

Although the employer had spoken to the claimant twice about poor performance, there was no indication that the employer was about to fire her. Instead, it took steps to more closely supervise her work. Claimant abruptly resigned without showing efforts to preserve her employment or that she was about to be discharged. She was ineligible under § 25(e)(1).

**Board of Review
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Issue ID: 0020 8081 54

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Eric Sullivan, 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 had filed a claim for unemployment benefits, which was denied in a determination issued on February 6, 2017. The claimant appealed to the DUA hearings department. Following a hearing on the merits, the review examiner overturned the agency's initial determination in a decision rendered on April 14, 2017. The employer sought review by the Board, which denied the appeal, and the employer appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On August 25, 2017, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence pertaining to any claimant efforts to preserve employment and to articulate in a credibility assessment his reasons for believing whether or not the employer made a statement about whether things were going to work out. Only the employer participated in the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's original conclusion, that the claimant was entitled to benefits because she resigned under a reasonable belief that she was about to be discharged, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings provide that neither the employer nor the claimant raised a question about whether the employer was thinking of ending the claimant's employment.

Findings of Fact

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

1. The claimant worked for the instant employer as a full-time book keeper from 10/31/2016 until her separation on 1/19/20[1]7.
2. During the course of her employment, the co-owner was dissatisfied with the claimant's work performance.
3. The co-owner verbally spoke to the claimant [on] a couple occasions informing the claimant that she needed to do a better job of keeping up with filing which was her main duty.
4. The claimant was doing the best she could but had difficulty keeping up with her job duties including filing.
5. On 1/18/2017, the co-owner informed the claimant that she was dissatisfied that the claimant was performing other duties instead of putting files in the cabinet.
6. The co-owner told the claimant that she would need to start meeting with her daily regarding her tasks.
7. The co-owner never told the claimant that she needed to think if things were going to work out regarding her continued employment.
8. There was no mention of possible future termination. The claimant never asked if she was going to be terminated.
9. The claimant believed that she was going to be terminated for her work performance and decided to resign her employment.
10. The claimant was aware of another employee which the [employer] had let go because things were not working out.
11. On 1/19/2017, the claimant told the co-owner that she was resigning after speaking with her husband and deciding that she would be a stay at home mom.

Credibility Assessment:

The owner's testimony is accepted as credible in all contested area[s] since the owner was forthright in giving detailed testimony and her version of the events made more sense. The claimant's testimony was less detailed and did not make logical sense, thus causing the claimant's testimony to be less credible in all contested area[s].

Ruling of the Board

In accordance with our statutory obligation, we review 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. Based upon these consolidated findings, we now reject the review examiner's original conclusion that the claimant quit under a reasonable belief of imminent discharge, as outlined below.

Because the claimant resigned from her employment, her eligibility for benefits is governed by G.L. c. 151A, § 25(e)(1), 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 (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

The express provision in this section of law places the burden of proof upon the claimant.

The consolidated findings show that the employer was not satisfied with the claimant's work performance. Specifically, it communicated on two occasions that the claimant was not keeping up with filing. *See Consolidated Findings ## 2, 3, and 5.* As in his original decision, the review examiner continued to believe that the claimant was doing the best job she could and quit because she believed that she was going to be fired for poor work performance. *See Consolidated Findings ## 4 and 8; and Remand Exhibit 1, page 2.*

The Supreme Judicial Court (SJC) has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401-402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981). Applying this principle, the review examiner originally concluded that the claimant reasonably believed her discharge for poor performance was imminent because the co-owner had just directed the claimant to think about whether she thought things were going to work out. However, the review examiner has now found that the co-owner did not make such a statement. *See Consolidated Finding # 7.* He has further found that the employer never mentioned the possibility of termination. *Consolidated Finding # 8.* Instead, the consolidated findings show that the employer was trying to help her succeed. It was taking steps to more closely supervise the claimant's work. *See Consolidated Finding # 6.*¹ These facts suggest that the employer was not planning to fire the claimant, at least not right away. Therefore, the claimant's belief that she was about to be fired was not reasonable.

¹ During the remand hearing, the co-owner also testified that, on the claimant's second-to-last day, she moved the claimant's desk up to the front of the office, where she could more easily be monitored and get questions answered. This testimony 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).

An employee who voluntarily leaves employment due to an employer's action 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). In the present case, nothing in the record suggests that the claimant made a reasonable effort to preserve her employment before resigning. Despite the District Court's remand order, the only reference to a possible preservation effort is in Consolidated Finding # 8, where the review examiner found that the claimant never asked if she was going to be terminated. This question is not a pre-requisite to showing reasonable efforts to preserve a job. However, in combination with the fact that the claimant showed up the next morning with her resignation rather than give the employer's new daily supervision a chance to work, the reasonable inference is that the claimant simply gave up on her job.

We, therefore, conclude as a matter of law that the claimant did not prove that she resigned under a reasonable belief of imminent discharge. We further conclude that she failed to make reasonable efforts to preserve her employment. Thus, the claimant has not sustained her burden to qualify for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning January 15, 2017, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 11, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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