

**Where the claimant immediately quit after her supervisor swore at her, and absent any other evidence that the supervisor's inappropriate language was part of a larger pattern or her reprimand was otherwise unreasonable, the claimant has not shown that she had good cause to quit or that efforts to preserve her employment would have been futile.**

**Board of Review  
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**Issue ID: 0021 2050 95**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by Dena Lusakhpuryan, 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 resigned from her position with the employer on March 1, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 18, 2017. 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 June 21, 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion, that the claimant left her employment with good cause attributable to the employer and was not obligated to attempt to preserve her employment, is supported by substantial and credible evidence and is free from error of law, where the claimant immediately resigned her employment when her supervisor swore at her.

### **Findings of Fact**

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

1. In 2005, the claimant started working for the employer, a hospital, as a fulltime surgical technician.
2. The claimant was scheduled to work 3 varying days of the week for the employer. The claimant was scheduled to work from 7AM until 7PM.
3. The claimant's supervisor was the Clinical Manager.
4. The claimant's last shift she worked ran from February 27, 2017 until February 28, 2017.
5. The Director had complained to the Clinical Manager that the claimant had caused a biohazard. The Director sent the Clinical Manager a photograph that another worker had taken of the biohazard.
6. On February 28, 2017, the claimant had a meeting with the Clinical Manager. The Clinical Manager initiated this meeting.
7. During the February 28, 2017 meeting, the Clinical Manager discussed a biohazard with the claimant. The claimant had left a plastic zip log bag containing a placenta unzipped. The Clinical Manager also showed the claimant a picture of the biohazard.
8. During the February 28, 2017 meeting, the Clinical Manager cursed at the claimant. The Clinical Manager asked the claimant if this was a big fuck you.
9. During the February 28, 2017 meeting, the claimant was upset about the way the Clinical Manager was treating the claimant.
10. The claimant subsequently left the meeting.
11. The claimant sent a text message to a co-worker asking if the co-worker had sent a photograph of a biohazard to the employer.
12. Two workers complained to the employer that text messages were being exchanged and social media postings were being exchanged blaming one particular working [sic] for sending a picture of a biohazard. The employer does not know who wrote the text messages or posted on the social media websites.
13. On March 1, 2017, the Clinical Manager initiated a telephone conversation to the claimant. During this phone call, the Clinical Manager cursed at the claimant. During this telephone conversation the Clinical Manager instructed the claimant to watch her fucking ass.
14. During the March 1, 2017 telephone conversation, the claimant verbally resigned from work. The Clinical Manager advised the claimant to reconsider her resignation.
15. The Clinical Manager requested a written resignation from the claimant.

16. The claimant quit her job because the Clinical Manager cursed at the claimant on February 28, 2017 and March 1, 2017.
17. The claimant did not attempt to speak with Human Resources about the Clinical Manager's behavior prior to resigning.
18. On March 1, 2017, the claimant e-mailed the employer a letter of resignation (Exhibit 7). The claimant offered to work until March 12, 2017.
19. On March 3, 2017, the claimant had a meeting with the Clinical Manager and a Human Resources Person. The employer declined to have the claimant work out her notice period. The employer paid the claimant her wages through March 12, 2017.
20. On March 3, 2017, the claimant filed for unemployment insurance benefits (Exhibit 1).
21. On May 18, 2017, the Department issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(1) of the Law commencing the week beginning February 26, 2017 and until she met the requalifying provisions of the Law (Exhibit 4).

#### Credibility Assessment:

During the hearing, the Clinical Manager contended that the Clinical Manager did not curse at the claimant on February 28, 2017 or March 1, 2017. However, the claimant's contention to the contrary is assigned more weight where the claimant's recollection of the Clinical Manager cursing at her on February 28, 2017 and March 1, 2017 was very specific and detailed.

#### 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 ultimate 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that these findings support a conclusion that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(1). Rather, we conclude that the claimant has not met her burden of proof and failed to make any reasonable efforts to preserve her employment before quitting.

As the claimant alleged that she quit due to a work-related issue, the applicable section of law is 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 explicit language in G.L. c. 151A, § 25(e)(1) places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985). Here, the claimant resigned because of two incidents in close succession in which her supervisor, the Clinical Manager, swore at her.

Despite the employer's testimony to the contrary, the review examiner credited the claimant's testimony that the Clinical Manager actually swore at the claimant on these two occasions. The responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). Such credibility determinations 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). Even if we were to reach a different conclusion, we must accept the review examiner's findings, because they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) ("[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner's findings are supported by substantial evidence.").

However, the Board is not obligated to accept the review examiner's legal conclusions. The "[a]pplication of law to fact has long been a matter entrusted to the informed judgment of the board of review." Fingerman, 378 Mass. at 463-464. Under G.L. c. 151A, § 25(e)(1), 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). While general and subjective dissatisfaction with working conditions does not provide good cause to leave employment, it is well-settled law that "intolerable working conditions" do so. Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). Here, it is clear that the Clinical Manager acted inappropriately in asking the claimant if her actions were "a big fuck you" and telling her to "watch [her] fucking ass." However, the employer's underlying concerns appear to be legitimate. As stated in the findings, the claimant had improperly disposed of biohazard material and then the claimant texted a coworker to try to determine who had reported this. See Findings of Fact ## 7 and 11. We also note that the specific profanities used by the Clinical Manager were not slurs, insults, or threats. It was undisputed that the Clinical Manager had never previously used inappropriate language with the claimant<sup>1</sup>. The claimant did not testify to anything that would suggest the Clinical Manager's inappropriate language was part of a larger pattern of behavior. In light of the above factors, we decline to conclude that this seemingly isolated incident rendered

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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 claimant's work environment so intolerable or unreasonable as to give her good cause to quit her employment.

In addition, even if we were to conclude that the Clinical Manager's actions rose to the level of 'good cause', the Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's actions 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). Here, it was undisputed that the claimant did not address her concerns with Human Resources or an upper-level manager such as the Director, before resigning on March 1, 2017.

In her decision, the review examiner noted that the claimant did not attempt to preserve her employment, but excused her from this obligation because "the Clinical Manager was the claimant's supervisor and cursed at the claimant." However, the fact that it was the claimant's own supervisor who acted inappropriately does not automatically render preservation efforts futile; this is merely one factor to consider. Notably, at the hearing, the claimant herself made several statements which indicate that she did not believe such efforts would have been futile. She expressed regret about her decision to quit, noting that it was made "quickly" and "in frustration." The claimant also testified that she wished the employer had attempted to resolve the problem during a meeting with Human Resources on March 3, 2017. This indicates that the claimant believed the issue possibly could have been resolved. However, this meeting took place *after* the claimant had already resigned both verbally and via email two days before. In light of the above, it cannot be concluded that the claimant reasonably believed that efforts to preserve her employment before resigning would have been futile.

We, therefore, conclude as a matter of law that the claimant voluntarily left work without good cause attributable to the employer.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending March 18, 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 - October 31, 2017**



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](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.

JRK/jv