

THE COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
 BOARD OF REVIEW

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**BOARD OF REVIEW
 DECISION**

In the matter of:

Appeal number **BR-115452-OP**

CLAIMANT APPELLANT:

EMPLOYING UNIT APPELLANT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. P. Sliker, 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 his position with the employer on April 22, 2009. He continued to receive benefits through the week ending October 31, 2009 based on a claim he had filed after a separation from a prior employer, effective November 2, 2008. On December 17, 2009, the agency sent the claimant a Notice of Redetermination and Overpayment, notifying him that he was overpaid \$19,447 and not eligible for benefits for the weeks ending April 25, 2009 through October 31, 2009. The notice also informed him that he had to return the overpaid benefits to the unemployment fund with interest. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's redetermination and denied benefits in a decision rendered on August 18, 2010.¹

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) and 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take additional testimony and evidence regarding the claimant's efforts to preserve his employment.

¹ This hearing was a de novo proceeding ordered by the Board in April, 2010. The claimant had previously appealed a prior decision rendered by a different hearing officer, but due to the incompleteness of the record, we ordered a new hearing before a new hearing officer.

Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant quit his job involuntarily for urgent, compelling, and necessitous reasons due to his need to care for his children, where a leave of absence would not have solved his childcare issues and the claimant did not think that any other accommodation or option would have been available or helpful.

Findings of Fact

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

1. The claimant worked as a sheet metal installer for the employer, a heating and air conditioning contractor, from 04/13/09 until 04/22/09 when he became separated.
2. The claimant left the employer to care for his children.
3. The claimant's benefit year began on 11/02/08 after he was separated from a prior employer under non-disqualifying circumstances.
4. The claimant has two children. The claimant has a daughter who was four years old, and a son who was seven years old, at the time of his employment.
5. When the claimant was separated from his prior job he and his wife decided that she would concentrate on her full-time job and that he would be responsible for child care and look for work. The claimant's son was in grade school. The claimant's daughter was in daycare and they decided that they would take her out of daycare while the claimant was looking for work.
6. The claimant had worked as a sheet metal installer before his employment with the employer.
7. On or about the beginning of April, 2009 the claimant saw an online posting for a job with the employer and he contacted the owner. The claimant interviewed with the owner. The owner told the claimant that some of the work he would be doing would be geothermal and solar. The claimant had not previously done that type of work and he was interested. He decided to work for the employer.
8. The employer policies include paid time off and other benefits after a 90 day probationary period. (Exhibit BR6)
9. The employer does not have a leave of absence policy.
10. The claimant was scheduled to work from 7 AM to 3:30 PM.
11. The employer does not have any other shifts.

12. The employer does not have any part-time positions.
13. The claimant found a daycare for his daughter.
14. The school district that the claimant's son is in requires children to be met by an adult at their school bus stop. The claimant arranged to have his son picked up by a neighbor whose son went to school with him.
15. After the claimant's daughter began daycare she complained about it. She told her parents that she did not want to participate in the daycare. The claimant went to the daycare and observed that it was not as clean and well kept as other daycare facilities they had used. The claimant and his wife felt stressed by their daughter's complaints.
16. The claimant also learned that the neighbors who were meeting his son at the bus stop were moving out of the area.
17. After the claimant began work for the employer he was not assigned to work on any geothermal or solar jobs. The claimant was also assigned to work with employees who he had difficulty communicating with because they did not speak English. Workers also informed the claimant that they were afraid of the owner and that there was a lot of turnover at the employer. On the claimant's last day of work he overheard a project manager/salesman for the employer tell other employees that he was going to assign the claimant "every shit job that comes down the pike."
18. Although he was dissatisfied by the comments from coworkers and the project manager the claimant did not leave his job because of these concerns. If it were not for the claimant's child care needs he would have continued to work at the employer and look for other work.
19. The claimant spoke with his wife about continuing to work for the employer. They decided that because of their child care needs the claimant would leave his job, continue to care for their children and look for work at other hours. They decided that the claimant's wife would not leave her job because she had better benefits and a better chance for career advancement.
20. On 04/22/09 at approximately 6:30 AM the claimant went to the employer's offices and spoke with the office manager. He told her that he was leaving for personal reasons.
21. The claimant testified at the hearing that he may have told the office manager that he was leaving to care for his children but he did not have a specific recollection. The office manager testified at the hearing that the claimant did not tell him this. Her recollection was specific and is therefore considered more credible.

22. The claimant called the owner. The claimant told the owner that he was leaving for personal reasons. He did not tell the owner about his children.
23. The office manager typed a written resignation which the claimant signed. The resignation states that he is leaving due to personal matters.
24. The claimant did not ask for a leave of absence because he was planning on working at times that the employer did not operate. Also, the employer does not have a leave of absence policy. The claimant did not ask for another shift or part time work because the employer does not have another shift or part-time work.
25. A leave of absence would not have solved the claimant's child care issues because the claimant and his wife decided that the claimant would look for work at night and/or weekends, and the employer does not have this type of work.
26. The claimant did not request any other accommodation because he did not think any would be available.
27. The claimant received unemployment benefits in the amount of \$19,447.00 for the 28 weeks ending 04/25/09 through 10/31/09.
28. On 12/17/09 the DUA issued the claimant a redetermination denying him benefits under Section 25(e)(1) of the law. He was found to be overpaid in the amount of \$19,447.00 for the weeks ending 04/25/09 through 10/31/09 in accordance with Section 71 of the law.
29. The CAU found that the overpayment was due to misrepresentation of facts and subject to a 12% annual percentage rate interest charged on the unpaid balance in accordance with Section 69(a) of the Law.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

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 . . .

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

. . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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 both of these sections of law, the claimant has the burden to show that he is entitled to benefits. Following the initial hearing, the review examiner concluded that the claimant had not carried his burden under either section.

We agree that the claimant did not quit for good cause attributable to the employer. The review examiner found that the claimant left his job to care for his children and that, even though he was not totally satisfied with his job responsibilities, he would not have quit but for the childcare issues. Indeed, there is not substantial evidence in the record to conclude that the employer could have done anything to assist the claimant with the childcare. It was an entirely personal reason for leaving his job.

This case is more appropriately analyzed under G.L. c. 151A, § 25(e). Although the review examiner initially concluded that the claimant did not show that he made attempts to preserve his employment, and, thus, could not be considered to have left involuntary for urgent, compelling, and necessitous reasons, we remanded the case to obtain more information about his efforts to preserve his job. After reviewing the record of the remand hearing and the consolidated findings of fact, we conclude that the claimant has carried his burden to show that he quit his job 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)(1), which may render involuntary a claimant’s departure from work.” Norfolk County Retirement System v. Dir. of Dep’t of Labor & Workforce Dev., 66 Mass. App. Ct. 759, 765 (2009), *citing* Reep v. Comm’r of Dep’t of Employment & Training, 412 Mass. 845, 847 (1992). This includes domestic responsibilities, including child care. Manias v. Dir. of Div. of Employment Sec., 388 Mass. 201, 208 (1983). To evaluate whether the claimant’s reasons for leaving work were urgent, compelling, and necessitous, we must examine the individual circumstances 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, 412 Mass. at 848. “Benefits are not to be denied to those ‘who can prove they acted reasonably, based on pressing circumstances, in leaving employment.’” Norfolk County Retirement System, 66 Mass. App. Ct. at 765, *quoting* Reep, 412 Mass. at 851.

Pursuant to this standard, we agree with the review examiner’s initial evaluation that the claimant’s concerns about his children were reasonable under the circumstances. The claimant has two young children, and, although the claimant is married, he is primarily responsible for dealing with the day-to-day childcare issues, including school and transportation. The claimant’s son’s school district requires that a child be met by someone when he is dropped off, and the claimant was unable to do so while working for the employer. Prior to the start of his job with this employer, the claimant arranged for his son to be picked up at the bus stop by neighbors.

However, while working for the employer, the claimant learned that the neighbors were moving away. The claimant was now required to pick up his son himself.

In addition, around the same time, the claimant found that the daycare facility his daughter attended was not satisfactory. His daughter was unhappy with the facility, and no longer wanted to attend. The claimant observed first-hand that the daycare was not as clean and well-kept as other daycare facilities the claimant's family had used in the past. After consulting with his wife, and taking into account the issues with both of his children, the claimant decided to leave his job to care for his children while also looking for work which could accommodate his need to take care of them.

We believe that this decision was reasonable and that the claimant has done enough to show that he attempted to preserve his employment or that such attempts would have proved to be futile. See Kowalski v. Dir. of Div. of Employment Sec., 391 Mass. 1005, 1006 (1984). He did not need to establish that he had no choice but to resign. See Norfolk County Retirement System, 66 Mass. App. Ct. at 766. He was not *required* to take a leave of absence, see Guarino v. Dir. of Div. of Employment Sec., 393 Mass. 89, 94 (1984), especially here where the employer had no leave of absence policy. He needed only to show that his actions were reasonable under the circumstances. In this case, the employer had no part-time positions which could have been available for the claimant, a leave of absence would not have solved the claimant's child care issues, and the claimant knew of no other accommodation which could have helped him. Based on these circumstances, the claimant has carried his burden to show that he left his job involuntarily, under G.L. c. 151A, § 25(e) due to his need to care for his children.

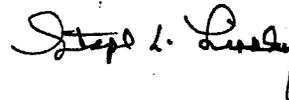
We, therefore, conclude as a matter of law that the claimant quit her job for urgent, compelling, and necessitous reasons.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the weeks ending April 25, 2009 through October 31, 2009, if otherwise eligible. He has not been overpaid. In accordance with G.L. c. 151A, § 14(d)(3), the costs of benefits paid to the claimant on this claim shall not be charged to the employer's account.

BOSTON, MASSACHUSETTS
DATE OF MAILING - April 4, 2012



John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT-May 4, 2012