

**A claimant with several health issues separated from her job involuntarily for urgent, compelling, and necessitous reasons after she exhausted her accrued sick time, her union informed her that there was no sick bank for her to use, and she requested FMLA leave, but did not hear back from the employer regarding any approval.**

**Board of Review  
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**Issue ID: 0024 7143 33**

## **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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her position with the employer, effective January 5, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 15, 2018. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 8, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence, as well as to clarify whether and how the employer informed the claimant that she had been approved for intermittent medical leave. Both parties attended the remand hearing. 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 is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant was dealing with several medical issues, she requested a leave of absence to deal with those issues, and the claimant was never informed that she had been approved for an intermittent medical leave.

## 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 as a 7th grade Special Ed Teacher for the employer, public school system, from 8/18/17 until she separated from the employer on 1/5/18. The claimant last performed work on 12/8/17.
2. The claimant was hired to work full time, 40 hours a week.
3. The claimant had been out sporadically in November and December of the 2017 school year. (Remand Exhibit 5) She had not been feeling well and had been having testing done.
4. The claimant had battled cancer three years prior and was dealing with posttraumatic stress. She had been seeing a psychiatrist who submitted FMLA paperwork for intermittent leave for the claimant on 11/30/17. (Remand Exhibit 8)
5. An Absence Specialist sent the claimant an FMLA form via an email message on 11/27/17 which was completed by the claimant's psychiatrist and returned to the employer on 11/30/17. (Remand Exhibit 9)
6. The claimant was never informed that her FMLA leave request was denied. The claimant was never informed that she was approved for an intermittent medical leave. The Absence Specialist never sent the claimant a letter approving her intermittent leave request.
7. The claimant was diagnosed on 12/10/17 with breast cancer.
8. The claimant had been using her sick time until she exhausted it as of 12/13/17. (Remand Exhibit 5) The claimant did not receive any discipline for being out in late 2017.
9. The claimant had a conversation with her Principal on 12/19/17. The Principal approached the claimant in the conference room where she had been working. The Principal told the claimant that her absences were a liability to the employer because her students were not receiving services for their IEP plans and this was opening the employer up to lawsuits. The claimant asked the Principal if the City had part time work or a work sharing program. The Principal told the claimant they did not have part time or work sharing available for the claimant. The Principal told the claimant it would be in the best interest of the school, students and district for the claimant to resign. The claimant never asked the Principal what she would do in her situation.

10. The claimant spoke to her Union Representative about whether she would be eligible for the sick bank. She was told there was no sick bank.
11. After exhausting all her options, the claimant felt she had no other recourse but to resign.
12. On 1/2/18, the Principal of the school received an email from the claimant resigning her position.
13. The claimant provided a letter from her Clinical Nurse dated 3/12/18 indicating she would need one to two days off during the work week to allow for treatment in response to a request for information from the DUA. (Exhibit 2, page 4) The claimant did not send in a note like the 3/12/18 note to the employer prior to her separation.

[Credibility Assessment]:

The employer's testimony that the claimant had been told that her FMLA request was denied but that she was approved for intermittent leave is not deemed credible. After being given the opportunity to present the witnesses who were directly involved with the events in question, the employer failed to do so. The claimant's testimony that she was never informed that she had been approved for intermittent leave is more credible since she provided direct testimony to the same and the Director of Human Resources testified that an approval letter for her leave was never generated to the claimant. The claimant's direct testimony that she had a conversation with the Principal on 12/19/17 and was informed it would be in the best interest of the employer if she resigned is also deemed credible on the same basis.

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. As discussed more fully below, we conclude that the claimant separated from her position involuntarily, and, thus, is not subject to disqualification.

It was undisputed that the claimant resigned from her position. She submitted an e-mail to the employer on January 2, 2018, which stated that her resignation would be effective January 5, 2018. *See* Exhibit # 2, p. 5. G.L. c. 151A, § 25(e), 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.

Under these statutory provisions, the claimant has the burden to show that she is eligible to receive unemployment benefits. The review examiner concluded in her decision that the claimant had not carried her burden. Following our review of the entire record, including the review examiner's consolidated findings of fact, we disagree.

As an initial matter, we decline to conclude that the claimant separated from her job for good cause attributable to the employer. The separation in this case ultimately derives from the claimant's inability to consistently perform her job duties due to several health issues she was experiencing in late 2017 and early 2018. The employer did not create a situation which made the claimant's job unsuitable or which rendered her continued employment untenable. Rather, the claimant was no longer able to complete her work due to illnesses beyond her control. Therefore, this case more appropriately falls into the category of situations which may be characterized as a resignation or leaving 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 initially applied for an FMLA leave of absence due to post-traumatic stress. She had been seeing a psychiatrist, and she had not been feeling well for several months. Consolidated Findings of Fact ## 3–4. Eventually, she was diagnosed with breast cancer on December 10, 2017. Consolidated Finding of Fact # 7. The record contains one letter from a medical professional, as well as the claimant's FMLA application, both of which describe some of the claimant's health issues. *See* Exhibit # 2, p. 4 and Remand Exhibit # 8. On the whole, there was little dispute during the hearing that the claimant had these medical conditions and needed time off from work to deal with them. Because there is substantial and credible evidence in the record to support the review examiner's findings about the claimant's medical issues, we conclude that there was an urgent, compelling, and necessitous circumstance affecting the claimant and which eventually forced her to leave her job.

However, even if the claimant has carried her burden to show that circumstances beyond her control were forcing her to resign, "[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, 597–598 (1974). Indeed, the record reflects that the dispute in this matter relates to whether the

claimant took reasonable steps to preserve her job. The employer argued that the claimant did not make reasonable efforts to stay in her job, because she had been approved for intermittent medical leave but resigned her position anyway.

The review examiner's consolidated findings of fact explicitly credit the claimant's remand hearing testimony that the claimant was unaware that she had been approved for intermittent medical leave. Consolidated Finding of Fact # 6. This finding is supported by a reasonable interpretation of the evidence presented. Although the employer's witness testified that the claimant had been told about the FMLA denial and the intermittent leave approval by the Absence Specialist,<sup>1</sup> the Absence Specialist did not testify. It was also undisputed that the claimant was never sent a letter informing her about what happened with the leave request. It was not unreasonable for the review examiner to believe the claimant's direct testimony that she was never told of the intermittent leave approval. Similarly, although a written statement was submitted into the record by the employer allegedly composed by the principal, *see* Remand Exhibit # 9, it was not unreasonable for the review examiner to believe the claimant's direct testimony about what her principal told her on December 19, 2017.

Taken together, the findings show that the claimant was suffering from several serious medical issues. She tried to keep her job by reasonably requesting a leave of absence. She was never informed about the status of the leave but reasonably believed that her continued employment was problematic given that the principal told her on December 19, 2017, that "it would be in the best interest of the school, students and district for the claimant to resign." Consolidated Finding of Fact # 9. She tried to inquire about getting more sick time off, as she had exhausted her accrued sick time as of December 13, 2017, but was informed by her union that would not be eligible to use a sick bank. Consolidated Finding of Fact # 10. Her principal also told her on December 19, 2017, that the employer could not accommodate a part-time schedule. We think that all of these circumstances together show that the claimant acted reasonably when she decided that she had to quit her position to address her ongoing health needs. *See Reep*, 412 Mass. at 848, 851 (question as to whether person quits job involuntarily depends on analysis of "the strength and effect of the compulsive pressure of external and objective forces" to see if claimant acted reasonably).

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is not supported by substantial and credible evidence or free from error of law, because the claimant has carried her burden to show that she separated from her employment involuntarily for urgent, compelling, and necessitous reasons after she took reasonable steps to try to keep her job.

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<sup>1</sup> The employer also submitted some documentary evidence that the claimant had been approved for the intermittent leave. *See* Remand Exhibit # 8, p. 5.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 31, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – September 24, 2018**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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.

SF/rh