

**Claimant, who had previously been offered a leave of absence to address family-related attendance issues, failed to make reasonable efforts to preserve her job, where she quit without discussing her need to take time off for surgery with members of the employer's management team, who had previously offered her a leave of absence.**

**Board of Review  
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**Issue ID: 0021 5369 77**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by Eric Walsh, 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 resigned from her position with the employer on September 20, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 27, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on June 21, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant involuntarily separated from employment for urgent, compelling, and necessitous reasons and, thus, was entitled to benefits, pursuant to 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 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.

The issue before the Board is whether the review examiner's conclusion, that the claimant, who quit because she was scheduled for arm surgery and would need light duty work for about four weeks thereafter, did so for urgent, compelling, and necessitous reasons and made reasonable efforts to preserve her job before quitting, is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked full-time for the employer, a nursing and rehabilitation facility, from March 21, 2016, to September 16, 2016, as a Certified Nursing Assistant.
2. In June of 2016, the employer met with the claimant to discuss her poor attendance. The employer offered a personal leave of absence to the claimant due to her domestic circumstances as a single mother.
3. In August of 2016, the employer again met with the claimant to discuss her poor attendance.
4. Around September 6, 2016, the claimant learned that she was scheduled for surgery on her arm for September 27, 2016. The claimant anticipated a recuperation period of up to one and one-half weeks. The claimant also anticipated that she could work after that period for four [weeks] on light duty. The claimant discussed the matter with the Scheduler, to whom the claimant was frequently referred. The claimant informed the Scheduler that she will need to be off the schedule following her surgery.
5. The Scheduler asked the claimant about light duty and whether she could work when it was available, which was during the day shift. The claimant indicated that she could not due to childcare issues. The Scheduler also informed the claimant that she could not keep the claimant off of the schedule for that long (four to five weeks).
6. The claimant last worked on September 16, 2016, as the claimant was not on the schedule after that date.
7. The claimant did not discuss the matter with the Human Resources Manager, the Administrator, or the Director of Nursing.
8. The claimant did discuss the matter with a Unit Manager.
9. The Scheduler solicited the claimant for a resignation in writing and advised her to explain that it is due to her health and childcare issues.
10. On September 20, 2016, the Scheduler informed the employer that the claimant quit without notice due to transportation and childcare issues.
11. On September 21, 2016, the claimant submitted her written resignation explaining that it was due to health and childcare issues.

### 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 made reasonable efforts to preserve her job before quitting.

The review examiner awarded benefits after analyzing the claimant's separation under G.L. c. 151A, §§ 25(e) and 25(e)(1), which provide, 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 of such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under these provisions of the statute, it is the claimant's burden to establish that her separation was for good cause attributable to the employer or for urgent, compelling, and necessitous reasons. The review examiner concluded the claimant met her burden and had quit for urgent, compelling, and necessitous reasons.

However, in addition to establishing urgent, compelling, and necessitous reasons for quitting, an employee who quits also has the burden to show that she made a reasonable attempt to preserve her job, or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984). Here also, the review examiner concluded the claimant met her burden. We disagree.

The review examiner found that the claimant learned on or about September 6, 2016, that she was scheduled to have arm surgery on September 27, 2016. She anticipated a recuperation period of up to one and one-half weeks, followed by a four-week period where she would need light duty work.

The review examiner found the claimant discussed the matter with the scheduler. The scheduler asked if the claimant would be available for light duty during the day shift, which was when the employer had light duty work available. The claimant declined to work light duty work during the day shift due to child care issues, and claimed she needed to be off the schedule following her surgery. The review examiner found the scheduler told the claimant she could not keep her off the schedule for as long as four to five weeks.

The review examiner found the claimant last worked on September 16, 2016. The scheduler reported to the employer that the claimant quit on September 20, 2016, asked the claimant for a written letter of resignation, and suggested she explain that it was due to her health and child care issues. The claimant provided a written resignation note on September 21, 2016.

The review examiner concluded that the claimant made reasonable efforts to preserve her job, by discussing her circumstances with the scheduler and with a unit manager. When the scheduler claimed she could not keep the claimant off the schedule for up to five weeks, the review

examiner concluded the claimant “reasonably believed that a non-regulatory [sic] leave was unavailable to her” and further efforts to preserve were “uncalled-for” [sic]. We conclude that the review examiner’s conclusion is incorrect as a matter of law.

The review examiner also found that the employer met with the claimant in June, 2016, to discuss her poor attendance. At that time, the employer offered the claimant a leave of absence to address her “domestic circumstances as a single mother.” The employer’s administrator testified that she and the director of nurses met with the claimant on June 3, 2016, to discuss attendance issues; the claimant admitted they discussed her taking a personal leave of absence at that time. The review examiner also found that the parties met again in August, 2016, to discuss the claimant’s ongoing attendance problems.

While the employer had previously raised the possibility of a leave of absence with the claimant earlier in 2016, the review examiner found that the claimant did not discuss her impending surgery and need for time off with the administrator, the director of nurses, or the employer’s human resources manager prior to submitting her resignation. In the two weeks between receiving notice on or about September 6 that surgery was scheduled and her resignation on September 20, the claimant failed to discuss the possibility of a leave of absence (or light duty work) with any of the people who had formally met with her twice to address her attendance problems, and who had previously proposed a leave of absence to resolve her personal issues. We conclude that it was not reasonable for the claimant to merely discuss her need for time off and light duty work with the scheduler and unit manager, when more senior members of the employer’s management team had previously offered the claimant a leave of absence to resolve her personal issues.

We, therefore, conclude as a matter of law that the claimant quit without making reasonable attempts to preserve her job before quitting. She is disqualified, pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits beginning September 20, 2016, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 28, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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.

JPC/rh