

**Claimant arrested for OUI, incarcerated until he was found guilty, & sentenced to 90 days in prison. Held he voluntarily separated from employment where the findings support the conclusion that he voluntarily engaged in the conduct for which he was arrested and unable to report to work.**

**Board of Review  
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**Issue ID: 0023 7949 82**

## **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 was separated from his position after last working for the employer on August 11, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 21, 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 April 5, 2018. 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, without urgent, compelling, and necessitous reasons, and without making reasonable efforts to preserve his employment. Thus, he 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 allow the claimant to provide testimony and 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 caused his own separation from employment when he stopped reporting to work due to his incarceration, is supported by substantial and credible evidence and is free from error of law, where the findings reflect that the claimant was incarcerated because he had been arrested and convicted of operating a motor vehicle while under the influence of alcohol.

### **Findings of Fact**

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

1. On July 25, 2016, the claimant began working as a maintenance supervisor for the employer, a residential property management company.
2. August 11, 2017, was the last day that the claimant performed services for the employer.
3. On August 13, 2017, the claimant was arrested for OUI and was incarcerated.
4. The claimant was allowed one emergency phone call from the Dedham House of Correction. He used this to call his girlfriend. He asked her to have his co-worker inform the General Manager that he, the claimant, had been arrested and would therefore be unable to report to work for an unknown period of time.
5. The claimant, due to an unrelated legal matter, which was later dismissed, was held without bail until his court date, September 7, 2017.
6. The claimant was scheduled to work August 14, 2017 through September 1, 2017. He did not call in or report for work as he was incarcerated.
7. On or about August 15, 2017, the claimant was moved to [County A] House of Correction. At that time, he was allowed another emergency phone call. He again called his girlfriend who told him that his co-worker had delivered the claimant's message and the General Manager had indicated she would do what she could to hold his job for him.
8. A week or two after the claimant was arrested, the claimant's mother called the employer trying to locate him. She contacted the employer again to find out if there was anything she could do to help the claimant keep his job and/or the apartment he had on the employer's property.
9. On September 1, 2017, the employer terminated the claimant's employment due to job abandonment, as he had been unable to report to work for 3 weeks and there was no definite date of return.
10. When the claimant and his attorney went to court on October 7, 2017, the hearing was continued to October 10, 2017.
11. On October 10, 2017, the claimant was found guilty of OUI and sentenced to 90 days incarceration. This included time served. There was an error made in calculating days and the claimant was not actually released until November 24, 2017, after serving 100 days.
12. On November 24, 2017, the claimant came into work and asked the General Manager if he could return to work. She informed him that his position had already been filled.

13. On November 29, 2017, the claimant filed his 2017-01 claim for unemployment benefits effective November 26, 2017.
14. On February 21, 2017, DUA issued a Notice of Approval with Issue Identification Number 0023 7949 82-01, stating that the claimant was entitled to benefits under Section 25(e)(2) of the law for the period starting November 26, 2107, if all other eligibility requirements are met.
15. On March 6, 2018, the employer appealed Approval 0023 7949 82-01. A hearing was held on March 29, 2018. The employer attended with a third party agent representing it. The claimant was sent [sic] notice but did not attend.
16. On or about April 5, 2018, DUA issued Hearings decision 0023 7949 82-02, overturning Approval 0023 7949 82-01.
17. On or about April 11, 2018, the claimant appealed Hearings decision 0023 7949 82-02. On May 2, 2018, the Board of Review ordered a hearing be held to take additional evidence.
18. On June 6, 2018, a remand hearing was held. The employer participated by telephone, with its third party representative present in person. The claimant attended the hearing in person without representation.

### 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.

In cases where a claimant becomes separated from his job for failing to show up for work due to incarceration, the Board has reaffirmed the agency's longstanding approach that such cases are appropriately analyzed in terms of job abandonment and, therefore, as quit cases, governed by G.L. c. 151A, §§ 25(e) and 25(e)(1), rather than as discharges. *See* Board of Review Decision 0017 5069 40 (Sept. 9, 2016).<sup>1</sup> G.L. c. 151A, §§ 25(e) and (e)(1) 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

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<sup>1</sup> Board of Review Decision 0017 5069 40 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

to the employing unit or its agent . . . [or] if such individual establishes 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 Massachusetts Supreme Judicial Court (SJC) has noted that the word “voluntarily,” as used in the above provision, 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) (employee deemed to have quit voluntarily when he lost his driver’s license through his own fault and as a result could not get to work). If an employee’s inability to get to work is outside of his control, he may be eligible for benefits under the portion of the above provision that allows benefits where an employee has left his job for urgent, compelling, and necessitous reasons. Even in the latter situation, the claimant may be denied benefits if he does not show that he made efforts to preserve his employment or that such efforts would have been futile. Norfolk County Retirement System v. Dir. of Division of Employment Security, 66 Mass. App. Ct. 759, 766 (2009).

Applying these concepts to cases where the claimant cannot report to work because he has been incarcerated, the claimant will be eligible for benefits if the record lacks substantial and credible evidence that the claimant engaged in the behaviors for which he was incarcerated. By the same token, a claimant whose incarceration occurred as a result of deliberate decisions made by the claimant, as reflected in the findings of fact and supported by substantial and credible evidence, will be denied benefits because his separation from employment was “voluntary” within the meaning of Olmeda, *supra*.

The claimant’s situation here clearly falls within the category in which his incarceration resulted from his own decision to engage in the conduct that prompted his incarceration. The findings of fact reflect that the claimant was arrested on August 11, 2017, for operating under the influence of alcohol. Even though the claimant, through intermediaries, notified the employer that he was unable to report to work, it was unknown when he would be released. The employer ultimately terminated the claimant’s employment on September 1, 2017, after he had missed three weeks of work without a definite date when he would return.

The findings further show that the claimant was found guilty of operating under the influence on October 10, 2017, and was sentenced to 90 days in prison. When the claimant was released on November 24, 2017, he returned to the employer and was told his position had already been filled.

Under the Board’s longstanding approach to cases of this nature, the claimant must be held to have quit his job voluntarily, because he chose to engage in the conduct that warranted his incarceration and his consequent inability to report for work. Here, it was found that the claimant operated a vehicle while under the influence of alcohol, was subsequently found guilty of the offense, and was sentenced to 90 days in prison.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from his employment within the meaning of G.L. c. 151A, § 25(e)(1), when he chose to engage in conduct that warranted his incarceration and his consequent inability to report for work.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending December 2, 2017, 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 - July 30, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

JPC/rh