COMMONWEALTH OF MASSACHUSETTS
DIVISION OF UNEMPLOYMENT ASSISTANCE
BOARD OF REVIEW
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Victory by
Lee Dunham,
Senior Volunteer
+ Kate Fitzpatrick
NHH Intern
at Greater Boston
Legal Servs

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: BR-94360

CLAIMANT APPELLANT:

S.S.
Office #02

EMPLOYING UNIT:
Verizon New England, Inc.
c/o Jon-Jay Associates, Inc.
P.O. Box 182523
Columbus, OH 43218

EMP. #00-911000

On November 5, 2004, in Boston, Massachusetts, the Board reviewed the written record and recordings of the testimony presented at the hearings held by the Commissioner's representative on July 6, 2004, and October 6, 2004.

On August 31, 2004, the Board allowed the claimant's application for review of the Commissioner's decision in accordance with the provisions of section 41 of Chapter 151A of the General Laws, the Massachusetts Employment and Training Law (the Law). The Board remanded the case to the Commissioner to take additional evidence and to make further findings of fact. The Commissioner returned the case to the Board on October 8, 2004.

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

The appeal of the claimant is from a decision of the Commissioner which concluded:

> The claimant was not discharged from her job. Therefore, Section 25(e) (2) does not apply to this case.
>
> In accordance with Section 25(e)(1), the burden of proof is upon the claimant to establish by substantial and credible evidence that she left her job with good cause attributable to the employer or for urgent, compelling and necessitous reasons.
>
> In this case, the claimant did not meet the burden required by Law.
>
> The claimant decided to participate in the Program because she believed that two of the offices (out of five or six) would be closing and she thought she would be without a job. The claimant's belief that she would be without a job was not reasonable.
>
> This examiner accepted the claimant's testimony that two of the five or six offices would be closing. Indeed, management informed the claimant of this. Although the claimant believed that the chance of her office closing was as good as that of other offices being closed, according to her further testimony, she did not know which offices would be closing. And, although the claimant believed that taking the program and "leaving with something" was better than having her office close and losing her job within one week, substantial and credible evidence which could support a finding that the Greenfield office would be closing has not been presented.

Finally, *if* the claimant's office closed, a commute to another office may have been untenable for the claimant, as indicated above, substantial and credible evidence that the claimant's office was one of the offices selected for closing was not presented.

This examiner considered the claimant's testimony that the situation with her abusive ex-husband helped her in the decision to accept the Program. However, this situation had been ongoing since at least 1995 and the claimant testified that she had not thought about leaving her job because of this as she was a single mother and had to keep her job to support her children.

Based on all of the above, it is concluded that the claimant has failed to meet her burden of proof in establishing that her leaving of work was with good cause attributable to the employer or for urgent, compelling and necessitous reasons.

Accordingly, the claimant is subject to disqualification and is denied benefits.

The claimant is denied benefits for the week ending November 29, 2003 and until she has had eight weeks of work and in each week has earned an amount equal to or in excess of her weekly benefit rate.

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.
> >
> > An individual shall not be disqualified from receiving benefits under this clause if the individual establishes to the satisfaction of the commissioner that the reason for the individual's leaving work was due to domestic violence, including:
> >
> > > (1) the individual's reasonable fear of future domestic violence at or on route to or from the individual's place of employment;
> > >
> > > (2) the individual's need to relocate to another geographic area in order to avoid future domestic violence;
> > >
> > > (3) the individual's need to address the physical, psychological and legal effects of domestic violence;
> > >
> > > (4) the individual's need to leave employment as a condition of receiving services or shelter from an agency which provides support services or shelter to victims of domestic violence;
> > >
> > > (5) any other respect in which domestic violence causes the individual to reasonably believe that termination of employment is necessary for the future safety of the individual or the individual's family.

The Commissioner's representative held a hearing by telephone on July 6, 2004. Both parties participated. After reviewing the record, the Board remanded the case to the Commissioner to take additional evidence and to make further findings of fact. The Commissioner's representative held a remand hearing by telephone on October 6, 2004. Both parties participated. The Commissioner's representative then issued the following consolidated final findings of fact:

1. The claimant worked for the employer from May 15, 1995 until November 22, 2003, when she left her job under an employer initiated separation program (the "Program").

2. Throughout her employment, the claimant was employed full-time, as a directory assistance operator in Greenfield. The claimant was the member of a union.

3. As a directory assistance operator, the claimant was required to work any and all shifts. Her schedule was announced two weeks in advance.

4. When she worked for the employer, the claimant lived in Turners Falls, about a six mile one-way commute to Greenfield, where she worked.

5. The claimant is a single mother, raising three minor children.

6. Because the claimant's ex-husband was abusive, she had restraining orders against him, dating at least from 1995, when she started working for the employer. The claimant's ex-husband had not been complying with the orders.

7. Since 1995, when the claimant had restraining orders against her ex-husband, he had a history of violating those orders. In February 2002, the claimant's ex-husband was released from jail. Beginning in about November 2002, when the ex-husband was drinking and taking drugs, he began to harass the claimant. The harassment continued through at least November 22, when the claimant left her job.

8. Because of her ex-husband's conduct, the claimant is very involved with her children to protect them from their father. Among other things, the claimant brings her children to and from school.

9. Before the Program was announced, the claimant had not thought about leaving her job because of her ex-husband because she was a single mother and had to keep her job to support her children. In addition, there was in effect a divorce decree between the claimant and her ex-husband whereby the claimant was prohibited from leaving Massachusetts with her children. At the time the claimant relocated to Florida on December 7 (see below) that provision was in effect.

10. The claimant was aware that because of competition, technology and wireless systems, the work for directory assistance operators was declining.

11. The employer declared a "surplus", which meant that there were more employees than work. In accordance with the union contract, declaring a "surplus" allows the employer to offer enhanced separation programs.

12. In September 2003, an agent of the employer informed employees that there would be a voluntary separation program and that if employees left their jobs under the program, that they would be entitled to receive unemployment benefits.

13. In late October or early November 2003, the employer formally announced a voluntary separation program for employees (the "Program").

14. Participation in the Program was voluntary.

15. Under the Program, employees who left their jobs received $2,200.00 for each year of service.

16. The employer reserved the right to reject elections to participate in the Program. In a letter dated October 27, 2003, the employer notified the claimant, "Additionally, if you voluntarily elect to leave under this program and you are accepted, you'll receive...".

17. Employees had until November 14, 2003 to elect to participate in the Program.

18. The claimant elected to participate in the Program on or about November 6, 2003.

19. Management did not limit the kind of information managers could give employees regarding the separation package.

20. There were about five or six offices in the area where the claimant worked.

21. Before the claimant elected to participate in the Program, management had told employees, including the claimant that two of the offices would be closing. Employees, including the claimant, did not know which offices would be closing. The claimant believed that the chance of her office closing was as good as that of other offices being closed.

22. The claimant understood that offices could be closing by the end of 2003.

23. The closest office to Greenfield (where the claimant worked) was in Gardner, about a thirty five to forty mile and one hour each way commute for the claimant. Had the claimant been transferred to an office that was a one hour each way commute, the claimant would not be able to be involved with the care of her children, as she needed to be.

24. Before deciding to participate in the Program, the claimant did not consult management concerning her future status because they already had informed her about the office closings and management did not have any other information about the future status of the claimant's job.

25. The claimant decided to participate in the Program because she believed that two of the offices (out of five or six) would be closing and she thought she would be without a job. In making her decision to participate in the Program, the claimant also considered the fact that her abusive ex-husband, against whom she had had a restraining order since at least 1995 (when she started working for the employer), was not complying with the most current restraining order.

26. The claimant believed that taking the program and "leaving with something" was better than having her office close and losing her job within one week, which she believed would occur had the employer decided to close the Greenfield office.

27. At the time the Program was announced, the claimant had three children living at home. They were ages 18, 17 and 15.

28. If the Greenfield office was closed requiring the claimant to transfer to another office farther from her home, the claimant would not have had any alternatives in getting her children to and from school and activities and otherwise providing care for her children. This was the case because there was, since 1995, usually a restraining order in effect against the claimant's ex-husband, where he was not permitted to contact the children or be at their schools. He would occasionally violate the restraining orders by appearing at their schools. The claimant feared for her children's safety if she was not able to bring them to and from school and other activities because she feared that her ex-husband would violate the orders and take the children.

29. The claimant had a friend who lived in Florida. Because of her ex-husband's harassment, in the summer of 2003, the claimant asked the employer for a transfer to Florida. The employer could not transfer the claimant to Florida.

30. After the claimant elected to participate in the Program, she had the right to rescind her election. The rescission date was initially November 10, 2003. On November 7, 2003, the rescission date was extended until November 14, 2003.

31. When the employer and the claimant's union were negotiating the union contract in 2003, the claimant had heard that the employer was seeking to negotiate the ability to lay off anyone with less than ten years of seniority service due to a surplus of union employees. The claimant became aware of this from the union in August 2003 during the negotiations. The claimant was not aware of how this issue was resolved prior to electing to leave under the Program or the election rescission date deadline of the Program.

32. In September 2003, the claimant became aware that the employer was not going to layoff employees, but instead was going to close offices.

33. Prior to electing to leave under the Program or the election rescission date, the claimant was not aware of the specific union contract provisions (which would prohibit involuntary layoffs of union employees hired before August, 2003, and which would prohibit the employer from relocating union employees to employer facilities located more than 35 miles from their current workplace in the event that their current workplaces were closed).

34. The employer did not provide written documentation of the above-referenced provisions of the union contract effective in August 2003.

35. If the employer closed the Greenfield office, the claimant would not have been involuntarily separated. She would have been transferred to another location. The employer would carry out the transfer based on seniority.

36. After she left her job with the employer, the claimant relocated to Englewood, Florida. She relocated on December 7, 2003. She relocated because she did not have a job and she wanted to get out of Massachusetts because her husband was harassing her.

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

Under Massachusetts General Laws, Chapter 151A, §25(e), the burden is upon the claimant to establish by substantial and credible evidence that she left for good cause attributable to the employer or its agent, or for urgent, compelling and necessitous reasons. The claimant has met her burden.

The claimant has presented substantial and credible evidence that she left for urgent, compelling and necessitous reasons when she elected to leave under the employer initiated separation program (the "Program"). Since 1995, the claimant has had restraining orders against her ex-husband, and he has a history of violating those orders. Beginning in November, 2002, the ex-husband was drinking and taking drugs, and he was harassing the claimant, which continued at least until the claimant left her job. In the summer of 2003, the claimant asked the employer if she could be transferred to Florida (where a friend was living) because of her ex-husband's harassment. The employer could not transfer the claimant to Florida.

In September, 2003, the claimant became aware that the employer would be closing offices by the end of 2003, and that two of the five or six offices in the claimant's area would be closed. The claimant was concerned that her office in Greenfield would be closed. The closest office to Greenfield was in Gardner, Massachusetts, about thirty-five to forty miles from her home and an hour commute each way for the claimant. If the claimant were transferred to an office requiring a commute of such length, she would not be able to be as involved with the care of her children as she needed to be. The claimant feared that her ex-husband would violate the restraining orders against him and appear at the schools and take the children if she were not bringing them to and from school and other activities. The claimant would not have had any alternatives in getting her children to and from school and activities and otherwise providing care for her children.

Because the claimant felt that she could not take a transfer to an office requiring an hour commute each way due to the above issues with her ex-husband and her children, the claimant believed that she would lose her job within a week if the employer decided to close the Greenfield office. Due to her situation, the claimant elected to leave under the Program offered by the employer. After her separation, the claimant and her children relocated to Florida on December 7, 2003, because she wanted to get out of Massachusetts, as her ex-husband was still harassing her. Under such circumstances, the claimant has established by substantial and credible evidence that her reasons for leaving were of such an urgent, compelling and necessitous nature as to make her separation involuntary. Therefore, the claimant is not subject to the disqualifying provisions of Section 25(e) of the Law cited above.

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

> **Section 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 Board modifies the Commissioner's decision. The claimant is entitled to benefits for the week ending November 29, 2003, and subsequent weeks, if otherwise eligible.

Franics J Holloway
Chairman

Donna A. Freni
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING - NOV 10 2004

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

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LAST DAY - DEC 10 2004