

Where the claimant's direct supervisor belittled her in front of other employees and customers, treated her differently from other employees when she had problems with her work, and often made strange comments to her about wishing he was dead, the claimant showed that she had a reasonable workplace complaint regarding the supervisor. Since the claimant complained to the owner about the situation, and the owner did nothing about it, the claimant also showed that she made reasonable efforts to keep her job.

**Board of Review
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Issue ID: 0021 4301 53

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Joan Berube, a review examiner of the Department of Unemployment Assistance (DUA), to deny 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 28, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 12, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 24, 2017.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and, thus, was 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 claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence. Both parties 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 conclusion that the claimant is disqualified from receiving unemployment benefits, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant's supervisor, a pharmacist, belittled her, pointed out her errors in front of customers, treated her differently from other pharmacy technicians when it came to processing prescriptions, and exhibited odd behavior during work.

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 full-time as a pharmacy technician for the employer's pharmacy business from 8/1/97 until 3/27/17. The claimant worked on Monday through Friday from 11:30am until 5:00pm and was paid \$15.77 per hour.
2. Approximately one month prior to the claimant's separation, the employer reduced the claimant's work schedule from 40 hours per week to 27 hours per week. The reduction in hours was initiated because the employer wanted to cover the pharmacy with certified technicians and to reduce expenses. The reduction in schedule did not factor into the claimant's decision to leave her job. The claimant had been contemplating requesting a reduction in schedule because she was caring for an elderly family member in her home.
3. The employer purchased the pharmacy business sometime in 2011. The claimant was assigned to work under the supervision of the employer's pharmacist. The claimant worked with other employees who were certified pharmacy technicians. The claimant was not certified.
4. During the term of the claimant's employment, the pharmacist remarked that he wished he hit a tree and died. The claimant heard the pharmacist repeat this remark several times. The business owner also heard the pharmacist make this remark. The claimant told the business owner that she thought the pharmacist was suicidal because he made this statement. The owner told the claimant that the pharmacist was likely having a bad day. The owner never addressed the pharmacist about having made this statement because he did not feel that the pharmacist was suicidal.
5. During the term of the claimant's employment, she observed the pharmacist cry. The claimant did not inform the business owner of the pharmacist engaging in this behavior.
6. During the term of her employment, the claimant felt that the pharmacist picked on her whenever she made a mistake. The pharmacist made statements to the claimant about errors while in the presence of customers. The claimant felt that the pharmacist put her down. A customer who observed such an incident felt that the pharmacist belittled the claimant in front of customers. The customer was uncomfortable with the environment created by the pharmacist and informed the business owner of such. The customer told the business owner that it would be a shame to lose business due to the pharmacist's attitude. The customer eventually stopped going into the business regularly due to the uncomfortable atmosphere.

7. When processing customer prescription orders, the claimant sometimes encountered a “red screen”, which was indicative of a potential drug reaction. Whenever such an incident occurred, the pharmacist had to review and clear the red screen from the technician’s computer. Some technicians had the ability to drop the screen down and process a different order. It is unknown if the claimant had such capability in the system. The claimant found that when she informed the pharmacist of having encountered a red screen, he would respond by stating that he was not going to check it now, not to go past the red screen, and then directing the claimant to take a four-hour break. The claimant observed that when other technicians informed the pharmacist of having encountered a red screen that he would immediately clear it for them, but he ignored her whenever this occurred on her screen.
8. The claimant informed the business owner that the pharmacist created an atmosphere that was hard to work in. The owner concluded that the claimant disliked the pharmacist’s communication style because the pharmacist tended to repeat or go over a point several times. The owner considered the pharmacist a strict supervisor. The owner did not have any concerns about the pharmacist’s conduct because he felt that, while the pharmacist was not as easy going as the owners, the pharmacist’s conduct was not inappropriate.
9. Other employees informed the business owner that the pharmacist created hostility between employees by lying and that there was dissatisfaction with the way in which the pharmacist treated the employees. The owner responded by telling the employees that this is how the pharmacist is.
10. Approximately 8 to 12 months prior to her separation, the claimant told one of the certified technicians that the reason she (the claimant) did not become a certified technician was that the certified technicians are the pharmacist’s slaves. The claimant made this remark after the certified technician shared with the claimant a website where it stated that the education required for certification was not worth the modest pay increase which would result. The claimant also remarked to the certified technician that the pharmacist is mentally ill. The certified technician was offended by the claimant’s remarks because she did not like the claimant labeling her and the other certified technicians as slaves and because she did not like the claimant labeling someone as mentally ill. The certified technician reported the claimant’s statements to the pharmacist.
11. On 3/24/17, the claimant remarked to the pharmacist and other employees as she was leaving work that they should not talk about her too much after she left. The claimant made this remark because a co-worker informed the claimant that the pharmacist talked about the claimant to her (the co-worker). The co-worker also told the claimant that she contemplated quitting because the pharmacist had treated her badly after she arrived late for work.

12. On 3/27/17, the pharmacist spoke with the claimant about her remark when leaving work on 3/24/17. The pharmacist told the claimant that he thought the claimant was her friend and her remark was disrespectful. The pharmacist told the claimant that he said things about her because he was in a bad mood after the co-worker arrived to work late on 3/24/17. The pharmacist also cited the claimant for making a work related error, which another employee figured out. The pharmacist told the claimant that she could figure things out but instead, she asks him too many questions. The claimant considered the pharmacist's remarks mean and she became upset. When the claimant tried to speak, the pharmacist would not allow her to. When the claimant stated that she was going to leave, the pharmacist told her to wait, he wanted to talk to her and he wanted to hug her. The claimant told the pharmacist that she was leaving and was not going back to work.
13. On 3/28/17, the claimant texted the business owner that she was quitting her work. The claimant quit her work because she felt that the pharmacist treated her badly. The claimant told the business owner that she could no longer work for the business due to conflict and harassment involving the pharmacist, and because the pharmacist is friends with the owners.
14. On 3/29/17, the claimant filed an initial claim for unemployment insurance benefits, effective 3/19/17. On 3/30/17, the claimant completed a DUA fact finding questionnaire in which she wrote that she quit her work. When asked what reason she provided the employer for her leaving, the claimant wrote: "Harassment from main pharmacist, being treated rudely on a daily basis to the point where I would cry. Also my hours were cut from 40 to 27.5 also he would say he could do what he wants because he's the owners [sic] wife's best friend." The claimant was asked "What was the employer's response?" The claimant wrote: "He said the pharmacist is not going to change the way he approaches issues." When asked if she quit due to her hours being reduced, the claimant responded: "No."
15. On 3/30/17, the employer completed a fact finding questionnaire in which he wrote: "She stated having difficulties with (Pharmacist) and that the employee harasses her. And that she tried resolving them with me and that they weren't resolved to her satisfaction. And that because (Pharmacist) is a good friend of mine and the Vice-President of my company..."
16. On 6/1/17, the business owner sent the claimant an email message, which contained a disciplinary action form documenting an oral warning. The warning was dated 3/27/17 and cited an incident date of 3/24/17. The warning cited the claimant for telling another employee that "...you don't become certified because the certified techs are the pharmacists' slaves", and for stating that another employee is mentally ill. The owner wrote in his email message: "This is an oral warning I meant to give you on the last day you worked but you left before I could give it to you. I thought I had sent it to you

but forgot to.” The business owner sent the email message to the claimant on the day of a scheduled DUA hearing.

Credibility Assessment:

The business owner testified to having emailed the claimant a disciplinary warning on 6/1/17 because, while preparing to attend the hearing scheduled for that day, he realized that he had not forwarded the warning form to the claimant on her last day. The owner testified to having learned of the incidents cited in the warning form after the claimant quit. The owner testified that he learned of the issues when speaking with the pharmacist and later confirmed them with the certified technician to whom the claimant directed the remarks. Given that the claimant resigned on 3/28/17, the owner appears to have backdated the disciplinary form. The owner’s testimony on this point was not credible and was therefore given no weight. Likewise, the owner testified during the first hearing session that he had not received complaints from other employees about the pharmacist’s behavior. The claimant presented two witnesses who previously worked with the pharmacist. Each witness testified separately and both confirmed having raised issues to the owner about the pharmacist’s behavior. In light of the above, the overall credibility of the business owner’s testimony was diminished. Further, the employer’s failure to provide direct testimony from the pharmacist and the certified technician, both of whom still work for the employer, resulted in greater weight being given to the claimant’s testimony.

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. As discussed more fully below, however, we reject the review examiner’s legal conclusion that the claimant is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner found that on March 28, 2017, the claimant sent a text to the employer’s owner stating that she was quitting her job. Since the claimant quit 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

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits. Following the initial hearing, at which only the employer offered

evidence, the review examiner concluded that the claimant had not carried her burden. After our review of the entire record, including the testimony from the hearings and the consolidated findings of fact, we conclude that the claimant has shown that she quit her job for good cause attributable to the employer.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct. 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 under the above-cited statute, 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) (noting that the standard is one of reasonableness in quit situations). In this case, the claimant quit her job due to the ongoing behavior of her supervisor, the pharmacist, and it is her burden to show that his behavior was sufficiently egregious or objectionable to create good cause for her to quit her job.

During the hearing, the claimant testified to several of the pharmacist's behaviors. The review examiner, who explicitly found that the claimant gave more credible testimony than the employer,¹ made findings in accordance with her testimony. Generally, the pharmacist exhibited odd and objectionable behavior toward the claimant. He would tell the claimant that he wished he had hit a tree and died. He cried at work. He talked down to the claimant, publicly belittled her, and picked on her in front of other employees and customers. See Consolidated Finding of Fact # 6. He treated her differently from other employees, in that he would help other employees if a "red screen" came up on a computer, but he would tell the claimant he would not check it and that the claimant should take a four-hour break if the claimant encountered a "red screen." On her final day at work, the pharmacist confronted the claimant about a remark she had made on March 24, 2017. He then proceeded to point out an error the claimant had made, told the claimant that she asked too many questions, would not allow the claimant to speak, would not let her leave when she wanted to leave, and told the claimant that he wanted to hug her. See Consolidated Finding of Fact # 12.

While each of these events, in isolation, would not be sufficient for the claimant to show that she had good cause for leaving her job, in the aggregate, we think that good cause is shown here. The pharmacist's behavior toward the claimant was at times inappropriate (asking the claimant for a hug) and at times embarrassing and humiliating (being reprimanded in front of other employees and customers). The uncomfortable and, at times, hostile environment was not an imagined circumstance, as other employees noticed the pharmacist's behaviors and a customer specifically told the owner about the pharmacist's treatment of the claimant. For the behavior to affect so many people, it could not have been isolated or a misunderstanding on the part of the claimant. Therefore, we conclude that the claimant has established a reasonable workplace complaint against the employer regarding the pharmacist's behavior toward her.

¹ The review examiner is responsible for determining the credibility of the parties. See Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984). Unless her credibility assessment is unreasonable, we will not disturb it or the findings of fact. See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Our thorough review of the record leads us to conclude that the review examiner's credibility assessment is supported by the record and is reasonable.

Our analysis does not end there, however. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action 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, the review examiner's findings show that the claimant made the employer aware of the situation with the pharmacist, but nothing substantial was done about it. The claimant told the employer's owner about the pharmacist's suicidal statements, but this was never addressed with the pharmacist. Consolidated Finding of Fact # 4. The claimant told the owner that the pharmacist "created an atmosphere that was hard to work in." However, the owner did nothing about the complaints, because he thought that the claimant disliked the pharmacist's communication style, and because he thought that the pharmacist's conduct was appropriate. Consolidated Finding of Fact # 8. Even after other employees told the employer about the pharmacist's behaviors in the workplace, the owner did nothing. Consolidated Finding of Fact # 9. These efforts show that the claimant was trying to resolve her issues with the pharmacist. The employer's owner ignored the problems. It does not even appear that he ever spoke with the pharmacist about the numerous complaints that employees and at least one customer had about the pharmacist. Given the employer's ongoing inaction, further efforts to keep her job would have been futile for the claimant. Consequently, it was reasonable for her think that going to the employer again after the March 27, 2017, conversation with the pharmacist would have done nothing. In short, she has shown that she tried to preserve her job.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence or free from error of law, because the claimant has carried her burden to show that she had good cause for quitting.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 26, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 15, 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.

SF/rh