

**Claimant failed to produce any information to support his assertion that his incarceration caused him to be unable to communicate with the employer or show up for work. Nor did he prove that he stopped reported due to the employer's actions. Therefore, he is not eligible for benefits pursuant to § 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: 0080 9073 86**

### 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 his position with the employer and filed a claim for unemployment benefits with the DUA, effective August 6, 2023, which was denied in a determination issued on August 24, 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 September 19, 2023. We accepted the employer's application for review.

Benefits were awarded 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 afford the employer an opportunity to testify and present other evidence. Only the employer 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant had mitigating circumstances for being absent from work because he was incarcerated, 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 full-time as a driver for the employer, a portable rental and storage company, from March 2023 through on or about 6/23/23.

2. The claimant's schedule varied as to days but was generally 40 hours per week.
3. The employer has an attendance policy which provides that an employee who has missed three days of work without notifying the employer will be considered to have abandoned their job. Managers have discretion to work with employees on attendance issues prior to terminating them.
4. The claimant was aware of this policy, as it was provided to him at hire. The claimant signed an acknowledgement that he had received the employer's policies on 3/23/23.
5. The employer had an expectation that employees are not absent from work without notifying the employer.
6. The claimant was aware of this expectation, as it was commonsense and outlined in the employer's policy.
7. The claimant was in an accident and was arrested on an unknown date. He had to appear in court regarding the arrest.
8. On or about 6/9/23, the claimant texted his direct manager ("[A]") to let him know he (the claimant) had to go to court for [sic] 8:00 a.m. and would reach out to him after. [A] responded to the claimant, acknowledging the message.
9. The employer did not hear from the claimant after 6/9/23.
10. On 6/20/23, having not heard from the claimant since 6/9/23, the employer determined the claimant had abandoned his job and processed his termination.
11. On or about 6/20/23, the claimant was terminated for not calling or showing up for work between 6/9/23 and 6/20/23.

#### Credibility Assessment:

Only the claimant attended the initial hearing. The employer did not attend. On November 6, 2023, a remand hearing was held via telephone. During the remand hearing, the employer appeared and testified for the first time in this matter. The employer's Chief Financial Officer (CFO) appeared for the employer, represented by an agent. The claimant did not attend the remand hearing.

The testimony the claimant gave at the initial hearing is in agreement with the employer's testimony given at the remand hearing on the points that the claimant texted his supervisor about court, and that the employer terminated him for abandoning his job after he was out of work from his court date until the employer terminated him. The claimant indicated at the first hearing that he had been incarcerated and unable to call the employer to explain his absences. He did not provide the dates of his incarceration. The claimant did not appear at the remand

hearing to provide additional information about his arrest, the charges, his incarceration, or any attempts to contact the employer. The employer witness had no information on those topics, either. As such, additional information about those topics is not available.

### 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 conclusion that the claimant is eligible for benefits.

At the outset, we must decide whether the claimant's separation is properly analyzed as a discharge, on one hand, or a quit, on the other. As noted above, the review examiner initially concluded that the claimant had been discharged from his employment. Consequently, the review examiner analyzed the claimant's eligibility for benefits under G.L. c 151A, § 25(e)(2), 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] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

In applying this provision, the review examiner concluded that the claimant's incarceration mitigated his failure to adhere to the employer's attendance expectations and, therefore, could not be seen as being done in wilful disregard of the employer's interest. After remand, the consolidated findings establish only that the claimant was in an accident, arrested on an unknown date, and had to appear in court regarding the arrest. Consolidated Finding # 8. The consolidated findings also show that, while the claimant sent his immediate supervisor a text message on or about June 9, 2023, concerning an upcoming court date, the employer did not hear from the claimant again. Consolidated Finding # 9. After the employer did not hear from the claimant after June 9, 2023, the employer terminated the claimant for failing to call or show up for work. Consolidated Findings ## 10–11. Given these findings, the claimant's separation is more appropriately viewed as voluntary job abandonment. We have held that the failure of an employee to notify his employer of the reason for his absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1). Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950). Therefore, we analyze his eligibility for benefits under the following provisions of G.L. c. 151A, § 25(e), which state, 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 explicit language in the foregoing provision places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

The claimant did not present any evidence to show that his failure to call in or appear for work was due to anything that the employer did. See Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980) (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). Thus, the record does not establish that he stopped working for good cause attributable to the employer

As for showing urgent, compelling, and necessitous reasons, the Supreme Judicial Court has stated that 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 v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992). Due to his failure to appear at the remand hearing to provide further evidence about why he did not call in or appear for work, the record fails to show urgent, compelling, and necessitous circumstances.

Even if the claimant's separation had been shown to be due to urgent, compelling, and necessitous reasons, a claimant, prior to separating, is required to take such "'reasonable means to preserve [his] employment' as would indicate the claimant's 'desire and willingness to continue [his] employment.'" Norfolk County Retirement System, 66 Mass. App. Ct. at 766, *quoting* Raytheon Co. v. Dir. of Division of Employment Security, 364 Mass. 593, 597–598 (1974).

In this case, the claimant sent a text message to his immediate supervisor on or around June 9, 2023, regarding an upcoming court date and informed the supervisor that he would reach out to him afterward. Consolidated Finding # 8. However, the employer never heard from the claimant again after June 9, 2023. See Consolidated Finding # 9. As the review examiner noted in her credibility assessment, the claimant did not appear at the remand hearing to provide additional information about his arrest, the nature of the charges against him, his incarceration, or any attempts to contact the employer. Without this information, we cannot conclude that further attempts to preserve his employment would have been futile.

We, therefore, conclude as a matter of law that the claimant left the job voluntarily without urgent, compelling, and necessitous reasons.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 25, 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 - September 27, 2024**



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  
(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](http://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