

**Although the claimant had an urgent and compelling reason to remain away from work, she is not eligible for benefits because she failed to take reasonable steps to preserve her employment when she did not return FMLA paperwork by the deadline or inform the employer that she needed more time.**

**Board of Review  
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**Issue ID: 0027 7507 59**

## **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 affirm.

The claimant separated from her position with the employer on August 8, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 13, 2019. 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 11, 2019. We accepted the claimant's application for review.

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 remanded the case to the review examiner to give the claimant an opportunity to testify and present other evidence. 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 voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked full-time as a residential counselor for the employer, a non-profit human services agency that provided support for individuals with disabilities and developmental delays, from March 13, 2017 until August 8, 2018.
2. The claimant worked a varied schedule.
3. On July 11, 2018, the claimant worked her last physical day for the employer.
4. The claimant was absent from work on July 16, 2018 and July 17, 2018.
5. It was unknown if the claimant reported her absences on July 16, 2018 and July 17, 2018.
6. On July 18, 2018, the employer received a doctor's note by facsimile from the claimant's doctor. The doctor's note excused the claimant from work until July 20, 2018.
7. On July 18, 2018, the claimant began undergoing medical tests because she experienced bowel and bladder incontinence, confusion, weakness, inability to see, and she was unable to walk without assistance.
8. The claimant was unable to drive because of her inability to see and stayed at the residence of a family member to ensure transportation to doctor's appointments.
9. On July 19, 2018, the claimant called her immediate supervisor, the program manager ("the PM"), notified her she was ill and would be out of work for an unknown period of time. The PM told the claimant to speak with the HRO Supervisor about a leave of absence.
10. On July 19, 2018, the claimant called the HRO Supervisor and notified her she was going to be absent from work for medical reasons for an unknown period of time. The HRO Supervisor told the claimant she was going to mail her Family Medical Leave Act ("FMLA") forms for completion and gave her a three-week deadline.
11. At the time the HRO Supervisor mailed the FMLA forms to the claimant, the claimant was residing with a family member and not at her residence.
12. The claimant did not ask a friend or family member to check the mail at her residence.
13. On July 20, 2018, the HRO Supervisor sent the claimant a letter with information about FMLA. The FMLA notice informed the claimant she was eligible for FMLA and provided information about whether it was paid or unpaid. The HRO Supervisor included a "Certification of Health Care

- Provider for Employee's Serious Health Condition" form for her doctor to complete. The HRO Supervisor stated in the letter that the claimant was required to return the certification form within 15 days, by August 7, 2018, and she would receive a letter from the HRO Supervisor approving or denying her leave of absence.
14. As of August 1, 2018, the claimant had not responded to the HRO Supervisor's July 20, 2018 letter.
  15. The claimant did not respond to the July 20, 2018 [letter] because she was not at home to receive her mail and did not have anyone check her mail.
  16. On August 1, 2018, the employer's human resources assistant ("the HRA") called the claimant and left her a voicemail reminding her to return the certification form the HRO Supervisor sent to her on July 20, 2018 by August 7, 2018.
  17. The claimant did not return the HRA's voicemail.
  18. The claimant did not receive the HRA's voicemail.
  19. On or about August 5, 2018, the claimant was admitted to the hospital.
  20. As of August 7, 2018, the claimant had not returned the certification form to the employer that the HRO Supervisor sent to her July 20, 2018.
  21. The claimant did not respond to the certification form because she was staying at a family member's residence while she was ill.
  22. On August 8, 2018, the HRO Supervisor sent the claimant a letter notifying her that the employer determined she resigned her position as she had failed to return the certification form by August 7, 2018.
  23. On August 8, 2018, the claimant quit her employment when she did not return the certification form.
  24. While in the hospital, the claimant spoke with her physician about completing FMLA forms. He told her he would not complete any forms until he determined what was wrong with her and how long she would need to be absent from work.
  25. On August 12, 2018, the claimant was discharged from the hospital, returned home and read the August 8, 2018 letter.
  26. The claimant did not return the certification form by August 8, 2018, because she did not receive the FMLA forms while staying at her family member's residence and while she was hospitalized.

## Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding of Fact # 13 states that the letter sent to the claimant on July 20, 2018, stated in part that she was to return the certification form within 15 days, for a deadline of August 7, 2018. We clarify that the July 20<sup>th</sup> letter states the paperwork is due within 15 days of receipt of the letter and no specific deadline date is given.<sup>1</sup> The employer later explains in the claimant's termination letter that it ultimately chose August 7<sup>th</sup> as the deadline, because it received confirmation from the USPS that the July 20<sup>th</sup> letter was delivered on July 23, 2018. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.<sup>2</sup>

Because the claimant quit her employment, her eligibility for benefits is governed by 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.

Under this statutory provision, the claimant has the burden to show that she is eligible to receive benefits. The review examiner concluded that the claimant had not carried her burden, and we agree with that conclusion.

After remand, the review examiner found that the claimant had to miss work for several weeks due to a medical condition. She also found that, on July 19, 2018, the employer explained to the claimant that FMLA forms would be mailed to her and the claimant had three weeks to return them to the employer. As of August 8, 2018, the claimant had not returned to work, as she was still sick and was hospitalized for approximately one week until her release on August 12<sup>th</sup>. On August 8, 2018, the employer sent the claimant a letter stating that it determined she had abandoned her job, because she failed to return the FMLA forms by the deadline of August 7, 2018.

To be eligible for unemployment benefits, an employee is expected to make reasonable attempts to preserve her employment. Guarino v. Dir. of Division of Employment Security, 393 Mass.

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence (Exhibits # 2 and # 3) before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

<sup>2</sup> Consolidated Finding of Fact # 23 is a mixed question of law and fact, which, on remand, is for the Board to decide. See Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In this case, however, we agree with the review examiner's analysis and finding.

89, 94 (1984). Here, the review examiner found that the claimant could not personally access her mail at the time the employer mailed the FMLA forms to her residence, because she was staying with family members while she was sick and was later hospitalized on or about August 5, 2018. Additionally, at some point the claimant's doctor told her that he could not fill out any FMLA forms until he determined what was wrong with her and how long she needed to be out of work. While these findings establish that the claimant faced some obstacles in returning the FMLA forms to the employer, there were a number of reasonable steps she could have taken to preserve her employment.

The claimant could have asked a family member or friend to retrieve the mail from her residence, or she could have told the employer on July 19<sup>th</sup> to mail the FMLA forms to her family's residence. Finally, there is no indication in the record that the claimant was unable to call the employer between July 20, 2018, and August 12, 2018, to ask for an extension of time to complete the FMLA paperwork, as the claimant's physician told her that he could not fill out the FMLA forms until he had a diagnosis of her condition. Thus, while the consolidated findings establish that the claimant had an urgent and compelling medical reason to remain away from work, she failed to take reasonable steps to preserve her employment when she did not attempt to retrieve the FMLA forms from her residence and failed to communicate with the employer that she would not be able to have the FMLA paperwork completed and returned by the deadline.<sup>3</sup>

We, therefore, conclude as a matter of law that because the claimant failed to take reasonable steps to preserve her employment, she is not entitled to benefits under G.L. c. 151A, § 25(e).

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<sup>3</sup> We note that per the employer's conversation with the claimant on July 19, 2018, the three-week deadline for returning the FMLA forms was August 9, 2018, but the employer gave her a new 15-day deadline in the July 20<sup>th</sup> letter, which the claimant did not see until she was released from the hospital on August 12<sup>th</sup>. This minor discrepancy does not change the end result, as the claimant failed to meet the August 9<sup>th</sup> deadline, as well, and had she made a reasonable attempt to retrieve her mail, she would have learned that she had a new deadline.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending August 11, 2018, 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 29, 2019**



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.

SVL/rh