

Held claimant ineligible for benefits under G.L. c. 151A, § 25(e)(1), due to voluntary job abandonment, when claimant was fired for being a no-call, no-show. He admitted doing the act, which led to his arrest, incarceration, and inability to report for work.

**Board of Review
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Issue ID: 0030 8752 17

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 discharged from his position with the employer on March 8, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 18, 2019. The claimant 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 denied benefits in a decision rendered on August 30, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was deemed to have voluntarily left employment and that he did so without good cause attributable to the employer or urgent, compelling, and necessitous reasons. Thus, he was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which disqualified the claimant from receiving benefits under G.L. c. 151A, § 25(e)(1), on the ground that the claimant brought about his own unemployment by setting in motion a chain of events that caused him to be arrested and unable to report for work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began working for the employer, a staffing agency, beginning in December, 2011.

2. The claimant reported to the vice-president and the practice manager.
3. In early to mid-February, 2019, the claimant was assigned to work as a full-time accounting and finance representative at one of the employer's client locations.
4. On or about March 2, 2019, the claimant purchased ammunition in [Town A], MA. He was not licensed or legally authorized to purchase the ammunition and was subsequently arrested for the unlawful possession of ammunition.
5. After his arrest, the claimant was sectioned involuntarily by the police and sent to a hospital in [Town B] MA for evaluation on Sunday, March 3. The claimant was then transferred to a behavioral healthcare facility in [Town C], MA. The claimant believed he would be released in a few days.
6. On Monday, March 4, the claimant contacted the employer and spoke with the practice manager to inform her he was hospitalized. The claimant did not disclose to the practice manager he had been arrested and was involuntarily sectioned. He told her he would be in touch and should be back to work on or about Thursday, March 7. The practice manager told the claimant to take care and be well.
7. On March 5, the practice manager and the vice president attempted to contact the claimant via cellphone and text. When they could not reach him, the practice manager reached out to the hospital and was informed the claimant was no longer there.
8. On March 6, the claimant was released from the behavioral healthcare facility into the custody of the [Town C] police department and transferred to [Town C] district court where he was charged with unlawful possession of ammunition and held on \$25,000 bail. The claimant was unable to make bail and was taken to the [Town D] House of Correction and incarcerated.
9. On March 6, the claimant did not have access to a phone and was not permitted to contact anyone but his attorney. The claimant asked the attorney to contact the employer for him.
10. Beginning March 6, and over the next day, both the vice president and the practice manager continually tried reaching the claimant by text, phone and email but were unsuccessful.
11. On March 7, the claimant spoke with his attorney, who informed him his arrest had been reported in the news media and, based on the negative publicity, he believed the claimant was fired. The claimant's attorney did not speak with the employer or contact anyone at the employer. The employer

never had any interaction with the claimant's attorney or informed him that the claimant was fired.

12. On March 7, the practice manager emailed the claimant at 3:27 p.m. and informed him she had been trying to reach him. The text stated in relevant part, "Just attempted to reach you again. Again, we are glad you are okay and at home. However, we do need to hear from you by tomorrow morning at 10 a.m. We need a doctor's note as well to excuse the absences for this week. Can you please give us a call at [employer number] we need to discuss [the client] so we can set up proper expectations."
13. On March 7, the claimant was not at home, he was incarcerated and did not have access to his cellphone or his email. The claimant did not know the employer was trying to contact him.
14. On March 8, the practice manager emailed the claimant at 7:42 a.m. asking him to call the office by 10 a.m. to discuss the next steps with [the client].
15. When the claimant did not respond to the employer by the 10 a.m. deadline, the employer moved forward with the decision to discharge the claimant for job abandonment.
16. On March 8, the client contacted the employer via email to inform them it had seen news reports of the claimant's arrest over the weekend. Due to those media reports, the client informed the employer it was terminating the claimant's assignment immediately.
17. On March 8, the practice manager emailed the claimant at 11:54 a.m. The email stated in relevant part "At this point, [the client] has terminated your project effective immediately. Do not contact, communicate, or go on site to [the client] or anyone at [the client]. Since we have not heard from you, we will be terminating your job with [the employer] due to job abandonment effective immediately."
18. On March 8, the employer terminated the claimant for job abandonment.
19. The claimant remained incarcerated at the [Town D] House of Correction until he was able to post bail on or about April 25, 2019.
20. On or about April 26, 2019, the claimant received and read the emails from the practice manager and the vice president. At this time, the claimant learned he had been discharged for job abandonment.
21. On April 26, 2019, the claimant filed a claim for unemployment benefits with an effective date of April 21, 2019.

22. As of the date of hearing, the claimant has not been convicted of any of the charges against him.

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 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. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first issue we must decide is whether the claimant's separation is to be analyzed as a voluntary or involuntary separation. Technically, the employer fired the claimant. *See* Finding of Fact # 18. However, the review examiner deemed the claimant to have quit his job and analyzed his separation under the following provisions of G.L. c. 151A, § 25(e):

[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 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 express language of the above sections of law places the burden of proof upon the claimant.

Underlying the review examiner's conclusion is a Supreme Judicial Court (SJC) decision, which 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).

The review examiner found that the employer discharged the claimant for job abandonment. *See* Findings of Fact ## 15 and 18. The findings further show that, although the claimant contacted the employer on Monday, March 4, 2019, to report that he would not be able to report for work that day or for several days until on or about Thursday, March 7, 2019, he did not report for work or contact the employer on March 7 or 8, and the employer discharged him on March 8, 2019. We have held that, where a claimant is fired for failing to notify the employer of the reason for absence, the separation is to be treated as a voluntary resignation. 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)).

The claimant did not contact the employer on March 7 or 8, 2019, because he was incarcerated. *See* Findings of Fact ## 8–9 and 19. Where a claimant is a “no-call, no-show” due to incarceration, we have examined the record to see whether there is substantial and credible evidence that the claimant engaged in the behavior for which he was incarcerated. For example, in Board of Review Decision 0017 5069 40 (Sept. 9, 2016), we disqualified a claimant who could not report for work because he chose to consume alcohol along with prescription medications while driving and was subsequently arrested for OUI and reckless driving. Our decision, guided by the SJC’s decision in Olmeda, concluded that the claimant was at fault for losing his job. *Compare* Board of Review Decision 0015 9093 69 (August 26, 2016), where the claimant denied engaging in the alleged criminal activity, the charges were eventually dismissed, and the record lacked any other evidence suggesting the claimant’s responsibility for the incarceration that prevented him from attending work.

In the present appeal, the claimant points out that he has not been convicted of any of the pending criminal charges, suggesting that we must presume him innocent until proven guilty of such charges. That is not necessary. We are an administrative tribunal, not a criminal court, and we need not wait for the outcome of the claimant’s criminal charges. Moreover, we have statutory obligations to issue our decisions in a timely fashion.¹ The evidence need not prove beyond a reasonable doubt that the claimant engaged in the charged behavior. Our standard of review is simply to determine whether the review examiner’s findings are supported by substantial evidence. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979).

We believe that the review examiner correctly concluded that the claimant brought about his own unemployment. The review examiner noted that the claimant freely admitted to having engaged in the behavior that caused his arrest (buying ammunition without a license), and she flatly rejected his excuse that he did not know the law required a license. In short, the record shows that the claimant set in motion the events that led to his arrest, incarceration, and inability to work.

On appeal, the claimant argues that the real reason for the employer’s discharge was the negative media attention following the arrest, a factor beyond his control, which would have made it impossible for the employer to assign the claimant to future clients. He urges the Board to conclude that, because he had no control of this negative publicity, his separation was involuntary due to urgent, compelling, and necessitous circumstances. However, the review examiner found that the employer discharged the claimant for job abandonment. Findings of Fact ## 15 and 18. The issue before us is whether these findings are supported by substantial evidence. “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627–628 (1984), *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

The findings do show that the employer sent its discharge email out soon after the client company reported seeing the news reports of the arrest and terminated the claimant’s assignment.

¹ *See* G.L. c. 151A, § 41(b); *see also* 42 U.S.C. § 503(a)(1).

See Findings of Fact ## 16 and 17. The timing indicates that hearing this news from the client company may have expedited the employer's discharge email. But, even if the negative media reports provided an independent incentive to abruptly terminate the claimant's employment, that does not detract from the weight of evidence noted above, which supports his discharge for job abandonment. It is the claimant's job abandonment, by itself, that gave the employer sufficient reason to discharge him, and, therefore, we believe Findings of Fact ## 15 and 18 are both reasonable and adequately supported by the evidence.

We also considered that, on March 7, 2019, the claimant tried to get his attorney to contact the employer, but the attorney failed to do so. See Findings of Fact ## 9 and 11. This does not render the attorney responsible for the claimant's disqualification for job abandonment. It is apparent that, on Monday, March 4, 2019, when the claimant had the chance to speak directly with the employer's practice manager, he deliberately refrained from giving her the full picture of the reasons for his absence. He did not tell her that he had been arrested or that he was *involuntarily* hospitalized. See Finding of Fact # 6. Rather, he led her to believe that he would be able to report for work on Thursday, when, in fact, he could not be certain of that at all. Had he frankly communicated with the practice manager on March 4th, the employer would have been on notice and could at least have anticipated his extended absence.

We, therefore, conclude as a matter of law that the claimant separated from employment voluntarily due to job abandonment. He has failed to meet his burden to show that he separated due to good cause attributable to the employer or due to urgent, compelling, and necessitous circumstances.

The review examiner's decision is affirmed. The claimant is denied benefits under G.L. c. 151A, § 25(e)(1), for the week beginning March 3, 2019, 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 - November 7, 2019



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

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.

AB/rh