**Shipping facility worker became pregnant with a 10 lb. lifting restriction and informed the employer. When the only accommodation was an offer to work part-time, which would have cut the claimant’s wages in half, the claimant resigned. Held the claimant had an urgent, compelling, and necessitous reason to quit.**

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**Issue ID: 0014 5404 50**

**BOARD OF REVIEW DECISION**

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Marielle Abou-Mitri, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her position with the employer on October 4, 2014. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 28, 2014. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on December 16, 2014. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer, or urgent, compelling, and necessitous reasons, and thus, was 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 claimant’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 claimant’s appeal.

The issue before the Board is whether the review examiner’s conclusion that the claimant did not have good cause attributable to the employer or urgent, compelling, and necessitous reasons for resigning is supported by substantial and credible evidence and is free from error of law, where the employer’s response to the claimant’s medical need for a lifting restriction was merely to offer part-time employment.

Findings of Fact

The review examiner’s findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked full time as a retail associate for the employer, a franchise shipping store, from February 14, 2014 to October 4, 2014.
2. The claimant’s direct supervisor was the owner. The employer is a small business that is run by the owner and his wife.
3. During the claimant’s initial training the claimant felt belittled. The owner yelled at the claimant in front of people and stated, “You’re not capable. Maybe you should find another job.” The owner and his wife would give the claimant rude looks if she asked a question or if she was not doing something correctly. The claimant trained herself and learned on the job to avoid being disrespected by the owner and his wife.
4. The owner and his wife disrespected and were rude to all their employees.
5. Once the claimant became more experienced in her job, the owner and his wife no longer disrespected her.
6. The claimant often worked alone in the store and had to carry boxes weighing up to seventy pounds.
7. In August 2014, the claimant was asked by the owner to begin working overtime, at 48 hours per week. The claimant agreed. Prior to working overtime, the claimant was paid per hour. In order to avoid paying the claimant an overtime rate, the owner switched the claimant to a salaried employee. The claimant complained to the owner but the owner said there was nothing he could do.
8. On October 4, 2014, the claimant discovered that she was pregnant. The claimant had a history of miscarriages and was restricted to lifting anything over 10 pounds by her doctor.
9. The claimant contacted the owner immediately and told the owner that she was pregnant and could not lift heavy items. The owner asked the claimant if she could work a part time schedule. The claimant declined the offer to work part-time and did not request any other accommodations. The claimant indicated that she was resigning effective immediately.
10. The claimant did not request a leave of absence.
11. The claimant filed a claim for unemployment benefits on October 10, 2014, effective October 5, 2014.

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. 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 has not carried her burden in this case to show that she is eligible to receive benefits.

It is undisputed that the claimant quit her employment. Therefore, the claimant’s qualification for benefits is governed by 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.

Under this section of law, the claimant has the burden to show that she is eligible for benefits. The claimant contends that she was mistreated by the employer, and the findings indicate that the owners had been disrespectful to the claimant earlier in her employment. However, the findings also reflect that the owners were generally rude to their employees and that the claimant had actually managed to gain respectful treatment by the time she left her job. Therefore, she has not met her burden to establish that the employer’s treatment gave her good cause for leaving her position.

The question then becomes whether the claimant has establish that she quit her job involuntarily, for urgent, compelling, and necessitous reasons. A ‘wide variety of personal circumstances’ have been recognized as constituting ‘urgent, compelling and necessitous’ reasons under the above statutory provision. 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). The Appeals Court in Norfolk County Retirement System, 66 Mass. App. Ct. at 765, discussed the legal standard to be applied as to whether the separation is urgent and necessitous, as follows:

In determining, pursuant to G. L. c. 151A, § 25(e), whether a claimant’s personal reasons for leaving a job are so compelling as to make the departure involuntary, the inquiry proceeds on a case-by-case basis. “The nature of the circumstances in each individual case, the strength and the effect of the compulsive pressure of external and objective forces must be evaluated, and if they are sufficiently potent, they become relevant and controlling factors.” … There should not be “too narrow a view [taken] of the factors entering into the determination whether reasons are ‘urgent, compelling and necessitous’ within the meaning of the statute.” … Benefits are not to be denied to those “who can prove they acted reasonably, based on pressing circumstances, in leaving employment.” . . .

(Citations omitted). A serious medical condition which severely restricts the claimant’s ability to perform her job is one of those personal circumstances.

In this case, the claimant had a history of difficult pregnancies and with the new pregnancy her medical professional had restricted her from lifting anything over 10 pounds. As reflected in Finding # 6, the claimant often worked alone at the store, a shipping facility, and was required to lift or move boxes weighing up as much as 70 pounds. When she learned that her pregnancy restricted her from lifting more than 10 pounds, the claimant approached her employer with that specific information. *See* Finding # 9. The employer’s only response was to offer to reduce her hours. The claimant rejected this suggestion, which would have cut her pay without necessarily eliminating the need for heavy lifting during the hours she was at work, and resigned her employment. Under these circumstances, the claimant reasonably concluded that her medical condition prevented her from performing her job, and we conclude that this situation was urgent, compelling, and necessitous within the meaning of G.L. c. 151A, § 25(e).

However, even if a claimant is faced with compelling circumstances, she cannot qualify for benefits unless she has made reasonable attempts to keep her job, or unless such attempts would have been futile. We conclude that the claimant has satisfied this requirement. She quit her job only after explaining her medical circumstances to her employer. *See* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 336 (1979); Norfolk County Retirement System, 66 Mass. App. Ct. at 766. Her employer proposed a solution that would have substantially reduced the claimant’s income without solving the lifting problem. The review examiner implies that the claimant should have sought a leave of absence, which might have preserved her job. We note that a claimant is not required to request a leave of absence, but merely to show a reasonable attempt to correct her employment problem. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89 (1984). It is not necessary for a claimant to explore every possibility or prove that she had no choice but to resign. Norfolk County Retirement System, 66 Mass. App. Ct. at 766. Most notably, an extensive leave of absence without pay in this situation, where a pregnant claimant is restricted from performing her current job but still capable of performing many jobs, would still leave her in unemployment and eligible for benefits. *See* Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980).

We, therefore, conclude as a matter of law the claimant has carried her burden to show that she left her position involuntarily for urgent, compelling, and necessitous reasons.

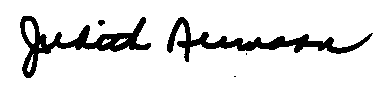
The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending October 4, 2014, and for subsequent weeks if otherwise eligible. Given the claimant’s medical restriction, we will takes steps to have the agency investigate the claimant’s eligibility for benefits, under G.L. c. 151A, § 24(b).

We also note that the employer’s account should not be charged for any benefits paid to the claimant, consistent with G.L. c. 151A, § 14(d)(3).

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**BOSTON, MASSACHUSETTS** Paul T. Fitzgerald, Esq.

**DATE OF DECISION -** **August 17, 2015** Chairman



Judith M. Neumann, Esq.

Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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](http://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.

SPE/rh