

Where a vent constantly blowing cold air at the claimant's workstation caused the claimant persistent respiratory health problems, she had good cause to quit pursuant to G.L. c. 151A, § 25(e)(1). Because the claimant spoke to her supervisor and several individuals from the employer's facility about the problem, and a transfer was not available, the claimant made sufficient efforts to try to preserve her employment before quitting.

**Board of Review
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Issue ID: 0021 4296 98

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 effective February 8, 2017. She reopened her existing claim for unemployment benefits with the DUA, and was denied benefits in a determination issued on September 26, 2017. 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 January 31, 2018. 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 remanded the case to the review examiner to allow the employer an opportunity to testify and offer 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 left her employment voluntarily for good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law, where the claimant developed chronic respiratory issues related to her work environment.

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 part time as a receptionist for the employer, a salon, from November, 2016, until February 8, 2017. The claimant had no other employment during this time.
2. The claimant worked at the employer's salon located in [Town A], MA. The employer's main office was located in [Town B], MA.
3. The claimant worked about 20 hours per week at a rate of \$12.00 per hour.
4. The claimant's supervisor was the employer's salon manager (manager).
5. The reception desk for the salon was located outside of the salon in the lobby of a senior living community to which the salon was connected.
6. Above the reception desk were two vents. Throughout the claimant's employment, the vents were constantly blowing cold air down onto the claimant. The temperature in the lobby was between 58–60 degrees.
7. The claimant asked the manager if the air could be turned off. The manager told the claimant that there was nothing she could do about it and it's "just the way it is." The manager acknowledged that the lobby was cold and advised the claimant to use the space heater under the reception desk.
8. The vents that were above the reception desk were controlled by the senior living community. The employer could not adjust the temperature in the lobby where the reception desk was located.
9. The claimant could not leave the reception desk for an extended period of time because she was responsible for answering calls, checking in clients, and booking appointments.
10. The claimant began using the space heater under her desk. The space heater did not provide relief to the claimant from the vents blowing cold air from above. The claimant also started to wear additional layers of clothing to work.
11. In December, [2016], the claimant began to feel ill, she was suffering from constant fatigue, a cough and sore throat.
12. On December 16, [2016], the claimant went to the doctor because of her symptoms. The claimant was diagnosed with a sinus infection and put on medication. The doctor told the claimant that the cold air could have contributed to her sinus infection.
13. The claimant asked the senior living communities maintenance man if the temperature of the air coming from the vents could be adjusted. The maintenance man told the claimant that there was nothing he could do.

14. The claimant asked the manager of the gym – also located in the senior living community – if the temperature in the lobby could be adjusted. The gym manager told the claimant that he could only adjust the temperature one or two degrees but it would not make a difference. It is unknown if the gym manager ever adjusted the temperature.
15. As of January 27, 2017, the claimant was still suffering from the sinus infection.
16. On January 27, 2017, the claimant gave her 2-week notice to the manager. The claimant indicated that her last day of work would be February 10, 2017.
17. The claimant quit her employment because the lack of adequate heating in the employer's reception area caused her to become persistently ill.
18. The claimant's last day of work was February 8, 2017. The claimant did not work until February 10, 2017 because there was a snow storm that closed the salon.
19. The claimant continued to suffer from the sinus infection until her last day of work.
20. The claimant did not contact the employer main office or human resources department to address her concerns with the temperature in the reception area because the manager told her that contacting the main office would not help.
21. The claimant did not request a transfer to one of the employer's other locations. Although the claimant would have been eligible for a transfer, there were no receptionist positions available at the employer's other locations.
22. The claimant did not request a leave of absence. Although a leave would have been available to the claimant, a leave would not have helped the claimant if she was going to be returning to the same working conditions.
23. After the claimant left her employment, she was seen in the emergency room. The claimant had lung inflammation which was caused by the sinus infection. However, since being seen in the emergency room, the claimant has felt better and no longer suffers from the sinus infection or related symptoms.

CREDIBILITY ASSESSMENT

In this case, the employer's witness offered not [sic] direct testimony or evidence as to the events that led to the claimant's separation or the working conditions. The regional coordinator testified that she only became aware of the circumstances surrounding the claimant's separation after the claimant filed for unemployment benefits. However, she did confirm that the employer does not have control over the temperature in the lobby where the claimant worked. Given the lack of

substantial and credible evidence provided by the employer during the remand hearing, the claimant's direct testimony from the first hearing regarding the working conditions is accepted as more credible.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's consolidated findings of fact support the conclusion that the claimant left her employment voluntarily for good cause attributable to the employer.

As the claimant asserted that she left work due to workplace conditions, 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

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that her separation was for good cause attributable to the employer. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

The responsibility for assessing credibility and determining the facts of the case rests with the review examiner. Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985) (citation omitted). However, the Board is not obligated to accept the review examiner's legal conclusions as well. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

The claimant maintained that she left her job due to the fact that her workstation was constantly subjected to a direct current of cold air. It is well-settled law that "intolerable working conditions [which] has generally been understood to import substandard sanitation, temperature, ventilation, or other like factors which may contribute to the physiological discomfort or demise of exposed employees" constitute good cause for leaving employment. Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). Where the claimant's working environment evidently caused numerous persistent respiratory problems, the flow of cold air constituted more than a nuisance or discomfort for the claimant. We, therefore, conclude that the claimant was subject to intolerable working conditions within the meaning of G.L. c. 151A, § 25(e)(1).

The analysis does not end there, however. 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). In this case, the claimant attempted to resolve the problem by speaking to her manager, using a space heater, wearing additional clothing, seeing her physician, speaking to the facility's maintenance person, and speaking to the manager of the facility. None of these efforts resolved the issue. While a transfer to a different location could have possibly solved the claimant's workplace complaints, it was undisputed that no other positions were available with the employer at the time the claimant resigned. While it is possible that the claimant could have made further efforts to resolve her concerns, the requirement is not that she pursue every possible avenue, but simply that she must make reasonable efforts. See Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2006) (citation omitted); Guarino, 393 Mass. at 94.

We, therefore, conclude as a matter of law that the claimant voluntarily left work with good cause attributable to the employer pursuant to 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 February 11, 2017, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 2018



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 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.

JRK/rh