

Although getting his car towed may have prevented the claimant from reporting for his scheduled shift, the claimant did not establish that he acted reasonably in failing to notify the employer of his absence under the circumstances. Held his no-call, no-show disqualified him from receiving benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
100 Cambridge Street, Suite 400
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: 0079 5701 90

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. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, he was ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, effective March 12, 2023, which was approved in a determination issued by the agency on May 2, 2023. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, attended only by the employer, the review examiner reversed the agency's initial determination in a decision rendered on June 18, 2023. The claimant sought review by the Board, which dismissed the appeal because it was filed after the statutory appeal deadline set forth under G.L. c. 151A, § 40, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On December 18, 2023, the District Court ordered the Board to review the claimant's appeal on the merits. Although we continue to maintain that we do not have jurisdiction to review this case, we complied with the District Court's order and reviewed the record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal. Subsequently, we remanded the case to the review examiner in order to afford the claimant an opportunity to present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which disqualified the claimant under G.L. c. 151A, § 25(e)(2), due to his failure to show mitigating circumstances for not appearing for, or contacting the employer about, an assigned emergency work shift, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record after remand, we affirm the review examiner's decision on different grounds.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. On January 29, 2022, the claimant began working part-time for the employer, a health and human services staffing company, as a direct support professional. The claimant was supervised by the senior placement consultant and the associate placement consultant. His most recent rate of pay was around \$20.00 per hour.
2. At the time of his employment, the claimant was living in [City A], Massachusetts.
3. The employer offers employees shifts via email and text messages. The senior placement consultant or the associate placement consultant sends employees email blasts with available shifts, including some that are prioritized as the most urgent to fill.
4. The employer sends between 4 and 5 email blasts per week announcing available shifts.
5. The employer occasionally calls employees directly to offer them shifts, especially if a shift needs to be filled urgently.
6. Employees create their own schedule by picking the shifts they want. There is no minimum number of shifts an employee is required to take.
7. If an employee wants a shift, they reply to the email specifying which shift they would like. Shifts are assigned on a first-come, first-served basis.
8. Employees can also call the employer to see if there are available shifts.
9. After an employee accepts a shift, the employer then sends them a confirmation email.
10. The employer has a reliability policy requiring employees to report to their confirmed shifts on time or to call out at least 4 hours in advance of the shift. When an employee calls out, they are required to speak to a supervisor and cannot leave messages or voicemails.
11. The purpose of this policy is to ensure that customers are satisfied. If an employee does not appear for a shift and does not call out, the employer could lose a customer and their reputation could be harmed. In addition, customers that are required to maintain a certain number of staff for a certain number of patients could fall out of the required ratio.
12. If an employee has an emergency where they cannot appear for work on time or at all, they should let the employer know as soon as possible.

13. The employer cannot have a shift begin and end without knowing that the scheduled employee is not going to appear.
14. Employees who do not appear for a confirmed shift and do not call out are subject to discipline, up to, and including, termination.
15. The claimant was aware of the policy and signed it before he was hired. He was also reinstructed on the policy before he took a shift on January 5, 2023.
16. The employer expects that employees appear for their scheduled shifts or call out at least four hours in advance by contacting the employer and speaking to someone, not by leaving a message or a voicemail.
17. The purpose of the expectation is to ensure that all the employer's clients are able to care for their patients and that the employer's reputation is not harmed.
18. When the claimant started working, he worked approximately 15 hours a week.
19. In May of 2022, the claimant began a medical leave due to a fractured shoulder. The leave was initially scheduled to end in October of 2022.
20. The claimant signed up to take a double shift on October 21, 2022.
21. On October 21, 2022, the claimant violated the policy when he did not appear for a shift and did not call out.
22. On October 21, 2022, the claimant received a verbal warning for violating the policy.
23. The claimant extended his leave of absence until January of 2023.
24. Between October 22, 2022, and January 4, 2023, the claimant performed no work for the employer.
25. On January 4, 2023, the claimant emailed the employer and asked for work. He was offered an 8:00 a.m. to 11:00 p.m. shift on January 5, 2023, in [City B], Massachusetts.
26. On January 5, 2023, the claimant worked his scheduled shift located in [City B], Massachusetts from 8:00 a.m. to 11:00 p.m.
27. In the morning of January 6, 2023, around 11:00 a.m., the claimant's supervisor texted the claimant and offered him an emergency shift that urgently needed to be filled. The shift was scheduled for January 6, 2023, at 12:30 p.m. until 8:00 p.m. The shift was located in [City C], Massachusetts.

28. The claimant had never worked at this particular location in [City C], Massachusetts before.
29. At approximately 11:05 a.m., the claimant called his supervisor to talk about the shift.
30. The claimant agreed to take the shift.
31. The claimant was not required to take the shift.
32. At 11:53 a.m., the supervisor sent the claimant the email confirming that he had taken the shift.
33. The claimant was not certain about how to get to the [City C] location.
34. The claimant drove from [City A] to a cousin's house in [Location]. He wanted to speak to his cousin to learn how to get to the location of the shift in [City C].
35. When the claimant arrived at his cousin's house, his cousin served him lunch.
36. At 12:30 p.m., when the shift began, the claimant was still at his cousin's house.
37. At 12:40 p.m., the claimant's car was towed from in front of his cousin's house, with his phone inside the car.
38. When the claimant realized that his car had been towed, he went to the tow company to try and get his car back. He did not have the funds to get his car back immediately and he could not recover his phone.
39. The claimant did not appear for his scheduled shift.
40. There are no records of the claimant calling the employer, texting the employer, or emailing the employer on January 6, 2023, after his car was towed.
41. The claimant did not speak directly to the employer to inform them that he could not appear for his shift.
42. The claimant did not try to reach the employer through his email because he could not get into his email without his phone.
43. The employer attempted to call the claimant on January 6, 2023, and on multiple other occasions over the next few days. The employer could not reach the claimant. The claimant did not respond to the employer's phone calls.
44. On January 6, 2023, after the claimant did not appear for his shift and did not call out, the employer made the claimant inactive in their system. When the claimant was inactive, he could not be scheduled for any further shifts.

45. The senior placement consultant made the decision to terminate the claimant after January 6, 2023, based on his no-call, no-show.
46. Between January 6, 2023, and January 10, 2023, the claimant was focused on trying to get his car back.
47. On January 10, 2023, the claimant was able to retrieve his car from the towing company.
48. On January 10, 2023, the claimant emailed the senior human resources generalist and informed him that on January 6, 2023, his car was towed with his phone inside and that he had been trying to reach his supervisor but could not contact her. The senior human resources generalist forwarded the email to the claimant's supervisor.
49. On January 10, 2023, the claimant also called his supervisor to explain the situation.
50. If the claimant had appeared for his shift, even if he was late, he would not have been terminated.
51. If the claimant had been able to reach out to the employer, even via voice mail or text message before or during the scheduled shift, he might not have been terminated.
52. On January 18, 2023, the employer sent the claimant a packet informing the claimant that he was terminated from his position.
53. The employer officially processed the claimant's termination on February 9, 2023.
54. On May 2, 2023, the Department of Unemployment Assistance issued a Notice of Approval allowing the claimant benefits under Section 25(e)(2) of the Law commencing the week beginning January 8, 2023. The employer appealed the Notice of Approval.

Credibility Assessment:

During the remand hearing, both the claimant and the employer agreed about the employer's attendance policy, the claimant's knowledge of the policy and the consequences for violating it, that the claimant did not appear for a shift on January 6, 2023, and that he did not directly speak to the employer about why he did not appear for the shift until January 10, 2023.

However, during the remand hearing, the claimant and the employer's testimony differed on two critical points. In both cases, the employer's testimony is

determined to be more credible than the claimant's. First, the claimant maintained that he never accepted the January 6, 2023, shift but that he only had told his supervisor that he might be able to accept the shift. The employer's testimony to the contrary, that the claimant had accepted the shift, [is] determined to be more credible where they provided the email sent from the employer to the claimant on January 6, 2023, confirming the claimant's shift that day and where the claimant testified that he had left his house to go to his cousin's to ask for directions about how to get to the [City C] location. Second, the claimant maintained that once he realized that his car had been towed, he had attempted to reach out to the employer on January 6, 2023, to let them know what happened, but that he was not able to reach the supervisor due, in part to his phone being in the car when it was towed. According to the claimant, without his phone, he did not have his supervisor's direct number and he did not have access to his email so he could not immediately log into his account and email his supervisor. He said that he did try calling a number for the employer that he found on the internet using his wife's phone and his cousin's phone and left voice and text messages, at least 3 or 4 times on January 6, 2023. The claimant's testimony, that he did try to reach the employer, is not determined to be credible, where the employer testified that they had searched their records from January 5, 2023, until January 10, 2023, but found no evidence of the claimant calling or leaving a message, and where no one was able to produce any records of phone calls or texts from the claimant to the employer between the January 6, 2023, email and the January 10, 2023, email. The claimant also admitted that during this time, he was more focused on getting his car back. Finally, in the January 10, 2023, email from the claimant to the employer, although he stated that he had been trying to contact his supervisor, he provided no dates or times when he had done so.

The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's testimony was more logical, more specific, and easier to follow compared to the testimony of the claimant.

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 and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree that the claimant is ineligible for benefits, but we reach our conclusion on different grounds.

The review examiner rendered her decision pursuant to G.L. c. 151A, § 25(e)(2), which sets forth the eligibility criteria when an employee is terminated from employment. In this case, the employer terminated the claimant for failing to appear for a January 6, 2023, shift or report his inability to do so. *See Consolidated Findings ## 45 and 46.* However, where an employee is terminated for a so-called no-call, no-show, we treat the separation as a voluntary resignation and analyze eligibility pursuant to G.L. c. 151A, § 25(e)(1). *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)).

While there was no dispute that the claimant did not appear for this shift, the parties disagreed as to whether the claimant notified the employer that he could not be there. In a detailed credibility assessment, the review examiner explains why she credited the employer’s testimony that the claimant never notified them that he could not make the shift until days later. 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).

For the reasons stated in the credibility assessment, particularly that the claimant did not present any evidence to support his testimony that he did call the employer on January 6, 2023, and texted the next day to explain his inability to report for the assignment, we believe that the review examiner’s assessment is reasonable in relation to the evidence presented. As such, the consolidated findings reflect that this was a no-call, no-show and the claimant’s eligibility for benefits is properly analyzed pursuant to G.L. c. 151A, § 25(e)(1). This provision states, in relevant part:

[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.

These provisions expressly place the burden of proof upon the claimant.

Nothing in the record indicates that the employer had anything to do with the claimant’s failure to report for his assignment or contact the employer. Thus, there is no basis to conclude that his separation was for good cause attributable to the employer. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980) (to determine if the separation was for good cause attributable to the employer, the focus is on the employer’s conduct).

The record does suggest that the claimant may have had urgent, compelling, and necessitous reasons for not reporting to work, as assigned. “[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). 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.

Here, the review examiner found that the claimant’s car was towed at about the time his shift was to begin. *See Consolidated Findings ## 36 and 37.* Even if we accept that losing access to his car prevented him from reporting to work, it does not explain his failure to promptly notify the employer that he could not make it. For this reason, the claimant has not shown that he acted reasonably based on pressing circumstances.

We, therefore, conclude as a matter of law that the claimant voluntarily separated from his employment, and he did not meet his burden under G.L. c. 151A, § 25(e)(1), to show that it was for good cause attributable to the employer or urgent, compelling, and necessitous reasons.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning March 12, 2023, 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 - March 18, 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.

AB/rh