

The employer fired the claimant for being a no-call, no-show. Although incarcerated, he was able to contact his mother, who reached out to his coworker, who then informed the employer that the claimant would be absent from work due to his incarceration. Because the claimant notified the employer of his absence, the Board held that the claimant did not engage in the misconduct for which he was fired, and he is entitled to benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0083 8355 11

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 we affirm on different grounds.

The claimant separated from his position with the employer on September 17, 2024. He filed a claim for unemployment benefits with the DUA, effective September 22, 2024, which was denied in a determination issued on November 9, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 22, 2025. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for urgent, compelling, and necessitous reasons and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). 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 decision, which concluded that the claimant voluntarily left his employment for urgent, compelling, and necessitous reasons because he failed to call out of work due to his incarceration, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time in the receiving department for the employer, a food distributor, from February 25, 2019, until September 13, 2024.

2. The employer determines discipline for employees who are absent and fail to call out of work for emergency reasons on a case-by-case basis.
3. The employer considers employees who fail to call out of work for 2 consecutive days to have abandoned their employment.
4. The claimant very rarely took time off from work.
5. The claimant had not received discipline for attendance issues in the past.
6. If the claimant required a day off, he always requested it properly or called out of work according to the employer's call out procedure.
7. On Thursday, September 12, 2024, the claimant was arrested for suspicion of operating under the influence and was held in jail overnight.
8. While the claimant was in jail, he could not make calls that were not "collect calls."
9. The claimant called his mother and told her what had happened. The claimant asked his mother to contact the claimant's co-worker (Co-worker A) to let the employer know he would not be able to go to work the next day.
10. Co-worker A told the claimant's immediate supervisor (the supervisor) about the claimant being in jail and unable to come to work. The supervisor told the Co-worker A the claimant had plenty of vacation time to cover his absence. Co-worker A relayed the information to the claimant's mother.
11. At the time of his arrest, the claimant had approximately 145 hours of vacation time available.
12. The supervisor tried to enter the claimant's vacation time to cover his absences and was told by the employer's human resources department that vacation time could only be used if pre-approved.
13. The supervisor let the operations manager (the OM) know about the claimant's situation. The OM indicated to the supervisor that he would let the employer's human resources department (HR) know.
14. While the claimant was in jail, HR learned from an employee (the employee) that there was a news article about the claimant's arrest.
15. HR asked the supervisor if he knew about the claimant's arrest. The supervisor told HR he had been advised by Co-worker A that the claimant would not be coming to work.

16. The claimant was brought to court the next day for a bail hearing. The claimant's bail was set at \$5,000.00.
17. The claimant could not post the bail, so he continued to be held in jail.
18. The claimant's attorney could not get the claimant into court again until September 17, 2024.
19. After the claimant appeared at court on September 17, 2024, he was released.
20. Immediately after being released, the claimant went to work to talk to the OM. The OM brought the claimant to the HR office and told him he was let go for failing to call out of work for 2 consecutive days.

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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, while we believe that the review examiner's findings support the conclusion that the claimant's separation did not disqualify him from receiving benefits, we do so under a separate provision of G.L. c. 151A.

The review examiner concluded that the claimant was a no-call, no-show for two consecutive days. For this reason, she decided the claimant's eligibility for benefits under 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)). However, the findings do not support such a conclusion.

The record shows that, through his mother and Co-worker A, the claimant not only notified the employer of his absence, but that he had also informed the employer that the reason for his absences was attributed to his incarceration. *See Findings of Fact ## 9, 10, 13, and 15.* As such, the claimant did not fail to notify the employer of his absence. Without evidence to indicate that the claimant otherwise resigned, and we see none, his separation is treated as a discharge. *See Finding of Fact # 20.*

When a claimant is discharged from employment, his eligibility for benefits is analyzed 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 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, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer,

provided that such violation is not shown to be as a result of the employee's incompetence. . . .

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Because the employer has discretionary authority as to the form of discipline for any violation of its call out policy, the employer has failed to meet its burden to show that the claimant violated a *uniformly enforced* rule or policy. *See* Finding of Fact # 2.

Alternatively, we review the record to see if the employer has proven that the claimant's actions constituted deliberate misconduct in wilful disregard of the employer's interest.

To meet its burden, the employer must first show that the claimant engaged in the conduct for which he was discharged. The employer in this case discharged the claimant for failing to call out of work for two consecutive days. *See* Finding of Fact # 20.

On Thursday, September 12, 2024, the claimant was arrested on suspicion of operating under the influence and was placed in jail. *See* Finding of Fact # 7. Since the claimant was only authorized to make collect calls, he was unable to contact the employer directly. *See* Finding of Fact # 8. However, the record reflects that he was able to speak with his mother and asked her to relay a message to his coworker. The coworker in turn notified the employer that the claimant was in jail, and that he was unable to work his scheduled shift. *See* Findings of Fact ## 9, and 10. Nothing in the record suggests that there was any delay on behalf of the claimant in reaching out to the employer to inform them of his absence. These findings, combined with the supervisor's testimony that the coworker kept him informed of the claimant's status on a daily basis, are substantial evidence that the claimant had notified the employer of his two absences.¹

Under these circumstances, the employer has not shown that the claimant failed to call out of work. Thus, the claimant did not engage in the misconduct for which he was discharged.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest or for knowingly violating a reasonable and uniformly enforced rule or policy of the employer, within the meaning of G.L. c. 151A, § 25(e)(2).

¹ While not explicitly incorporated into the review examiner's findings, the supervisor's testimony regarding his knowledge of the claimant's absence and the daily interactions that he had with the coworker about the claimant's absentee status is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending September 21, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 7, 2025



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.

DY/rh