

**Claimant is deemed to have voluntarily abandoned his job pursuant to § 25(e)(1), where the review examiner was reasonable in rejecting the claimant's unsubstantiated testimony that he in fact called the employer and was then summarily discharged by the employer.**

**Board of Review  
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**Issue ID: 0019 7942 50**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by John Cofer, 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 September 28, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 20, 2016. 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 November 16, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was discharged for reasons not attributable to 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 remanded the case to the review examiner to allow the employer an opportunity to testify and present evidence regarding the claimant's separation from employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 was discharged from his employment for non-disqualifying reasons is supported by substantial and credible evidence and is free from error of law, where, after remand, the record indicates the claimant failed to both report for a number of his scheduled work shifts and communicate with the employer regarding these absences.

### **Findings of Fact**

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

1. The employer is a plumbing service. The claimant worked as a full-time journeyman plumber for the employer from 1/11/16 until 9/21/16.
2. The employer created a handbook. The handbook featured a policy titled "4.8 Job Abandonment." The policy read, "If an employee fails to show up for work or call in with an acceptable reason for the absence for a period of three consecutive days, he or she will be considered to have abandoned his or her job and voluntarily resigned from the company." The claimant understood this policy.
3. On Sunday 9/18/16, the claimant sent a text message to the employer's controller. In the message, the claimant indicated that he was in the hospital. The controller responded via text and asked the claimant to call her. The claimant did not call her.
4. The claimant's doctor created a note. The note was dated, "Sunday 09/19/16." The note read, "This notice verifies that [the claimant] was seen and treated in our emergency department on the above printed date. The employee will be able to return to work in 4 days." The claimant never submitted this note to the employer.
5. The claimant never submitted any medical documentation to the employer after 9/18/16. He never told the employer that a doctor ordered him to not work for any period of time after 9/18/16.
6. The claimant was scheduled to work on 9/19/16, 9/20/16, 9/21/16, 9/22/16, and 9/23/16.
7. In the period 9/19/16 through 9/28/16, the claimant did not communicate with the employer. He did not make any attempt to return to work in that period.
8. The claimant never told the employer that he planned to not present for work on any day in the period 9/19/16 through 9/28/16.
9. The employer sent a letter to the claimant. The letter was dated 9/28/16. The letter read, "After three consecutive days of not showing up to work without notification to [the controller] or [the owner] we have determined you have voluntarily resigned from the company. [The controller] and [the owner] attempted texting and emailing several times last week regarding your returning to work. No return communication was received from you as of today's date. This decision is final based on the employee handbook section 4.8 Job Abandonment."

10. The claimant contacted the employer on 9/29/16. The claimant asked what worksite he should report to. The employer responded that he no longer worked for it.
11. The employer did not end the claimant's employment before 9/28/16. Prior to 9/28/16, the employer did not tell the claimant that he was discharged.
12. The claimant filed a claim for unemployment insurance benefits. The effective date of the claim is 9/25/16. When the claimant filed his claim, he reported to [the] DUA that the employer laid him off.

#### CREDIBILITY ASSESSMENT:

In the initial hearing held on 11/15/16, the claimant testified that the employer's owner told him that he was discharged for job abandonment. He testified that this happened in a telephone conversation on 9/21/16. The claimant testified that he maintained regular contact with the employer in the period 9/15/16 to 9/21/16. In the remand hearing held on 2/06/17, the employer's controller testified that the claimant was not discharged on 9/21/16. She testified that the claimant ceased contact with the employer from 9/19/16 through 9/28/16. Given the totality of the testimony and evidence presented, the employer's testimony is accepted as more credible. First, when the claimant filed his claim for benefits, he reported to DUA that the employer laid him off. This was a disingenuous report because the claimant indicated in the hearing that the employer did not merely lay him off. Second, the claimant emphatically insisted in the 2/06/17 hearing session that he had telephone records to show that he indeed maintained contact with the employer. The claimant declared that he would submit these records for the 2/28/17 continued hearing. However, the claimant did not submit the records nor did he attend the 2/28/17 continued hearing. Thus, he did not substantiate his claim.

#### 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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. Finding of Fact # 1 erroneously states that the claimant worked until September 21, 2016, a date that neither represents the claimant's last day of physical work nor the date of separation. Both parties agreed that the claimant's last day of actual work occurred on September 15, 2016. As to the date that the claimant was formally separated, as indicated in Finding of Facts #9, the employer sent the claimant a termination letter on September 28, 2016. The review examiner did not credit the claimant's testimony that his separation occurred earlier. Finding of Fact # 3 erroneously places the date of the claimant's last text message to the employer as September 18, 2016. The employer testified that this text message exchange occurred on September 19, 2016. The text messages themselves are time-

stamped between 7:22 a.m. and 9:27 a.m. and indicate that the claimant spent the night in the hospital and had just been released<sup>1</sup>. This is consistent with a date of September 19, 2016, as the claimant's testimony from the initial hearing was that he was admitted to the hospital on September 18, 2016, and was released the following morning. In adopting the remaining findings, we deem 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 was discharged, under G.L. c. 151A, § 25(e)(2). Rather, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant voluntarily abandoned his job, under G.L. c. 151A, § 25(e)(1).

We note from the outset that the parties disputed the nature of the claimant's separation. Both parties agree that the claimant last sent a text message on September 19, 2016, and thereafter abandoned his job by failing to either appear for work or contact the employer. The employer produced a letter, dated September 28, 2016, and delivered the following day, stating that the employer considered the claimant to have voluntarily resigned.<sup>2</sup> The claimant, on the other hand, maintained that he was discharged by the Owner via telephone sometime between September 20, 2016, and September 22, 2016.

After the initial hearing, attended only by the claimant, the review examiner credited the claimant's version of events and applied G.L. c. 151A, § 25(e)(2). However, with the benefit of direct testimony from the employer during the remand hearing, the consolidated findings of fact indicate that the review examiner found the employer's version of events more credible. "The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). Such credibility determinations are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. Even if we were to reach a different conclusion, we must accept the review examiner's findings, because they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence."). Based upon the record before us, we conclude that the review examiner's credibility assessment was reasonable, and that his findings are based on substantial evidence.

The review examiner's consolidated findings indicate that the claimant effectively abandoned his job after September 19, 2016. We, therefore, conclude that the claimant quit his job, and analyze the claimant's separation under 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

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<sup>1</sup> Exhibit #4, pages 4–5.

<sup>2</sup> Exhibit # 6 and Remand Exhibit # 11.

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 the above provisions, it is the claimant's burden to establish that he left his job voluntarily with good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons. The claimant may have been justified in remaining away from work until September 23, 2016, due to medical issues, as the claimant obtained a doctor's note to this effect.<sup>3</sup> However, the claimant failed to offer a credible explanation for his failure to contact the employer about his absences, or for his continuing absence beyond September 23, 2016. As the claimant's testimony was deemed not credible and he denied abandoning his job, there is no basis from which to conclude that the claimant had a non-disqualifying reason for quitting.

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

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<sup>3</sup> Exhibit # 14.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 1, 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 31, 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