he separated for good cause attributable to the employer or urgent, compelling, and necessitous circumstances as meant under G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is denied benefits for the week of May 14, 2023, 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 - April 10, 2024



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

LSW/rh