

**Bus driver could not return to his regular position at the end of his leave of absence because he was not yet medically cleared to work. He could perform office work, but none was available. He was eligible for benefits due to urgent, compelling, and necessitous medical reasons.**

**Board of Review  
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**Issue ID: 0023 0455 14**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by Krista Tibby, a review examiner of the Department of Unemployment Assistance (DUA), to award the claimant benefits following his separation from employment on August 8, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm on different grounds.

On October 5, 2017, the agency initially determined that the claimant was entitled to unemployment benefits. The employer appealed and both parties attended the hearing. In a decision rendered on December 14, 2017, the review examiner affirmed the agency determination, concluding that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interests, or knowingly violate a reasonable and uniformly enforced rule or policy of the employer, and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employer's application for review.

The issue before the Board is whether the review examiner's conclusion, that the claimant is eligible for benefits after being discharged from his job, is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant is a member of a union (the Union).
2. The claimant worked full time as a bus operator for the employer, a public transportation company, from April 30, 2001, until August 8, 2017.

3. The employer maintained an expectation that employees would return to work upon the expiration of their leaves of absence. The employer maintained this expectation to ensure the employer was adequately staffed.
4. The Union and the employer maintained a collective bargaining agreement (CBA).
5. The CBA provided employees job preservation while on a leave of absence for up to six (6) months.
6. In January 2017, the claimant was diagnosed with cancer.
7. The claimant's last physical day of work for the employer was January 19, 2017.
8. On January 20, 2017, the claimant began a leave of absence under a Family Medical Leave Act (FMLA) leave of absence [sic] while being treated for cancer.
9. The claimant collected short term disability (STD) while on FMLA effective January 28, 2017.
10. Throughout the claimant's leave of absence, he met with the employer's controller (the Controller) to keep her updated about his status.
11. On April 12, 2017, the claimant's FMLA expired.
12. The claimant had not been released to return to work by his physician as of April 12, 2017.
13. On April 12, 2017, the claimant remained on a personal leave of absence under the CBA.
14. On an unknown date in June 2017, the claimant obtained a note from his physician stating he would be allowed to return to work in six (6) to eight (8) weeks. The note did not specify a date when the claimant would be released to return to work.
15. On an unknown date in June 2017, the claimant provided the employer with a copy of the note stating he would be allowed to return to work [in] six (6) to eight (8) weeks.
16. On July 19, 2017, the claimant's personal leave of absence under the CBA exhausted. The claimant was not released to return to work on July 19, 2017.

17. On July 20, 2017, the Controller sent the claimant a letter notifying him his six (6) month personal leave of absence ended on July 19, 2017. In the letter, the Controller requested the claimant have his physician complete a medical questionnaire ("the Questionnaire") about his ability to return to work by July 31, 2017.
18. On July 27, 2017, the claimant's physician completed the Questionnaire and provided [it] to the employer by fax. In the Questionnaire, the physician responded that they could not determine when the claimant was going to be able to return to his regular job duties without restrictions. The physician stated in the Questionnaire that the claimant was unable to drive at that time because of blood clots in his legs and pain in his feet. The physician also stated the claimant could work in the office if that was available.
19. The employer did not have office work available for the claimant.
20. On July 27, 2017, the claimant's doctor had not released him to return to work to his regular position.
21. During the week ending July 28, 2017, the claimant's STD exhausted.
22. On August 8, 2017, the Controller sent the claimant a letter terminating him from employment for not returning to work after his leave of absence expired.
23. The claimant did not intend to quit his job when his doctor did not release him to work in his regular position. The claimant intended to return to work when his doctor released him to return to work.
24. On September 25, 2017, the claimant provided the Department of Unemployment Assistance with a copy of the letter terminating him from employment for not returning to work when his leave of absence expired.
25. The Union President filed a Step 2 grievance with the employer on the claimant's behalf regarding his termination. The employer denied the claimant's grievance.
26. On October 6, 2017, the claimant's doctor released him to return to work without restrictions.
27. As of the hearing date, the claimant's grievance was pending arbitration.

### 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 disagree with the review examiner's legal conclusion that the claimant's separation from employment should be treated as a termination.

The review examiner analyzed the claimant's separation as a discharge under G.L. c. 151A, § 25(e)(2). However, the findings show that the claimant did not report to work after his leave of absence expired. Effectively, he quit when he failed to return back to work to perform his bus driving job. For this reason, the claimant's eligibility for benefits is more appropriately analyzed pursuant to G.L. c. 151A, § 25(e)(1), 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.

The express provisions of this section of law place the burden of proof upon the claimant.

At issue is whether the claimant's resignation is due to 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), "which may render involuntary a claimant's departure from work." 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). Medical conditions are recognized as one such reason. *See* Dohoney v. Dir. of Division of Employment Security, 377 Mass. 333, 335–336 (1979) (pregnancy or a pregnancy-related disability, not unlike other disabilities, may legitimately require involuntary departure from work). In this case, the claimant established that at the end of his leave of absence, he could not perform his regular job duties because of blood clots in his legs and pain in his feet. *See* Finding of Fact # 18. On this evidence, the claimant has established that the reason for not reporting for work was a medical condition. Thus, his reason for separating was due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e).

In order to be eligible for benefits, the claimant must show that he made a reasonable effort to preserve his employment. "Prominent among the factors that will often figure in the mix when the agency determines whether a claimant's personal reasons for leaving a job are so compelling as to make the departure involuntary is whether the claimant had taken such 'reasonable means to preserve her employment' as would indicate the claimant's 'desire and willingness to continue her employment.'" Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–98 (1974). Here, the findings indicate that the claimant did make a reasonable effort to preserve his employment. At the end of the leave of absence, the claimant was willing to return to work in a light duty

capacity. See Finding of Fact # 18. However, the employer did not have any such work available.

We, therefore, conclude as a matter of law that the claimant's separation was involuntary due to urgent, compelling, and necessitous circumstances within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed on this different legal ground. The claimant is entitled to receive benefits for the week ending August 12, 2017, and for subsequent weeks if otherwise eligible.

Benefits shall not be charged to the employer's account but shall be charged to the solvency account pursuant to G.L. c. 151A, § 14(d), if appropriate.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 31, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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.

SVL/AB/rh