

The claimant was fired for being a no-call, no-show. Although arrested and in jail, she made no effort to inform the employer of the reason for her absence. Held she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0058 4188 23

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 her position with the employer on October 29, 2020. She filed a claim for unemployment benefits with the DUA which was approved in a determination issued on December 26, 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 affirmed the agency's initial determination and awarded benefits in a decision rendered on July 16, 2022.

Benefits were awarded after the review examiner determined that the claimant was not discharged for a conviction of a felony or misdemeanor and, thus, was not disqualified under G.L. c. 151A, § 25(e)(3). 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 take additional evidence and to notify the parties that G.L. c. 151A, §§ 25(e)(1) and 25(e)(2), could be considered in our analysis. 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, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's original decision to award benefits is based on substantial and credible evidence and free from error of law, where the claimant's separation occurred when the claimant was unable to report to work due to her arrest and incarceration, and she made no attempts to contact the employer regarding her work status.

Findings of Fact

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

1. The claimant worked as a full-time residential counselor for the employer human services agency between August 2, 2015, and October 29, 2020, when she separated.

2. The claimant worked Thursday through Sunday on varied shifts, earning \$13.35 per hour.
3. The claimant's immediate supervisor was the program manager (supervisor).
4. The employer maintains a Job Abandonment Policy (the policy). The policy states that "Employees who fail to report to work for three (3) consecutive work days and/or scheduled work shifts without notifying the agency of the absence will be considered as having voluntarily resigned as a result of job abandonment."
5. On October 19, 2020, the claimant was scheduled for and worked her shift.
6. The claimant was scheduled to work on October 22, 23, 24, and 25, 2020. The claimant was aware that she was scheduled to work on those dates.
7. On October 21, 2020, the claimant was arrested by the Massachusetts State Police for trafficking narcotics. The claimant was locked up in a [City] jail.
8. On October 21, 2020, when the claimant was arrested, the police took her phone.
9. While the claimant was locked up, she had to create an account to access a telephone.
10. The claimant did not attend her shifts on October 22 or 23, and 24, 2020 nor did she inform the employer that she would be absent from the shifts. The claimant did not attend her shifts because she was in jail. The claimant did not contact the employer because she did not have access to a phone, nor did she know the employer's number from memory.
11. October 23 and 24, 2020, the employer's assistant manager (manager) attempted to contact the claimant but did not get a response.
12. On October 25, 2020, the claimant did not attend work, nor did she contact the employer to report her absence, because she was still in jail.
13. On October 25, 2020, the employer's on-call manager called an individual connected to the claimant and asked the individual to have the claimant contact the employer. The relationship between the claimant and the individual is unknown.
14. On October 29, 2020, the employer's human resources assistant sent a letter informing the claimant that, effective October 29, 2020, she had been terminated from her job due to job abandonment. The claimant was also

informed that she should contact the employer's director of employee relations (director).

15. The claimant's termination was not due to a conviction of a felony or misdemeanor.
16. On November 2, 2020, the claimant was released from jail after her mother, who lives in Puerto Rico, posted her bail.
17. On November 3, 2020, the claimant called the supervisor, about returning to work. The supervisor told the claimant that she should call the employer's human resources department regarding her job.
18. On November 3 or 4, 2020, the claimant called and spoke to a human resources representative (representative). The representative told the claimant that she was discharged because she was a no-call no-show for her shifts. The representative also sent the letter dated October 29, 2020, to the claimant's email.
19. At no time did the claimant tell the employer that she had been convicted of a felony or misdemeanor.
20. The claimant completed a fact-finding questionnaire for the DUA, stating that her mom bailed her [out] on November 2, 2020. She also stated that she contacted the employer on the next day.
21. As of September 1, 2022 (the hearing date), the charges against the claimant are still pending. The claimant was not convicted of a felony or misdemeanor in relation to the charges.

Credibility Assessment:

At the remand hearing, a copy of the employer's Job Abandonment Policy and a copy of the letter dated October 29, 2020, were entered into record as Remand Exhibits 6 and 7, respectively.

During the hearing, the parties gave consistent testimony regarding the claimant's no-show no-call for her shifts between October 22-25, 2020.

During the initial hearing, the director testified that the claimant contacted her on November 9, 2020, to report that she had been arrested. However, during the remand hearing, the claimant testified that she contacted the supervisor on November 3, 2020, after being released from jail. She also testified that the supervisor told her to contact the employer's human resources department, which she did on November 3 or 4, 2020. The claimant's testimony is consistent with her fact-finding statement to the department stating that she contacted the employer the day after being released from jail. The claimant's testimony is being accepted as

more credible than the testimony offered by the employer. Consequently, findings were made that the claimant contact the employer (her supervisor) right after she was released rather than on November 9, 2020.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to unemployment benefits.

The review examiner initially awarded benefits under G.L. c. 151A, § 25(e)(3), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he period of unemployment next ensuing . . . after the individual has left work . . . (3) because of conviction of a felony or misdemeanor.

After the initial hearing, the review examiner awarded benefits because the claimant had not been convicted of a felony or misdemeanor. However, we remanded the case for additional evidence, because the scope of the review examiner's inquiry did not adequately encompass the relevant sections of the law applicable to this separation.

We conclude that the proper section of law to apply to the claimant's separation is G.L. c. 151A, § 25(e)(1). The findings of fact show that the claimant completed her last day of work for the employer on October 19, 2020. Consolidated Finding # 5. Although she was aware that she was scheduled to work from October 22 through 25, 2020, the claimant did not report to work on those dates or inform the employer that she would be absent for those shifts. Consolidated Findings ## 6 and 10.

The employer attempted to contact the claimant on October 23, 24, and 25, 2020, going as far to contact an individual associated to the claimant to ask for the claimant to contact the employer, but the claimant did not respond. Consolidated Findings ## 11–13. After the claimant failed to report to work or call out for these consecutive shifts, the employer sent a letter on October 29, 2020, advising the claimant that she had been separated due to job abandonment. Consolidated Finding # 14. By failing to report to work or even to notify her employer about why she was absent from work, the claimant brought her unemployment upon herself and initiated the separation from her job. *See Olechnichy v. Dir. of Division of Employment Security*, 325 Mass. 660, 662–663 (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)). Therefore, G.L. c. 151A, § 25(e)(2), which applies to cases of discharge, does not apply.

G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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

G.L. c. 151A, § 25(e) also provides, in pertinent part, as follows:

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, 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.

Under both of these sections of the law, the claimant has the burden of proof to show that she is entitled to benefits. After reviewing the records of both hearings, as well as the consolidated findings of fact, we conclude that the claimant has not met her evidentiary burden.

The review examiner found that the claimant failed to appear for work between October 22 and October 25, 2020, because she was in jail. Consolidated Finding # 10. She was arrested and taken into custody on October 21, 2020, and remained in jail until her mother came from Puerto Rico and bailed her out on November 2, 2020. Consolidated Findings ## 7, 16. We recognize that an arrest is most often an unexpected event and carries with it a certain sense of involuntariness. However, under the above-cited sections of the law, in order for the claimant to carry her burden, she must show that she made reasonable attempts to keep her job. Kowalski v. Dir. of Division of Employment Security, 391 Mass. 1005, 1006 (1984) (rescript opinion). Such efforts would indicate a desire and willingness to continue in her employment. *See* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597-98 (1974). *See also* Board of Review Decision 0011 1258 40 (April 22, 2014) (claimant who was in contact with his attorney while incarcerated, yet failed to ask his lawyer or anyone else to contact the employer about his absences, was ineligible for benefits because he did not make reasonable attempts to keep his job)¹.

The claimant made no such attempts in this case. Although her mobile phone was confiscated while she was incarcerated (Consolidated Finding # 8), she was nevertheless able to create an account to access a telephone from jail (Consolidated Finding # 9) and indeed reached her mother, who lived in Puerto Rico, to come to Massachusetts to post bail for her (Consolidated Finding # 16). The claimant's arrest, inability to show for work, and her lack of effort to keep the employer informed about her situation leads us to conclude that the claimant caused her own separation and brought her unemployment upon herself. Consequently, her separation from the employer is disqualifying.

¹ Board of Review Decision 0011 1258 40 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

We, therefore, conclude as a matter of law that the claimant voluntarily quit her position without good cause attributable to the employer or urgent, compelling, and necessitous reasons, and was not entitled to benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending October 24, 2020, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 8, 2023



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
(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.

JPCA/rh