COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
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Boston, MA 02114

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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR-83789-CTRM**

CLAIMANT APPELLANT:

[redacted]

EMPLOYING UNIT:

[redacted]

S.S. #[redacted]
Office #11

EMP. #[redacted]

On December 14, 2001, the Fitchburg Division of the District Court Department remanded this case, Civil Action No. 0116 -CV-0451, to the Board of Review. On May 13, 2002, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Deputy Director's representative on August 23, 2001, and March 11, 2002.

On October 4, 2001, the application of the claimant for review by the Board of Review of the decision of the Deputy Director was denied in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The claimant exercised her right of appeal to the courts under section 42 of the same law. The case was remanded by the Fitchburg District Court to take additional evidence. On December 27, 2001, the Board remanded the case to the Deputy Director for the taking of the additional evidence and the issuance of consolidated findings of fact. The case was returned to the Board on March 26, 2002.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The Deputy Director's decision, dated August 28, 2001, concluded:

> Only the claimant appeared at the hearing. The employer sent a statement in lieu of appearance. The facts reflect the claimant's uncontraverted and uncontravened testimony.
>
> The employer did not discharge the claimant from her employment. The claimant did not have a reasonable belief of discharge. Therefore, Section 25(e)(2) is not an issue in this matter.
>
> The claimant's competency to perform her position did not become an issue at the hearing or a reason for separating from employment.
>
> Where a claimant quits employment, the claimant has the burden of proof to show

that she left employment for good cause attributable to the employer under provisions of s. 25(e)(1) or for an urgent, compelling and necessitous reason under provisions of s. 25(c). The claimant has not met her burden of proof.

The claimant did not quit her employment with good cause attributable to the employer. The claimant's reasons for leaving employment deal with a situation outside of the workplace. Therefore, s. 25(e)(1) does not apply to the claimant's separation.

Accordingly, the claimant has to show that she left employment for an urgent, compelling and necessitous reason under provisions of s. 25(e). The claimant quit her employment on February 23, 2001 with an effective date of June 1, 2001. The claimant quit employment based upon her commute and her son's commencement of kindergarten in September 2001.

In this separation, the claimant decided to quit her employment in February 2001. The claimant made the effective date of her leaving June 1, 2001. The claimant's child does not begin kindergarten until September 2001. The employer had work for the claimant to perform. The claimant's decision to leave employment six months before the start of kindergarten has to receive consideration a(sic) premature. This does not represent an urgent, compelling and necessitous situation.

The claimant is disqualified from the receipt of benefits for the week ending June 9, 2001 and until she has had eight weeks of work and in each week has earned an amount that is equal to or greater than her benefit amount.

Section 25(e) of Chapter 151A of the General Laws is pertinent and provides, in part, as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for-

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount 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,. . .

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.

The Deputy Director's representative held a hearing on August 23, 2001. The claimant was present. The employer did not appear. The Deputy Director's representative held a court ordered remand hearing on March 11, 2002. The claimant was present. The employer did not appear. The Deputy Director's representative then issued the following consolidated findings of fact:

1. The claimant applied for benefits on June 6, 2001. The Division disqualified the claimant from the receipt of benefits on July 23, 2001. The claimant appealed on July 31, 2001.

2. The claimant quit her employment. The claimant quit her employment, because she knew that she had childcare only until June 1, 2001.

3. The claimant worked for the employer from October 1989. In its present form the claimant worked for the employer from May 27, 1994 to June 1, 1001. The claimant worked as a sales associate since 1994.

4. The claimant reported to the same supervisor since 1994. The claimant worked from 9:30 a.m. to 4:00 p.m. during the winter. The supervisor had changed the claimant's hours in order to accommodate her commute during the winter.

5. The claimant and the father of her child lived in Lunenburg, MA since sometime in 1997. The claimant gave birth to her child on December 8, 1995. She returned to work in March 1996. She arranged childcare at a location in Framingham, MA.

6. The claimant lived in Framingham, MA before moving to Lunenburg, MA. The claimant and the father of her child worked at the same company and the same location in 1997. They commuted to work together and cared for the child while traveling together.

7. Between March 1996 to January 2001, the claimant had taken her child to daycare in Framingham, MA. The commute from Lunenburg to the childcare provider in Framingham took approximately one-hour and covered about 49 miles. The claimant then had approximately a one-half mile distance to work.

8. Commencing in October or November 2000 the claimant had her childcare provided on Fridays by her sister. The claimant's sister lives in Hopkinton, MA.

9. In November or December of 2000 the father of her child transferred to Southboro, MA. He travels a great deal for his position. They no longer commuted together.

10. By the end of January 2001, the claimant removed her child from the daycare provider in Framingham, because he had outgrown the location. The claimant's sister agreed to care for the child between February 1, 2001 and May 31, 2001. She did not want to care for the child during the summer.

11. The claimant needed about one hour to cover the 40 miles to her sister's home in Hopkinton, MA. The claimant then had another 12 miles to work. This took approximately another one-half hour.

12. The claimant's sister began to meet her near Route 9 in mid-February 2001. This saved the claimant traveling approximately three miles from Route 9 to the house in Hopkinton and back to Route 9. The amount of time saved remains undeterminable.

13. The claimant gave an oral notice that she would quit employment. The claimant gave the notice on February 23, 2001. The claimant reduced her resignation to writing on the same date. The claimant made her notice effective for June 1, 2001. The claimant worked out her notice period.

14. The claimant gave notice because she mentioned to her supervisor that she would have to leave in the fall. The claimant expected to enroll her child in kindergarten in Lunenburg, MA. Kindergarten runs between 11:30 a.m. and 2:30 p.m.

15. The supervisor wanted a firm date of separation. The claimant knew that she had child care through May 31, 2001. She used the end of child care as the date that she needed to quit employment.

16. The claimant also gave notice of more than three months so that the employer would have the opportunity to replace her before she left this employment. The employer had work for the claimant to perform after June 1, 2001.

17. The claimant did not seek a leave of absence in order to resolve her daycare and schooling issues. The claimant did not expect a leave of absence to prove helpful.

18. The claimant spoke to her supervisor about working certain days of the week or certain hours of the week. The claimant's supervisor did not pursue this option with management. The claimant did not pursue this option with management or with human resources.

19. The claimant did not seek daycare in the Lunenburg area, because she did not expect a daycare provider to remain open long enough to allow her to commute from work in time. The claimant generally got out of work at 5:30 p.m. She would then arrive home at approximately 7:00 p.m. She fed her child in the car.

20. The claimant did not seek assistance from the school department in Lunenburg, MA.

21. No performance issues existed with the claimant's work.

22. Credibility Assessment: All testimony in both sessions comes from the claimant without conflicting testimony from the employer. The two sessions present a larger and broader picture of the claimant's decision making process to give notice and leave employment

After reviewing the record, the Board adopts the consolidated findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes as follows:

The claimant's leaving of work was due to lack of childcare. The claimant lived in Lunenburg and worked in Framingham, an approximate forty-nine mile commute from her home. The claimant brought her child to a daycare provider near the employer's Framingham location. By the end of January 2001, the claimant's child had outgrown the services offered by the daycare provider. The claimant's sister cared for the child between February 1 2001, and May 31, 2001, but she was not willing to continue providing care following that date, through the summer. Then, beginning in September 2001, the claimant's child would be attending kindergarten from 11:30 A.M. to 2:30 P.M. in Lunenburg. He would require other daycare arrangements during both the hours before and the hours after kindergarten each day. The claimant generally worked until 5:30 P.M. and did not arrive home until about 7 P.M.

When the claimant informed the employer on February 23, 2001, of her resignation effective June 1, 2001, she knew that she would have no childcare as of this date. She reasonably believed that childcare from another daycare provider would not be feasible, and a leave of absence would not be helpful. The Board, therefore, concludes that the claimant's leaving of work, under these circumstances, although without good cause attributable to the employer, was involuntary due to reasons of an urgent, compelling and necessitous nature within the meaning of Section 25(e) of the Law, quoted above.

Section 14(d)(3) of Chapter 151A of the General Laws is also pertinent and provides as follows:

> 14 (d) The commissioner shall determine the charges and credits to each employer's account, as follows:

(3) . . . Benefits which, in accordance with the provisions of this paragraph, would be charged to an employer's account shall not be so charged but shall be charged to the solvency account in any case where no disqualification is imposed under the provisions of clause (1) of subsection (e) of section twenty-five because the individual's leaving of work with such employer, although without good cause attributable to the employer, was not voluntary.

The decision of the Deputy Director is modified. The claimant is entitled to benefits for the week ending June 9, 2001, and subsequent weeks, if otherwise eligible.

Francis J. Holloway
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - MAY 16 2002

Thomas E. Gorman
Member

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

LAST DAY – JUN 18 2002

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