**The claimant could not explain why she was a no-call/no-show from work for two consecutive shifts on November 10th and 11th, 2022. Therefore, she has not met her burden to show she abandoned her job for good cause attributable to the employer or for urgent, compelling, and necessitous reasons under G.L c. 151A, § 25(e). She is ineligible for benefits.**

**Board of Review**
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**Issue ID: 0079 1788 80**

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 November 12, 2022. She filed a claim for unemployment benefits with the DUA, effective November 27, 2022, which was denied in a determination issued on February 23, 2023. 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 April 20, 2023. We accepted the employer's application for review.

Benefits were denied after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate 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 obtain additional evidence pertaining to the reason for the claimant's separation. Only the employer 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 decision, which concluded that the claimant's failure to notify the employer of her consecutive absences did not constitute deliberate misconduct in wilful disregard of the employer's expectations because she had previously been absent on multiple occasions due to her mental health, 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. The claimant worked in many capacities for the employer, the operator of retail stores.

2. The claimant's primary role for the employer was the beauty coordinator for the store location where she worked.

3. The claimant was hired on or about April 15, 2022, and was typically scheduled to work forty hours per week with occasional overtime.

4. The claimant had two ways of receiving her schedule: one was from a hard copy posting of the schedule displayed in the associate lounge, and the other was through an app.

5. The schedule in the lounge announced the schedule for three weeks out, and the claimant never notified the employer that she had difficulty accessing the hardcopy schedule.

6. The claimant occasionally had difficulty accessing the app, and the few times the claimant brought the difficulty to the assistant store manager's ("ASM's") attention, the ASM readily reestablished the claimant's access to the app.

7. To the extent the claimant had lingering difficulties with using the app, the employer was unaware of those difficulties.

8. The ASM reminded the claimant multiple times, both by text and in person, that the schedule was posted and also available on the app.

9. The claimant did not drive, and she, therefore, typically walked to the store, about an hour from her home.

10. If the claimant was unable to work during any of her scheduled shifts, she was, per company policy, supposed to call the manager on duty before the start time of her shift.

11. The employer's written policy provided that three consecutive days of no-call/no-show was grounds for termination.

12. The claimant was aware of her obligation to notify the employer in advance and had been instructed on this obligation numerous times during her employment.

13. The claimant had difficulty with telephone reception where she lived; because of that, the employer permitted her to communicate with the managers by text message instead of by telephone.

14. The claimant texted the employer about rides and the permissible arrival time and sometimes her inability to work, and the employer made a habit of

responding to the claimant's texts and providing her with the requested information.

15. More often, however, the claimant did not notify the employer in advance that she would not be working.

16. The claimant and the ASM with whom she communicated the most did not communicate by email.

17. The claimant was scheduled to work but did not work on the following fifty-two days, all in 2022: 5/27, 5/29, 5/31, 6/21, 6/22, 7/1, 7/2, 7/3, 7/5, 7/7, 7/8, 7/9, 7/17, 7/19, 7/25, 7/26, 7/27, 7/29, 7/30, 7/31, 8/6, 8/9, 8/20, 8/22, 8/23, 8/24, 8/25, 8/26, 8/29, 8/30, 9/5, 9/7, 9/8, 9/9, 9/17, 9/20, 9/22, 9/27, 9/28, 10/3, 10/7, 10/10, 10/11, 10/12, 10/20, 10/25, 10/26, 10/31, 11/4, 11/8, 11/10, and 11/11.

18. Of the fifty-two missed days, forty-one of them were no-call/no-shows.

19. The claimant often missed work because her mental health was suffering and she was unable to get out of bed, but the reason she missed work on any particular one of these fifty-two occasions is unknown.

20. The claimant had worked as a hairdresser before the [COVID]-19 public health emergency interfered with her business.

21. The claimant had expected the beauty coordinator job to be easy but found it to be very difficult.

22. The claimant had three different managers, and she was often getting assignments from them that seemed to conflict or were more than she could handle or both.

23. The claimant was frequently pulled into an office to be questioned on why she had not completed this assignment or that one and why she had not issued more store credit cards to customers.

24. The claimant, who missed her former position as a hairdresser, missed work many times because she was unhappy in her new job.

25. Aside from the claimant's attendance infractions, the employer considered the claimant to be a very good employee.

26. Despite the claimant's many absences and her many failures to notify the employer in advance of the absences, the employer accommodated the claimant by continuing to employ her.

27. The employer made the accommodations only because the employer was extremely short-staffed, and the claimant was a very good worker when she arrived to work.

28. The accommodations were not part of the employer's standard practice but were geared to unusual circumstances.

29. The ASM spoke to the claimant several times to improve her attendance.

30. The ASM suggested adjusting the claimant's schedule to make it easier for her to show for work, and the employer adjusted the claimant's schedule several times, but the attendance problems continued.

31. The employer also accommodated the claimant by allowing her to communicate by text message rather than telephone.

32. Even then, the claimant failed many times to report her absences in advance.

33. Before November of 2022, the employer spoke with the claimant about the need for her to report on her scheduled workdays, to arrive on time, and to communicate with the employer beforehand if she was going to be late or miss work.

34. The employer had recently issued the claimant a written warning regarding the need to improve her attendance and communication. The specific date when the warning was issued is unknown.

35. It is unknown whether the written warning specified that the claimant could be terminated if she engaged in similar conduct in the future.

36. The employer had a policy that three consecutive workdays of no-call/no-show constituted job abandonment.

37. The claimant was aware of the employer's policies regarding attendance because, in the claimant's training, the employer read the entire front and back of its attendance policies out loud, and throughout the reading, the employer asked if anybody had questions and also because it is common sense that an employee knows that they are expected to arrive for work when scheduled.

38. The claimant last worked for the employer on November 9, 2022.

39. The claimant was aware that she was scheduled to work on November 10, 2022, and November 11, 2022.

40. The claimant failed to report to work on November 10, 2022, and also on November 11, 2022, and she failed to notify the employer in advance that she would be missing work.

41. The reason the claimant neither reported to work nor informed the employer of her absence on November 10, 2022, and November 11, 2022, is unknown.

42. The employer reached out to the claimant about the two no-calls/no-shows several times without a response.

43. The claimant did not communicate with or reach out to the employer after November 9, 2022.

44. By failing to report to work after November 9, 2022, and ceasing to communicate with the employer, the claimant effectively quit her employment for unknown reasons.

45. On or about November 12, 2022, the employer terminated the claimant's employment as a result of job abandonment.

46. Once the employer terminated the claimant's employment, the employ[er] withdrew her shifts and assigned them to other associates.

47. The employer never communicated to the claimant that she was no longer employed.

48. By Notice of Disqualification, dated February 23, 2023, the claimant was denied benefits as of November 20, 2022.

49. The claimant appealed the disqualification.

[Credibility] Assessment:

The claimant testified at the initial hearing, which was held on April 12, 2023. The ASM to whom the claimant primarily reported while she worked at the store testified at the remand hearing, on June 7, 2023, on behalf of the employer. The two witnesses never testified at the same time and, therefore, did not ask questions of the other and did not directly respond to the other's testimony.

The claimant and the ASM offered starkly different testimony. The claimant testified that her work schedule was not posted timely and that the only way for her to find out the schedule at the beginning of each week was to text a manager or to walk to the store, an hour away, to view the schedule. She testified further that she frequently had problems accessing the schedule through her app.

The ASM, on the other hand, testified that the schedule was regularly posted in the lounge area three weeks in advance and that the few times the claimant brought app access difficulties to the ASM's attention, the ASM re-established connection for the claimant right away. The ASM's testimony was specific, responsive, and clear. The nature of her testimony indicated an organized and responsive person. Those

qualities rendered her testimony credible regarding the availability of the scheduling information and more persuasive than the claimant's testimony.

Based upon time records from the employer's computer system, the ASM identified all the dates that the claimant had missed work. The ASM testified that forty-one of these dates had been codified as no-call/no-show events. In doing so, the witness exhibited a high familiarity with the claimant and her situation and her mode of operating. She also demonstrated a high amount of respect for the claimant as a worker and as a person. This testimony revealed little reason for the ASM to stretch or deviate from the truth. The claimant's testimony, in contrast, was more general. It was initially credited, after the first hearing, only because it was undisputed. Overall, the ASM's testimony was more reliable than the claimant's, and it, therefore, serves as the basis for the majority of the factual findings.

The employer's witness testified that she was the primary manager from the employer who communicated with the claimant. She also testified that she did not believe she had text messages or emails between her and the claimant because she deleted any text messages after the claimant no longer worked with the employer and that they never corresponded via email. The ASM did not have a copy of the written warning available to her, but both she and the claimant agreed that a written warning had issued.

The claimant testified that she had texted her manager on November 11, 2022, to get her schedule for the following week and that the manager had not responded to the claimant's text message. The claimant testified further that she had sent her manager another text message days later to confirm whether she had been let go and that the manager likewise did not respond to that text. The ASM testified, in contrast, that she and the other managers had reached out to the claimant multiple times after the no-calls/no-shows on November 10 and 11, 2022 and that the claimant had not responded to any of them.

For the reasons stated above, the ASM's testimony regarding the claimant's no-calls/no-shows on November 10 and 11, 2022, and her failure to respond to communications about those absences is considered more credible than the claimant's, and it is, therefore, accepted. Furthermore, if the claimant had intended to remain employed, she could have communicated with the employer by visiting the store in person but did not do so. Thus, it appears that the claimant did not intend to remain employed. It is therefore concluded that the reason why the claimant chose to remain away from work on these days is unknown.

The claimant indicated that she did not know whether she was scheduled for either November 10 or 11, 2022. The ASM testified, on the other hand, that the claimant was scheduled for both those dates. In so testifying, the ASM relied upon the time records from the employer's computer system. The computer software had marked both days as no-calls/no-shows. The marking was also consistent with the ASM's memory that it was these two no-calls/no-shows that prompted the employer to terminate the claimant's employment.

> Given that the employer's schedule was posted weeks in advance and that the claimant was readily able to re-establish connection (with the ASM's help) when her scheduling app became disabled, it is not credible that the claimant did not know that she was scheduled to work on November 10 and 11, 2022.

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 benefits.

Following remand, the review examiner accepted as credible the assistant store manager's testimony that the claimant failed to report to work on either November 10th or 11th, 2022, did not inform the employer that she would be absent, and failed to respond to any of the employer's attempts at communication. *See* Consolidated Findings ## 39, 40, and 43. 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). As the employer provided documentary evidence verifying the testimony provided by its witness, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

Given this assessment, the claimant's separation is more appropriately viewed as voluntary job abandonment. 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)). Therefore, this case is properly analyzed under the following provisions under G.L. c. 151A, § 25(e), 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 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.

The express language of these provisions places the burden of proof upon the claimant.

There is no indication from the record that the claimant resigned because of some decision made or action taken by the employer. Therefore, we need not consider whether the claimant resigned for good cause attributable to the employer. *See* Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (to show good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving).

We next consider whether the claimant established urgent, compelling, and necessitous reasons for her separation. "[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under" G.L. c. 151A, § 25(e), "which may render involuntary a claimant's departure from work." Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). To make such a determination, we must examine the circumstances in each case and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep, 412 Mass. at 848, 851.

The claimant testified that she had missed work in the past because challenges that she experienced with her work assignments were impacting her mental health. Consolidated Findings ## 19, 21, and 24. However, she did not provide any evidence indicating that she had sought treatment for or been diagnosed with any conditions that impacted her ability to perform her job. The claimant was also unable to explain why she was absent from work on November 10th and 11th, 2022, or account for her failure to contact the employer after November 9, 2023. Consolidated Findings ## 19, 40, 41, and 43.

Because the claimant failed to establish any reasons which either prevented her from reporting to work on either day or notifying the employer of her absences, she has not shown by substantial and credible evidence that she left her employment for an urgent, compelling, and necessitous reason. We, therefore, conclude as a matter of law that the claimant is 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 of November 27, 2022, 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.

Charlene A. Stawicki

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - August 30, 2024**

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

LSW/rh