

0015 9093 69 (Sept. 2, 2016) – A claimant, who missed work because he was incarcerated on felony charges, involuntarily separated from work for urgent, compelling, and necessitous reasons, where the claimant denied engaging in any wrongdoing and the record contains no other evidence of such wrongdoing. On this record, his arrest and prolonged incarceration were due to circumstances beyond his control.

**Board of Review**  
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**Issue ID: 0015 9093 69**  
**Claimant ID: 977311**

## **BOARD OF REVIEW DECISION**

### Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 affirm.

The claimant was discharged from his position with the employer on November 13, 2014. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 14, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on June 15, 2015. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest, or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to provide the employer with an opportunity to testify and to obtain additional testimony on the issues surrounding the claimant's separation. 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 conclusion that the claimant had mitigating circumstances for failing to call out or show up for work, in that he was incarcerated, is supported by substantial evidence and free from error of law.

### 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 painter and maintenance worker for the employer, a hotel, from 12/19/13 to 11/1/14. He worked from approximately 7am to 3:30pm, Tuesday through Saturday.
2. The employer has a written attendance policy which indicates that if an associate is unable to report to work, the associate must inform a manager or supervisor before the start of a shift, and failure to do so may result in discipline. Employees may be disciplined for excessive attendance infractions, including coaching and counseling, a verbal warning, and written warnings.
3. The employer's attendance policy indicates that employees who are no call/no show for three consecutive shifts are considered to have abandoned their positions and will be terminated from employment.
4. The policy is in place to enable the employer to meet staffing needs. The claimant was aware of the policy. The claimant received no discipline in the past regarding his attendance.
5. On 11/1/14, the claimant's wife told the claimant she was going to go out with some friends. She returned home around 1am on 11/2/14. The claimant looked at his wife's mobile phone after she returned home and saw that she deleted all of her text messages and call history, and he asked her why she did that.
6. The claimant's wife told him to check their mobile phone carrier website and he could see who she was talking to. The claimant did so, and saw that she was frequently talking to a male who she worked with, during varied hours.
7. The claimant's wife told him she was cheating on him and she was in love with her co-worker. The claimant told his wife he was going to call her employer and report that she was dating a co-worker.
8. On 11/2/14, the claimant was arrested. On 11/3/14, he was charged with assault and battery with a dangerous weapon; kidnapping; assault to rape; assault and battery on a family/household member; and witness/juror/police/court official intimidation. Bail was set at \$100,000. The claimant maintains that he is innocent with regard to the above charges.
9. The claimant appeared at a dangerousness hearing following his arrest. He did not provide information regarding the outcome of the dangerousness hearing. No evidence was presented regarding whether the claimant could post bail, or whether bail was affected by the outcome of subsequent court appearances. He was incarcerated from 11/2/14 to 2/19/15.

10. The claimant was scheduled to work again on 11/3/14. He did not appear at work that week.
11. The claimant called his mother and asked her to contact the employer the first time he was permitted to make a telephone call. She contacted the employer and indicated that the claimant would not be available to work 11/4/15 to 11/7/15.
12. The employer told the claimant's mother that if the claimant could return to work within a week, he could keep his position, but would most likely receive discipline for his absence. The claimant's mother told the claimant what the employer said.
13. The claimant did not appear at work on 11/11/14, 11/12/14, and 11/13/14. He did not call out any of those days to inform the employer he would not be at work.
14. The employer sent the claimant a letter dated 11/13/14, indicating that the employer believed the claimant abandoned his position, as he was no call/no show from 11/11/14 to 11/13/14.
15. The claimant's mother received the above letter and told the claimant that he was terminated from his employment. He believed he was discharged from employment for not appearing at work after 11/1/14.
16. The claimant did not attempt to return to work after 2/19/15 because of the above termination letter. The claimant believes he was released from custody on 2/19/15 because the District Attorney realized there was no case against him.
17. The claimant believes he appeared in court nine times with regard to the above charges. He does not recall the dates he appeared in court or the outcome of each court appearance.
18. The claimant filed a claim for unemployment insurance benefits on 3/24/15 and obtained an effective date of his claim of 3/22/15.
19. The kidnapping charge and the assault to rape charge, which was changed to attempt to commit a crime, were dismissed on 7/28/15, upon the request of the Commonwealth for failure to prosecute.
20. The assault and battery with a deadly weapon, witness/juror/police/court official intimidation, assault and battery on family/household member, and threat to commit a crime charges were dismissed on 7/28/15, upon the request of the Commonwealth, and filed with the defendant's consent. The note 'lack of witness participation' was on each of the dispositions for each of the above charges.

## 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 ultimate 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. As discussed more fully below, we believe these findings sustain the review examiner's decision to award benefits to the claimant, but under a different provision of the Massachusetts unemployment statute.

At the outset, we must decide whether the claimant's separation is properly analyzed as a discharge, on one hand, or a quit, on the other. As noted above, the review examiner initially concluded that the claimant had been discharged from his employment. Consequently, the review examiner analyzed the claimant's eligibility for benefits under G.L. c 151A, § 25(e)(2), 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

Applying this provision, the review examiner concluded that the claimant's incarceration mitigated his failure to adhere to the employer's attendance expectations. Thus, the claimant's attendance violation was unintentional. In our view, however, the claimant's failure to show up for work for several consecutive days is more properly viewed as an abandonment of his job and, therefore, a quit, governed by G.L. c. 151A, § 25(e)(1), rather than a discharge. Our conclusion in this regard is consistent with long-standing appellate precedent. The Massachusetts Supreme Judicial Court (SJC) has held that the word "voluntarily," as used in § 25(e)(1), is a term of art that must be read in light of the statutory purpose of "[providing] compensation for those who are thrown out of work through no fault of their own." Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985) (rescript opinion). *See also* Moën v. Dir. of Division of Employment Security, 324 Mass. 246, 250 (1949), *quoting* Howes Bros. v. Unemployment Compensation Commission, 296 Mass. 275, 282 (1936). *Cf.* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 96–97 (1979). In accord with these precedents, the SJC has also held that "a person who causes the statutory impediment that bars his employment leaves his employment 'voluntarily' within the meaning of Section 25(e)(1) when the employer realizes the impediment and terminates the employment." Rivard v. Dir. of Division of Employment Security, 387 Mass. 528, 528–529 (1982). The SJC has further opined that, in determining whether an employee left work "voluntarily," for purposes of G.L. c. 151A, § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, but whether the employee brought his unemployment on himself. Olmeda, 394 Mass. at 1003, *citing* Rivard, 387 Mass. at 530.

In this case, applying the above-cited law, we are persuaded that the claimant initiated his own unemployment when he was incarcerated and absent from work during the period November 2,

2014 through February 19, 2015, and, therefore, we analyze his eligibility for benefits under G.L. c. 151A, §§ 25(e) and (e)(1), which state, 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 explicit language in the foregoing provision places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

We have had occasion in the past to resolve cases where a claimant's failure to report for work is the result of his/her incarceration. The Board's decisions in these cases have consistently pivoted upon whether the incarceration was the result of a claimant's own intentional actions. *See e.g.* BR-81022-A (February 27, 2001) (claimant denied benefits where his incarceration resulted from his conscious decision not to appear in court, which resulted in claimant's arrest and detention). *Cf* Board of Review Decision 0002 3706 54 (February 4, 2014) (claimant entitled to benefits where his incarceration resulted from arrest on a false charge).<sup>1</sup>

The consolidated findings in this case establish that the claimant was involved in a domestic dispute on the evening of November 1, 2014, which resulted in his arrest and incarceration on November 2, 2014. On November 3, he was arraigned on charges of assault and battery with a dangerous weapon, kidnapping, assault to rape, assault and battery on a family/household member, and witness/juror/police/court official intimidation. Bail was set at \$100,000.00. At the claimant's request, his mother thereafter contacted the employer and indicated that the claimant would be out of work until November 7, 2015. The employer promised the mother that it would keep the job open for a week, and the mother duly conveyed that information to the claimant. The claimant was unable to return to work after the first week and did not either call or appear for work on three consecutive scheduled work days in the following week. On November 13, 2014, the third consecutive day, the employer terminated the claimant for abandoning his job. The claimant remained incarcerated from his arrest until February 19, 2015. On July 28, 2015, all five felony charges were dismissed at the request of the prosecution — two for failure to prosecute and three for "lack of witness participation."

On these facts, we cannot conclude that the claimant's arrest and incarceration resulted from his own intentional acts. Rather we fairly infer from the evidence in its totality (as did the review examiner) that the claimant's arrest and incarceration were beyond his control.<sup>2</sup> As a result of this incarceration, the claimant was unable to continue his employment. Consequently, we

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<sup>1</sup> Board of Review Decisions BR-81022-A and 0002 3706 54 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

<sup>2</sup> We note that the ultimate dismissal by the Commonwealth of all the charges filed against the claimant is not the determining factor in our conclusion. Generally, we believe that, where a claimant's separation from employment results solely from an arrest and/or incarceration, the ultimate disposition of any criminal charge is a probative but not necessarily determinative factor.

conclude that the claimant separated from his employment involuntarily, for urgent, compelling and necessitous reasons, within the meaning of G.L. c. 151A, § 25(e). See 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) (“[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.”).

Under Massachusetts law, a claimant is required, prior to separating for urgent compelling and necessitous reasons, to take such “‘reasonable means to preserve [his] employment’ as would indicate the claimant’s ‘desire and willingness to continue [his] 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). Here the claimant attempted to preserve his employment by having his mother contact the employer regarding his incarceration and consequent absence from work. The employer indicated it would hold the claimant’s job open for a one week period. When the claimant remained incarcerated and unable to show up for work, the employer concluded that he had abandoned his job and separated him. It appears, therefore, that any further attempt on the claimant part to preserve his employment would have been futile.

On the basis of the foregoing, we conclude that the claimant left his employment involuntarily, for urgent, compelling, and necessitous reasons, within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending March 22, 2015, and for subsequent weeks if otherwise eligible. Charges from the employer's account should be removed, in accordance with G.L. c. 151A, § 14(d)(3).

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 28, 2016**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
Member



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.

SE/JMN/rh