

**Where the employer initially granted the claimant an informal open-ended leave of absence due to her car breaking down, but the claimant could not afford to fix it and no alternative transportation was available, the claimant separated for urgent compelling and necessitous reasons when the employer terminated the claimant's employment after two weeks.**

**Board of Review  
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**Issue ID: 0024 4495 55**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits for a discrete period of time. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant began a leave of absence from her position with the employer in December 2017. She filed a claim for unemployment benefits with the DUA, effective January 21, 2018. On February 22, 2018, the claimant was issued a determination finding her indefinitely ineligible for benefits pursuant to G.L. c. 151A, §§ 1(r) and 29. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant and her representative, the review examiner modified the agency's initial determination and, in a decision rendered on August 4, 2018, denied the claimant benefits for the period of December 24, 2017 through March 24, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not meet the definition of "unemployment" during the period in question and, thus, was disqualified under G.L. c. 151A, §§ 1(r) and 29. 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 make additional findings and to add another section of law, G.L. c. 151A, § 25(e), to the case. Both parties attended the remand hearing, held over two dates. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not meet the definition of "unemployment" pursuant to G.L. c. 151A, § 1(r), because she was on a leave of absence, is supported by substantial and credible evidence and is free from error of law. Additionally, we must determine whether the claimant involuntarily left her employment for urgent, compelling and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

### **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 full time as a bartender/expeditor/trainer for the employer, a restaurant, from 2006 until approximately January 21, 2018, when she was separated from employment.
2. The claimant worked at the employer's restaurant located in [Town A], MA.
3. The claimant resided in [Town B], MA.
4. The claimant's last physical day of work for the employer was December 22, 2017.
5. The claimant requested time off to drive to North Carolina for personal reasons. The claimant was scheduled to return to work during the first week of January 2018.
6. The employer granted the claimant's request.
7. On December 12, 2018, the claimant had her right front axle replaced on her vehicle.
8. On December 21, 2017, the claimant had her transmission replaced in her vehicle.
9. Sometime during the first week of January 2018, the claimant's vehicle broke down in Pennsylvania on her return trip home. The claimant had a friend tow her car home.
10. When the claimant returned from her trip on or about January 2, 2018, she telephoned the employer and advised the Culinary Manager she couldn't report to work because her car needed to be repaired.
11. The claimant brought her car to be repaired. The vehicle broke down the day after it was repaired. The mechanic told the claimant a sensor couldn't handle the new transmission and it needed to be replaced. He told her the cost would be approximately \$300.00.
12. The claimant did not have the funds to fix her car.
13. It would have been a 2.5-hour commute to work via public transportation.
14. Public transportation was not available for a return trip at the end of her shift.

15. The cost of an Uber was \$80.00 each way. The claimant could not afford the cost.
16. During the first week of January 2018, the claimant placed a second call to the employer. The claimant spoke with the General Manager. The claimant told the General Manager she couldn't return to work at that time because she didn't have transportation and she didn't have the money to repair the vehicle.
17. The General Manager told the claimant to return to work when her vehicle was repaired.
18. The claimant asked the General Manager, if she could claim unemployment benefits.
19. The General Manager told the claimant he didn't believe she could collect unemployment because the employer had her position available to her.
20. The General Manager expected the claimant to return to work within two weeks.
21. The General Manager didn't tell the claimant he expected her return to work in two weeks.
22. The claimant didn't return to work in two weeks because she didn't have transportation.
23. The claimant believed she could return to [sic] job once her vehicle was fixed.
24. The claimant's employment was terminated by the General Manager when she didn't return to work two weeks after their conversation.
25. The employer didn't notify the claimant her employment was terminated.
26. On January 23, 2018, the claimant filed a claim for unemployment benefits effective January 21, 2018.
27. On January 23, 2018, the claimant began looking for work she could commute to via public transportation or walk to because she needed money to repair her vehicle. The claimant lived near the center of her town. The claimant looked for retail work, restaurant work and cleaning work three to five days a week.
28. The claimant sold some heirlooms to obtain funds to repair her car.
29. On March 6, 2018, the claimant had the throttle position sensor replaced in her vehicle for a total of \$246.58.

30. The claimant did not attempt to return to work after it was repaired because it broke that day or the next. The claimant had to have her car towed.
31. On March 22, 2018, the claimant had the transmission output speed sensor replaced in her vehicle.
32. The claimant was removed from the employer's employee roster in its computer system 90 days after her last physical day of work. The 90th day after her last physical day was March 22, 2018.
33. After the claimant's vehicle was repaired, she went to the employer's restaurant to return to work. The claimant was told she had to speak with the Service Manager.
34. A couple of days later, the claimant was told by the employer she had to reapply for her position.
35. On Monday, April 2, 2018, the claimant went the career center for assistance. She reapplied for a position with the employer the same day.
36. On June 2, 2018, the employer notified the claimant via email her job application was received, but she wasn't being offered a position.
37. The claimant did not contact the employer between April 2, 2018 and June 2, 2018 to inquire of her job application because she was upset that she had to reapply for her position.
38. On February 22, 2018, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under section 29(a) & 1(r) of the Law beginning December 3, 2017 and indefinitely thereafter.
39. The claimant has a diagnosis of Complex PTSD. The claimant's trauma therapist reported the claimant's condition impacts her memory and she suffers from dissociation under stress. Dissociation is defined as a lack of connection in a person's thoughts or memories.

#### Credibility Assessment:

The claimant had difficulty providing specific dates of conversations she had with her employer relative to her job and details of the many repairs she had made to her vehicle. However, the claimant submitted documentation from a medical professional, which states the claimant has memory issues due to her medical diagnosis. Therefore, this examiner deems the claimant's testimony is credible.

#### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant did not meet the definition of "unemployment" pursuant to G.L. c. 151A, § 1(r), because she was on a leave of absence. In addition, we conclude that, based on the above consolidated findings, the claimant involuntarily separated from her employment for urgent, compelling and necessitous reasons pursuant to G.L. c. 151A, § 25(e).

Though the review examiner initially found that the claimant remained on a leave of absence from the employer until March 27, 2018, after remand, the consolidated findings indicate otherwise. The findings now show that, as of approximately January 21, 2018, the employer separated the claimant from her employment. While this separation may have been formally initiated by the employer, the undisputed facts were that the claimant failed to return to work at the end of an approved vacation and continued to be absent from work for approximately two or three weeks. Where the employer was under no obligation to continue to hold the claimant's job for her, and where the claimant did not know when she would be able to return to work, it is reasonable to conclude that the claimant effectively quit her employment and was not discharged.

Because we conclude the claimant quit her employment, we analyze her eligibility for benefits under the portion of G.L. c. 151A, § 25(e), which 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 this section of law, the claimant bears the burden of proof. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993). "[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). In the instant case, the claimant was unable to commute to work due to her vehicle breaking down. The claimant could not afford to have it repaired, and other transportation options were not feasible.

Though these circumstances clearly compelled the claimant to remain away from work, "[p]rominent 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 claimant made a number of such


efforts. The claimant attempted to have her car repaired shortly after returning from vacation, but the vehicle broke down again almost immediately. She attempted to explore other means of commuting to work. She contacted the employer to request a leave of absence. However, all of these efforts proved futile, and the claimant could not afford the necessary repairs to her vehicle. Even after being separated from her employment, the claimant continued to make efforts to recover her job, re-applying for a job with the employer after her vehicle was eventually repaired.

We, therefore, conclude as a matter of law that the claimant's separation from employment was of such an urgent, compelling and necessitous nature as to make her separation involuntary within the meaning of G.L. c. 151A, § 25(e).

We note that, pursuant to G.L. c. 151A, § 14(d), when a claimant has been separated due to urgent, compelling and necessitous reasons, benefits shall not be charged to the employer's account, but shall be charged to the solvency account.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending January 27, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 30, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

JRK/rh