The claimant stopped reporting to work when he became upset that he did not receive pay when absent. His belief that he was entitled to such compensation was unreasonable, where the evidence showed that he was not eligible to be paid wages while absent from work. Because the claimant did not establish a reasonable workplace complaint, he is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0052 7588 10

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 separated from his position with the employer. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 6, 2020. 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 January 11, 2021. 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 or urgent, compelling, and necessitous reasons and, thus, 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 an opportunity to testify and afford both parties an opportunity to present additional evidence. Both parties attended the remand hearing, which took place over two sessions. 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 quit his job when he did not report to work as scheduled and subsequently stopped reporting to work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. On April 2, 2017, the claimant started working fulltime for the employer, a food and beverage service provider for country clubs, as a Dishwashing Manager.

2. The claimant's schedule varied.

3. The claimant's most recent schedule was on a two-week rotating basis. During the 1st week rotation, the claimant worked 6 full days. During the 2nd week rotation, the claimant worked 6 half days. The employer paid the claimant the same salary regardless of the claimant working the full days or half day schedule. The employer accommodated the claimant's schedule due to the claimant needing to provide childcare for his girlfriend's child.

4. The claimant was paid a gross weekly salary of $1,100.

5. The claimant's supervisor was the 1st co-owner.

6. The employer's establishment is seasonal in nature. The employer customarily lays workers off from October until May.

7. The claimant was laid off from the employer's establishment most recently from November 1, 2019 until May 20, 2020. In May 2020, the claimant returned to work for the employer.

8. The claimant's last date of work was on Sunday[,] August 9, 2020.

9. The claimant was having personal issues regarding the loss of his driver's license. The claimant made the employer aware of these personal issues including coordinating with law enforcement and courts.

10. The claimant was scheduled to work on August 11, 2020.

11. On August 11, 2020, the 1st co-owner spoke with the claimant. The claimant informed the 1st co-owner that he had to go to an attorney's office. The 1st co-worker [sic] gave the claimant permission to go the attorney's office as needed. The 1st co-owner instructed the claimant to report to work after. The claimant subsequently did not report to work.

12. The claimant was scheduled to work on August 12, 2020. On August 12, 2020, the claimant's girlfriend contacted the employer and spoke with the 1st co-owner. The claimant's girlfriend informed the employer that the claimant was not going to report to work as the claimant was having a breakdown and needed to go to see a doctor.

13. On August 12, 2020 at 5:32 p.m., the claimant sent the 1st co-owner and the 2nd co-owner the following text message: "I'm sorry that I have failed you guys and the rest of the team. I've failed myself and my body had failed me. I can't keep it together and still be a productive person, at work or in my life right at

this moment. I need some time to get my head on straight and my knees looked at. I am sorry but I can't pretend anymore shit had gotten out of my control. I appreciate all that you have done for me and am truly hurt I can't hack it right now."

14. In response to the August 12, 2020 text message from the claimant, the employer sent the claimant the following text message: "No worries brotha [sic]. Get straight, hang stuff and much love. Let me know if you need anything."

15. On August 19, 2020, the claimant sent the employer the following text message: "Tuesday August 25, @ 8:30 I have an appointment in [Town A], MA for my lab work, covid test, and x ray for my knees, and Tuesday September 1, @130 with Dr and I'll find out when I see a specialist orthopedic. In the interim the Dr suggested that I cut back my hours on my feet. He suggested only working 3-4 days, I don't know how you guys want to schedule it; Tues-Fri, Wed-Sat, Thur-sun (9-9). I want to do what I can and be productive and help you out as much as I can. We have made arrangements to have [child] taken care of during the week while she is under our supervision."

16. In the August 19, 2020 text message, the claimant also mentioned going to the police.

17. On August 19, 2020 at 9:40 a.m., the employer sent the claimant the following text message: "Not once have you mentioned a return to work[,] I am willing to continue to endure the pain of your absence but we need to begin to discuss a resolution."

18. On August 19, 2020, the claimant sent the employer the following text message: "[1st co-owner] In regard to that comment, I don't think you read my text in its entirety. This hasn't been a vacation for me I've been battling on the phone fixing the VAs fuck up in pain, on top of dealing with Court house bureaucracy and police bullshit run around. I didn't ask for any of this and I'm trying to do what I can for you. Please look at what I said and let's work something out. I'm heading into the court house."

19. On August 19, 2020, the 2nd co-owner sent the claimant a text message writing in part: "I feel like you have always had my back also. I am sorry for the pain and suffering you are going through right now. But not coming in to talk face to face or calling us is tough for me. Having us worry about you and having [girlfriend] text [1st co-owner] again is rough for me. We are trying to run a business and you not being here has put us in a bad way. VA stuff, police shit and court personal stuff but it is affecting our business. You need to look at this through our eyes also. We feel for you and care for you both personally and professionally that's why I am taking the time to text this to you. If you were someone else you woukd [sic] have already been replaced. Like I said in the first text you need to do what's best for you."

20. On August 19, 2020, the 2nd co-owner subsequently sent the claimant the following text message: "I'm done texting…If you want to chat face to face or by phone. Or [1st co-owner] in charge anyway so whatever works."

21. The employer wanted to discuss the claimant's employment concerns during an in person meeting instead of by text messages exchanges. The employer concluded the text messages exchanges were not productive.

22. On August 21, 2020 at 8:36 a.m., the claimant sent the employer the following text message: "I'm on my way into work and noticed I didn't get paid. Am I hourly or salary? I'm not trying to be a dick here but what is going on here? Sorry I needed some needed time to get to see a Dr. because I am in serious pain. I told you I can't work 36-48 hours whenever you want. I don't know what more you want from me. And these games are childish and silly."

23. On August 21, 2020, the employer sent the claimant the following text message: "Childish and silly like having your girlfriend call to explain what is going on with you."

24. On August 21, 2020, the claimant sent the employer the following text message: "Sorry I was having a breakdown and physically, but yeah silly stuff. So as I stated in the previous text, am I salary or hourly? Or are you guys done." The employer did not respond to this text message.

25. The employer was expecting the claimant to report to work on August 21, 2020 as listed in the claimant's text message. The employer thought it was great that the claimant was going to finally report to work to discuss the situation.

26. The claimant subsequently did not report to work on August 21, 2020.

27. The claimant did not report to work on August 21, 2020 as the claimant wanted the employer to pay him wages for the days he was absent from work and wanted the employer to grant him an accommodation for his medical issues.

28. The claimant was not eligible for paid sick time from the employer's establishment for the time he was absent from work. The employer did not inform the claimant that he was going to be paid wages for the times he was absent from work.

29. The employer was willing to discuss the claimant's concerns about not being paid wages for the times he was absent from work. The employer would have considered possibly granting the claimant a loan if needed.

30. The employer was willing to discuss the claimant needing accommodations at work due to his medical conditions.

31. The claimant had no more contact with employer after August 21, 2020 and stopped reporting to work. The employer still had work available for the claimant.

32. The claimant was not laid off or discharged from work.

33. The claimant quit his job.

34. The claimant did not specifically notify the employer verbally or in writing that he was quitting or resigning from his job.

35. The claimant quit his job because the claimant did not report to work on August 21, 2020 after the claimant informed the employer by text message that he was on his way to work on that day, and the claimant subsequently stopped reporting to work.

36. The claimant did not make any efforts to preserve his job prior to quitting.

37. The claimant did not ask the employer for a leave of absence from work. The claimant was eligible for a leave of absence from work.

38. The employer was willing to discuss with the claimant scheduling accommodations that the claimant may have needed if the claimant did report to work on August 21, 2020.

39. The claimant re-opened his initial unemployment claim that was effective the week beginning November 17, 2019 for the week ending August 29, 2020.

Credibility Assessment:

During the hearing, the claimant contended that he did not quit his job. However, the employer's contention to the contrary is assigned more weight. It is concluded the claimant initiated the separation by not reporting to work on August 21, 2020, even though the claimant initially notified the employer by text message that he was on his way to work on that day. The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's testimony was more specific and easier to follow compared to the testimony of the claimant during the hearing.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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, except Findings of Fact ## 33 and 35, to the extent they contain a mixed question of fact and law, and Finding of Fact # 36, which states a legal conclusion that the claimant did not make any efforts

preserve his employment. "Application 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 adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we also agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question we must decide is whether the claimant initiated his separation from employment. The parties disputed the nature of the claimant's separation. The employer maintained that the claimant quit his job when he did not report to work on August 21, 2020, and subsequently failed to communicate with the employer again. The claimant maintained that, although he did not quit his job, and the employer did not fire him or lay him off, he no longer worked for the employer because it did not pay him for the time that he was absent from work.

"The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Here, the review examiner made a credibility assessment in favor of the employer. Such assessments 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. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "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.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). As stated previously, we believe the review examiner's credibility assessment was reasonable in relation to the evidence presented.

The review examiner found that, on August 21, 2020, the claimant sent the employer a text message stating that he was on his way to work, and that, although the employer was expecting the claimant to report to work on that date, the claimant did not report to work. *See* Consolidated Findings ## 22, 25, and 26. The review examiner also found that the claimant had no more contact with the employer after August 21, 2020, and stopped reporting to work. Consolidated Finding # 31. Where an employee fails to show up for work or report the reasons for an absence, the no-call, no-show is tantamount to a voluntary resignation. *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)). Given these findings, we agree that the claimant voluntarily resigned, effectively abandoning his job.

Because the claimant quit his job, we analyze the claimant's 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 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 provision, 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. In her original decision, the review examiner concluded that the claimant had not carried his burden. We agree.

Nothing in the record suggests that the claimant's decision to leave employment is based on urgent, compelling, or necessitous circumstances. The remaining question, then, is whether the claimant left for good cause reasons that are attributable to the employer. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). To determine if the claimant has carried his burden to show good cause under the above-cited statute, we must first address whether the claimant had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief).

The review examiner found that the claimant wanted the employer to pay him wages for the days he was absent from work. Consolidated Finding # 27. If the claimant had presented evidence that he had, in fact, experienced an unlawful withholding of pay by the employer under Massachusetts wage and hour laws, such a unilateral and substantial decrease to the amount of income paid to the claimant could constitute a reasonable workplace complaint supporting a quit for good cause. *See* Graves v. Dir. of Division of Employment Security, 384 Mass. 766 (1981). However, although the claimant argued throughout the hearing that he does not work for free, the claimant presented no evidence showing that he performed any services for the employer for which he did not receive appropriate compensation. Moreover, the record establishes that the claimant was not eligible for paid sick time from the employer's establishment for the times he was absent from work, and that the employer did not inform the claimant that he was going to be paid wages for the times he was absent from work. *See* Consolidated Finding # 28. The findings further show that the employer was willing to discuss the claimant's concerns about not being paid wages while he was absent from work. *See* Consolidated Finding # 29. For these reasons, we believe the claimant did not establish that he had a reasonable workplace complaint that constitutes good cause for resigning.

The review examiner also found that the claimant wanted the employer to grant him a medical accommodation. Consolidated Finding # 27. However, there is no evidence that the employer refused to grant a medical accommodation or that it was unwilling to consider granting the claimant one. *See* Consolidated Finding # 38. To the contrary, the record demonstrates that the employer was willing to discuss the need for a medical accommodation and, in fact, it allowed the claimant to remain away from work between August 11, 2020, and August 21, 2020, in part, to address these issues. *See* Consolidated Findings ## 11, 14, 17, and 30. Because the record does not suggest that the employer acted unreasonably toward the claimant at any time, we cannot conclude the claimant left his employment for good cause attributable to the employer.

Even assuming *arguendo,* that the claimant had valid workplace complaints, the claimant failed to undertake the reasonable attempt to preserve his employment required under Massachusetts law. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). As noted above, the consolidated findings indicate that the employer was both consistently responsive to the various personal challenges the claimant confronted and willing to discuss the claimant's workplace concerns. The claimant, however, neither reported to work nor otherwise communicated with the employer after August 21, 2020. Thus, the claimant failed to avail himself of the employer's willingness to address and thereby potential resolve any workplace complaints. Given this failure, we cannot conclude that the claimant reasonably attempted to preserve his employment or that such an attempt would have been futile.

We, therefore, conclude as a matter of law that the review examiner's original conclusion that the claimant's separation from employment was disqualifying under G.L. c. 151A, § 25(e)(1), is supported by substantial evidence and free from error of law.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning August 16, 2020, 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 - September 27, 2021

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: https://ui-cares-act.mass.gov/PUA/_/. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT 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.

JMO/rh