

0019 5811 74 (Sept. 13, 2017) – Where a supervisor repeatedly asked the claimant to work on Saturdays, even though the employer had granted Saturdays off as a religious accommodation, she had good cause attributable to the employer to resign. The claimant reasonably believed that further efforts to correct the problem would have been futile.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0019 5811 74

BOARD OF REVIEW DECISION

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 affirm.

The claimant resigned from her position with the employer on August 26, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 20, 2016. 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 April 1, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer 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 conclusion, that the claimant had good cause attributable to the employer to resign due to her supervisor's statements and actions relating to job performance, job security, and exercising a religious exemption from Saturday work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer briefly in 2008 until she was laid-off.

2. The claimant returned to work for the employer on 01/02/11 and she worked fulltime for this employer's college until she left employment on [08/26/16].
3. At hire and several times during the course of her employment, the claimant requested a religious accommodation so she would not be asked to work on Saturdays because she is a Seventh Day Adventist and Saturday is the Sabbath day in this faith.
4. The claimant worked as a non-union Administrative Assistant from 01/02/11 until her position was eliminated on 08/01/16 and the claimant was given additional work tasks and the new title of Admissions Assistant. The claimant worked as an Admissions Assistant from 08/01/16 through 08/25/16.
5. When the claimant became an Admissions Assistant, she was told that she was being placed on probation for a period of six months.
6. The claimant felt anxious and threatened by the new probation period because since 2013, the claimant had been complaining to senior management and to human resources that she was being harassed, bullied and retaliated against by her immediate supervisor, the Assistant Dean and Campus Director.
7. The claimant feared the probation period she was placed on was part of a pattern of mistreatment to cause her to leave her employment.
8. Prior to 2013, the claimant received only positive reviews for her work. In 2013, the claimant was asked to serve on a search committee and her supervisor became angry at the claimant when, in her role on the search committee, she did not choose the person he wanted. The claimant's immediate Supervisor began to harass the claimant by asking her to work on Saturdays and telling her that she was "doing a bad job" and could be "written up and fired".
9. In 2013, when the claimant complained to Human Resources regarding bullying and harassment by her supervisor, she was told that the supervisor denied her allegations and she should work it out with the same supervisor she had complained was harassing her in the workplace.
10. The claimant in 2013 sought counseling from her religious leaders for the workplace bullying and harassment by her immediate supervisor.
11. The claimant loved her job so much that she did her best to ignore the harassment, the non-response from Human Resources and to just continue working.

12. Despite repeatedly being assured of the religious exemption by human resources and senior management, the claimant's immediate supervisor continued to pressure her to work on Saturdays.
13. Human Resources and senior management would tell the claimant's immediate supervisor to accommodate the claimant's religion by not insisting she work on Saturdays, but the immediate supervisor, while recognizing the exemption, would still pressure the claimant to work on Saturdays.
14. The claimant's immediate supervisor would hold staff meetings where he would emphasize the need for everyone to work that Saturday as it was an "all hands on deck" necessity.
15. The immediate supervisor would then go around the room and make each worker, including the claimant (who in theory had a religious exemption in place) state to those assembled for the meeting if they intended to work that Saturday.
16. Although the claimant had a religious exemption in place, the pressure on her to work was such that sometimes she would work because she believed she would be forced off the job if she did not work on Saturday.
17. It is unknown how many Saturdays the claimant worked because the immediate supervisor, to avoid paying overtime, would note those that [sic] workers who actually worked on Saturday had worked on Sunday.
18. The claimant suffered emotionally and spiritually when she worked on Saturday and she frequently sought advice from her religious leaders regarding the problems she had with her immediate supervisor.
19. In December 2015, the claimant began receiving counseling from a Clinical Social Worker at the Center for Violence Prevention and Recovery at [Name] Medical Center for the stress caused by the bullying and harassment by the claimant's immediate supervisor.
20. The claimant sought assistance from the employer's EAP (Employee Assistance Program) noting the ongoing harassment and its impact on her health, but she was told that while they could listen to her to allow her to vent, they could take no action to end the harassment and address the hostile work environment created by her immediate supervisor. The claimant did not find EAP helpful because they could not resolve the underlying problem of harassment.
21. Near the end of her employment, the claimant had her position eliminated and she was given a new position with additional job tasks and she was told she was on probation so her work in the new position could be closely monitored.

22. The claimant was not given any additional compensation when her job changed and her work tasks increased.
23. When the claimant requested training from her immediate supervisor for the new position, she was told dismissively that he did not need to train her.
24. The immediate supervisor also made comments to the claimant that “everyone knows what a bad job you are doing” and the immediate supervisor could discharge her anytime he wanted to end her employment as she was an “at-will” employee. The immediate supervisor also accused the claimant of “lying about her workload”.
25. After being placed on probation and openly threatened with discharge, the claimant concluded that any further job preservation efforts resulting in a non-hostile work environment would be futile. The stress from the ongoing harassment negatively impacted the claimant’s health and for the claimant this was the final straw that caused her to resign when she chose to resign.
26. The claimant’s family has a history of heart issues that led to death at an early age and the claimant was concerned that the stress she felt from the workplace harassment could negatively impact her health.
27. In the claimant’s 08/16/16 resignation letter to Human Resources, she notes the long history of complaining about the harassment and retaliation over a period of years and the impact on her health as she stayed working for years hoping for the situation to improve before finally deciding to leave to protect her health.
28. The claimant filed a claim for unemployment benefits on 08/29/16, effective 08/28/16. The claimant requested a hearing on the 09/20/16 initial determination that she was not eligible for benefits.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact and credibility assessment except as follows.

First, we reject those statements in the findings that describe the supervisor’s behavior as harassment, except to the extent the findings are referring to the claimant’s characterization of her supervisor’s conduct. We do so because under G.L. c. 151A, § 25(e), the term “harassment” carries legal significance, as referenced below, and whether or not the supervisor’s actions amounted to harassment is a legal, not a factual conclusion. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979) (“Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.”). Second, in Findings

of Fact ## 4, 21, and 22, the review examiner's reference to the new Admissions Assistant job description containing additional tasks is misleading. The record indicates that, although the changes included new tasks and more responsibility, these were not necessarily added to the claimant's former work tasks. Third, the portion of Finding of Fact # 9 stating that the Human Resources representative told the claimant that the supervisor denied her allegations is unsupported.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Because the claimant resigned from her job, her eligibility for benefits is properly analyzed pursuant to the following provisions of law. G.L. c. 151A, § 25(e), 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 (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

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.

An individual shall not be disqualified, under the provisions of this subsection, from receiving benefits if it is established to the satisfaction of the commissioner that the reason for leaving work and that such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.

Under these provisions, the claimant has the burden of proof. *See Crane v. Comm'r of Department of Employment and Training*, 414 Mass. 658, 661 (1993).

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. *Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980). To determine if the claimant has carried her burden to show good cause, we must first address whether the claimant had a reasonable workplace complaint. *See Fergione v. Dir. of Division of Employment Security*, 396 Mass. 281, 284 (1985) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief).

One reason for the claimant's departure was the claimant's dissatisfaction with how the employer handled her request for a religious accommodation not to work on her Sabbath (Saturday). The parties agreed that the employer had granted this accommodation and that the

claimant was, therefore, not required to work the new student orientations, which were usually held on a few Saturdays each year. The review examiner found that the claimant had made this request when she was hired. Finding of Fact # 3. Emails from the employer's Dean show the employer's consent for this accommodation as early as September, 2013. *See Exhibits ## 29 and 30.* During the hearing, the claimant's supervisor acknowledged learning about and consenting to honor the accommodation. Nonetheless, at staff meetings prior to the new student orientations, the supervisor would emphasize the need for everyone to work the orientation and then go around the room asking each staff person, including the claimant, if they intended to be there. *See Findings of Fact ## 12–15.* This very act of asking the claimant to work on a Saturday, knowing of her religious accommodation, was unreasonable behavior, particularly where he continued this practice after the claimant had spoken with the supervisor directly,¹ complained to human resources and the college dean, and submitted letters from her church. *See Exhibits ## 17, 18, and 30.* It makes no difference whether the supervisor did so because, as he testified, he believed the claimant enjoyed meeting the students at the new orientations, or because she had consented to work Saturdays on several occasions. His conduct is not insulated by the fact that he let the claimant know how happy he was that she was attending one Saturday open house and thanked her.² The claimant could reasonably understand this behavior to mean that the supervisor was not happy when she did exercise her accommodation, and we believe she could reasonably have felt pressured to work another Saturday orientation.

Apart from how the supervisor dealt with the claimant's religious accommodation, the review examiner found that, during the course of her employment, the supervisor would also tell the claimant that she was doing a bad job, could be written up and fired at any time, and he had accused her of lying about her workload. *See Findings of Fact ## 8 and 24.* In rendering such findings, the review examiner accepted the claimant's assertions over the supervisor's denials. An employer's express dissatisfaction with work performance generally does not constitute good cause to leave employment under G.L. c. 151A, § 25(e)(1). In this case, however, we need not decide whether the supervisor's criticism was warranted or rose to the level of creating a hostile work environment, because the mishandling of the claimant's approved religious accommodation, by itself, created good cause attributable to the employer to resign.

In order to be eligible for benefits, the claimant also has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). The evidence shows that, beginning in 2013 and at various times right up until June, 2016, the claimant complained about being expected to work on Saturdays to the human resources department or the college dean, and that she sought counseling from her religious leaders and, in her last year, from a therapist. Findings of Fact ## 9, 10, 18, and 19; *see also Exhibits ## 28, 30, 50, and 63.* Meanwhile, the stress, which the record indicates was, at least, in part due to the pressure she felt to work on her Sabbath, was apparently taking a toll on the claimant's health. Findings of Fact

¹ During the hearing, the supervisor testified to discussing the claimant's religious exemption with her in early 2014 and confirming it with the college dean. This testimony, while not explicitly incorporated into the review examiner's findings, 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).

² In testifying about this, the supervisor noted that he also observed that the claimant seemed kind of sad while she was there. This testimony was also part of the unchallenged evidence presented at the hearing.

25 and 26. Thus, when the Director of Human Resources offered to allow the claimant to rescind her resignation and help work through her concerns³, we think it was reasonable for the claimant to believe that, after three years if trying, further efforts would have been futile.

We, therefore, conclude as a matter of law that the claimant had good cause attributable to the employer to resign. She is eligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending August 27, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 13, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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

³ See Exhibit # 66, an email from the Director of Human Resources to the claimant. This exhibit is also part of the unchallenged evidence presented at the hearing.