

**Where, after notifying the employer that he would be returning to work on a specific date, the claimant did not return to work or contact the employer for eight days, his separation constitutes job abandonment and he is disqualified under § 25(e)(1).**

**Board of Review  
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**Issue ID: 0019 4253 28**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by Danielle Etienne, 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 reverse.

The claimant separated from his position with the employer on August 3, 2016. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 9, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on November 14, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged for actions not attributable to either deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 was discharged from his employment for non-disqualifying reasons is supported by substantial and credible evidence and is free from error of law, where the record indicates the claimant essentially abandoned his job.

### **Findings of Fact**

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

1. The claimant worked full time as a service technician for the employer from October 1, 2014 until August 3, 2016 when the employer discharged the claimant.
2. The employer maintains a policy that prohibits employees from failing to notify the Supervisor of an absence.
3. The employer maintains the policy to fulfill the expectation of its customers and provide customer service.
4. The employer issues a verbal warning upon the first violation of the policy, a written warning upon the second violation and terminates all employees upon the third violation of the policy.
5. On June 10, 2015, upon the claimant's first violation of the policy, the employer issued a verbal warning to the claimant for failing to notify the employer of his absence.
6. On June 12, 2015, upon the claimant's second violation of the policy, the employer issued a written warning to the claimant for failing to notify the employer of his absence.
7. The claimant's work schedule was 8:00am to 6:00pm, Tuesday to Saturday.
8. The claimant's last physical day at work was on Thursday June 30, 2016.
9. The claimant's grandfather lived with the claimant.
10. On July 1, 2016 and July 2, 2016, the claimant did not notify the employer because he was with his family, his grandfather was ill and the employer was not "on his mind".
11. During the week of July 4, 2016 the claimant was on a pre-approved vacation.
12. The claimant was a no call/no show on July 12, 2016 and July 13, 2016.
13. On July 12, 2016 and July 13, 2016, the claimant did not notify the employer of his absence because he was not ready to go back to work because he spent his vacation with his grandfather who was ill and was not worried about "them" (the employer).
14. On July 14, 2016, the claimant notified the Service Manager that he needed some time off due to personal issues. The Service Manager asked the claimant to stay in touch with the employer.
15. On July 20, 2016, the claimant called and notified the employer that he was taking care of personal issues but would be back at work on July 26, 2016.

16. On July 21, 2016, the claimant's grandfather passed away.
17. On July 26, 2016, the claimant's grandfather's funeral services were held.
18. From July 26, 2016 through August 2, 2016, the claimant was a no show/no call.
19. From July 26, 2016 through August 2, 2016, the claimant was a no show/no call because the claimant was not ready to return to work.
20. On August 3, 2016, the claimant reported to work. At that time, the Service Manager and the employer's Fixed Operations Manager met with the claimant and notified the claimant that he was discharged. During the meeting, the claimant notified the employer that his grandfather had been ill and passed away.
21. The employer discharged the claimant for failing to notify the employer of his absence.

### 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 reject the review examiner's legal conclusion that the claimant's separation constituted a discharge, under G.L. c. 151A, § 25(e)(2). Rather, we believe that the review examiner's findings of fact support the conclusion that the claimant voluntarily abandoned his job.

As an initial matter, we must determine the applicable section of law to apply to the claimant's separation. The findings indicate that the claimant last worked on June 30, 2016. Though the claimant was never approved for any type of formal leave of absence<sup>1</sup>, the findings indicate that, on July 14, 2016, the employer gave the claimant implicit permission to remain away from work for personal reasons. Then, on July 20, 2016, the claimant notified the employer that he would be returning to work on July 26, 2016. On that date, the claimant did not return to work or contact the employer, despite a previous request by the employer to remain in contact. The claimant did not contact the employer until August 3, 2016, when he attempted to report to work and the employer did not allow him to return.

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence 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).

Without explanation or analysis, the review examiner applied G.L. c. 151A, § 25(e)(2), the section of law dealing with discharges from employment, to these facts. While it is up to the review examiner to determine the facts based on the record before her, “[a]pplication of law to fact has long been a matter entrusted to the informed judgment of the board of review.” Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463-464 (1979). In light of the facts as outlined as above, we conclude as a matter of law that the claimant effectively quit by abandoning his employment. See Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review’s conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)).

Since the claimant quit his job, his eligibility for benefits is governed by G.L. c. 151A, §§ 25(e) and (e)(1), which provide, 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 section of the law, the claimant bears the burden to prove good cause attributable to the employer or urgent, compelling, and necessitous circumstances. Crane v. Comm’r of Department of Employment and Training, 414 Mass. 658, 661 (1993). The record contains no suggestion that the claimant abandoned his position for reasons that could be considered good cause attributable to the employer, such as a change to the terms or conditions of his employment.

The review examiner credited the claimant’s testimony that he remained away from work due to his grandfather’s illness, death, and funeral. However, the claimant did not testify to any circumstances that could be considered urgent, compelling and necessitous occurring after his grandfather’s funeral on July 26, 2016. The claimant merely testified that he “was not ready to return to work” for unspecified reasons.

Even if the claimant had carried his burden to show that urgent, compelling, and necessitous circumstances required him to remain away from work beyond July 26, 2016, “[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 [his] employment’ as would indicate the claimant’s ‘desire and willingness to continue [his] employment.’” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009), quoting Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). In this case, the claimant made no preservation efforts whatsoever. Though a claimant need not make preservation efforts that will be futile, that is not the case here. The employer had previously allowed the claimant to remain away from work without even requiring him to explain what “personal issues” required

him to be absent, instead stressing the need to stay in touch with the employer. In light of this, if the claimant had merely contacted the employer to explain that he needed additional days off before returning to work, the claimant likely would have continued to remain employed.

We, therefore, conclude as a matter of law that the claimant separated voluntarily, without good cause attributable to the employer; without urgent, compelling, and necessitous reasons; and without making a reasonable effort to preserve his job. He is disqualified, pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending August 6, 2016, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 27, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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.

JRK/rh