

**The claimant did not quit in reasonable anticipation of discharge, as no one told him he would be fired, and the totality of the evidence in the record indicates that the employer was working toward addressing the claimant's concerns, rather than looking to fire him.**

**Board of Review  
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**Issue ID: 0022 3265 10**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. Benefits were denied on the ground that the claimant did not resign from his employment for good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

The claimant separated from his position with the employer on June 29, 2017. He filed a claim for unemployment benefits, which was denied in a determination issued by the DUA on August 4, 2017. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on November 25, 2017. The claimant sought review by the Board, which affirmed the decision, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On October 17, 2018, 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 concerning the claimant's alleged workplace complaints to the employer. Both parties attended the remand hearings. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant voluntarily quit his employment without either good cause attributable to the employer, or urgent, compelling and necessitous reasons, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision.

### **Findings of Fact**

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a full-time community support provider for the employer, a mental health treatment center, from November 2016 until June 29, 2017. The claimant was a union member.
2. The claimant's supervisor was the program director.
3. The employer is located in an office building owned by the state of Massachusetts (the state). In or around July 2016, before the claimant began working for the employer, the state began construction on the building. The state was replacing windows and making repairs to the outside of the building.
4. The employer expects that employees will follow the directives of their supervisor. The claimant understood the employer's expectation as a matter of common sense.
5. In February 2017, the employer hired a new community support provider (the coworker). The coworker was placed in the claimant's office. It is typical for community support providers to share an office because much of their time is spent working in the community with clients. The employer expects the community support providers who share an office to coordinate their schedules with each other for privacy reasons. If a community support provider is meeting with a client in the office, the other community support provider is not permitted to be in the office at that time.
6. The claimant was dissatisfied with sharing an office space with a coworker. Although the claimant was dissatisfied he was sharing an office space, he wanted to continue working for the employer.
7. The claimant felt the coworker was dismissive and disrespectful. The claimant was dissatisfied that when he tried to assist the coworker, she ignored him and did things in her own way. The claimant felt it was disrespectful when he said, "good morning," to the coworker and she responded, "what's so good about it." Although the claimant was dissatisfied with the coworker's conduct, he wanted to continue working for the employer.
8. At no time did the coworker use discriminatory language towards the claimant. At no time did the coworker call the claimant a "faggot" or an "old man." At no time did the claimant report the coworker had called him these names to the program director.
9. At no time did the coworker mistreat the claimant.
10. During the claimant's employment, the building was still under construction.

11. During the construction process, the state sent out emails regarding the status of the construction process. Among other updates, the state specifically indicated it would be monitoring the air quality in the building during the construction process.
12. The construction often displaced employees from their offices. In those cases, the employer accommodated employees by providing a temporary alternative work space. At no time was the claimant displaced from his office due to the physical construction process.
13. The construction also created noise disturbances in the building. In order to accommodate noise disturbances, the employer directed those employees affected to contact the office manager and inquire about getting a temporary work space.
14. In April 2017, the claimant, who is diagnosed with HIV, contracted an infection and was seen in the hospital. The claimant was out of work for one week. At no time did the claimant request a leave of absence.
15. In late April 2017, the claimant was seen in the hospital again because he was suffering from headaches. The claimant was diagnosed with and medicated for hemiplegic migraines.
16. At the hospital, the claimant disclosed that his apartment had been sprayed with pesticide. The hospital could not pinpoint a specific trigger that caused the claimant's migraine but believed it could have been caused by the pesticides used in his apartment.
17. The claimant notified the program director about his migraines.
18. At no time did the claimant notify the program director that he believed the construction exacerbated his migraines.
19. At no time did the claimant complain about the air quality in the building. At no time did the claimant report that he believed the construction was effecting his health.
20. On May 22, 2017, the program director met with the claimant and the coworker to discuss the employer's referral process.
21. On May 23, 2017, the program director sent an email to the claimant, the coworker and other employees indicating, "the following is the process to make referrals: A referral form must be filled out. These forms are located with the med assistants as well as in the third floor reception officer in a basket by the door. Once a form is filled out, please put it in the marked basket by the door in the third floor reception office.... I will distribute them to [the coworker] or [the claimant]. Once [the claimant] or [the coworker]

- receive the referral, they will contact with the individual who is making the referral. Please do not hand [the coworker] or [the claimant] referrals directly.”
22. On June 21, 2017, at 2:13 p.m., the claimant sent an email to the program director indicating in part, “The solution that I came up with to overcome what I see as poor working conditions, is to schedule clients who request to meet in person after 3:30 PM. It is not my fault that [the employer] doesn’t have enough room to employ all of the people it has and is hiring. In my opinion, if they do not have enough room, they should enforce a hiring freeze, to avoid expecting people to work under poor working conditions.” “Please do not ask me to agree to leave #207 randomly throughout the day according to the daily schedule of my co-worker, as it would only contribute to what I feel is a very unfair situation.”
  23. After receiving the email, the program director went to the claimant and the coworker’s office to ask them to meet with her. The program director wanted to meet with the claimant and the coworker to address the claimant’s email and alleged poor working conditions. At that time, the claimant was on the phone with a client. The program director wrote a note indicating she would be having a meeting with the claimant and the coworker in 10 minutes and put the note on the claimant’s desk.
  24. Before going to the program director’s office, the claimant went to get a union steward. No union steward was available to meet with the claimant and the program director.
  25. The union steward spoke with the program director, who indicted [sic] no disciplinary action was going to be taken against the claimant. However, the claimant was still uncomfortable meeting with the program director and the coworker.
  26. No meeting took place on June 21, 2017.
  27. On June 21, 2017, at 3:34 p.m., the claimant sent an email to the program director indicating in part, “This issue that I presented in my last email, does not involve [the coworker]. If you wish to meet with me alone regarding it, I would be more than happy to do this, otherwise, I will not be at this meeting.” “I do not wish to meet with you and [the coworker] in the future as well, and prefer to meet with you separately. These are my boundaries, and I expect them to be respected by you. I will contact the union today regarding this matter.”
  28. After receiving the email, the program director informed the claimant a meeting was scheduled for June 22, 2017 at 11:45 a.m.

29. On June 21, 2017, at 3:41 p.m., the claimant sent an email to the program director indicating he was willing to meet her and the coworker if a union steward was present, otherwise, he was only willing to meet with the program director alone.
30. On June 21, 2017, at 3:57 p.m., the claimant sent an email to the program director, indicating the coworker “has acted abusively towards me since the day she was hired, and I wish to be moved to another office as it is affecting my physical health. I also do not wish to be in meeting with you and her because of this.” This was the first time the claimant indicated he felt the coworker was abusive. This was the first time the claimant asked to move offices.
31. The program director responded to the claimant’s email indicating, “Please plan to bring a union rep at the 11:45 meeting. [The coworker] will not be there.” The program director wanted to meet with the claimant to address his concerns with the coworker.
32. On June 21, 2017, at 4:28 p.m., the claimant sent an email to the program director indicating he was not available to meet at 11:45 because he had a client scheduled and asked “please change the time and/or day.”
33. No meeting took place on June 22, 2017. At that time, the meeting was not rescheduled.
34. On or around June 22, 2017, the program director asked the claimant and the coworker to coordinate their schedules by posting them on the office door. The coworker posted her schedule on the door.
35. On June 26, 2017, at 12:19 p.m., the claimant sent an email to the program director indicating, “To improve working conditions for myself and clients, as of today, I will begin only using #207 after [the coworker] leaves, which is from 3:30 to 6:30 PM. Between the hours of 10:30 AM and 3:30 PM, if available, I will utilize office #205. If #205 is not available, I will try to use the group room, and as per your wishes, leave the door open if I’m in there. If neither one of these rooms is available, I will ask [the office manager] if there is another room available for me to use. If by any chance there is no available room, as happened last week, I will become mobile and use the laptop [employees name] gave me to do exactly what I do when I’m at [the employer’s second facility], as it is designed to do just that. If I must become mobile, I will let [the office manager] know. In addition, I will no longer be participating in meetings with you and [the coworker], for reasons mentioned in emails sent to you last week. I will also go back to generating my own referrals, as I successfully did for six months, as well as receiving referrals from you.”

36. The program director considered the claimant's email and refusal to meet as insubordination.
37. After receiving the June 26, 2017 email, the program director and program supervisor asked the claimant to meet with them. The claimant refused to meet without union representation.
38. As a result of the claimant's refusal to meet with the program director, the employer decided to place the claimant on a paid administrative leave until a meeting with a union steward could be scheduled. At no time did the employer tell the claimant that he had been discharged.
39. On or around June 27, 2017, a union representative contacted the claimant to inform him that a meeting between the claimant, the program director and the union had been scheduled for June 29, 2017.
40. The purpose of the meeting on June 29, 2017 was to address the claimant's concerns as well as the employer's concerns with the claimant's insubordinate behavior. At no time did the program director inform a union steward that she was going to accuse the claimant of pretending to be a therapist.
41. As of the date the meeting was scheduled, the employer had not decided to issue the claimant formal discipline.
42. On June 29, 2017, the claimant, in order to avoid a possible reprimand failed to attend the meeting and instead sent an email to the employer quitting his position. The claimant stated in part, "it is time for me to leave, as it has over a short period of time become clear to me that my own potential at work is no longer being recognized."
43. The claimant quit because [sic] to avoid possible further reprimand after being placed on administrative leave.
44. On or around June 29, 2017, the employer's human resources department requested to set up an exit interview with the claimant. The claimant did not respond to the employer's request for an exit interview.

#### Credibility Assessment:

The claimant's testimony as to the discriminatory language used towards him and his efforts to report such language is deemed not credible. The claimant testified the coworker called him a "faggot" and an "old man," and he reported this discriminatory language to the program director prior to June 21, 2017. During his testimony, the claimant offered specifics as to the situation where the coworker allegedly used this language. The claimant indicated he was able to recall these events because, especially in relation to the comment about his sexuality, he had dealt with this issue in the past and it has a profound impact on him. However,

when asked if he reported it or how he reported it the claimant was inconsistent in his testimony. During the initial hearing, the claimant testified that although he did not specify the language used by the coworker he did notify the program director prior to June 21, 2017. During the remand hearing, the claimant contradicted his earlier testimony indicating he specifically told the program director the coworker called him a “faggot” and an “old man.” The claimant further testified the program director did not address these allegation[s] and changed the subject. The program director denied ever being informed the coworker called the claimant these names. I find it unlikely the claimant would not have a clear recollection of his conversations with the program director had he reported these alleged events. I also find the claimant’s allegation the program director ignored the issue and changed the subject when he reported it to her not credible. The program director testified had she been made aware of the discriminatory language allegedly used by the coworker, she would have spoken with the coworker and human recourse [sic]. Given the immediate efforts and steps taken by the program director to meet with the claimant regarding his concerns addressed in emails on both June 21st and June 26th, I find it unlikely she would ignore a complaint regarding discriminatory language in the work place. Based on the above, I find the program director’s denial that the claimant brought these incident[s] of discriminatory language to her attention more credible than the claimant’s testimony. Given that this alleged language was never brought to the program director’s attention and the claimant’s testimony as to what an impact language of this nature would have had on him, I find his testimony as to the alleged language used by the coworker towards him to be not credible.

The claimant also alleged the coworker mistreated and acted abusively towards him. The claimant specifically testified the coworker was “dismissive,” “disrespectful” and “mean.” The claimant offered specific examples as to why he perceived the coworker in these ways. The claimant directly testified he felt the coworker was dismissive and disrespectful because while attempting to train her, she ignored his instructions and proceeded to do things in her own way. The claimant further testified the coworker was mean and disrespectful because when he initiated a conversation by saying “good morning,” her response was “what’s so good about it.” In these instances, the claimant’s testimony was consistent and unrefuted. However, what was refuted was the claimant testified he reported this alleged mistreatment and abusive behavior to the program director prior to June 21, 2017. The program director denied the claimant brought forth any allegation of mistreatment or abuse from the coworker prior to June 21, 2017. Based on the totality of the record and again the program director’s immediate efforts to meet with the claimant regarding his June 21st email, I find it unlikely had the claimant brought these allegation[s] to the program director’s attention she would have ignored them. As such, I find the program director’s denial the claimant notified her of allegations of mistreatment from the coworker prior to June 21, 2017 more credible than the claimant’s testimony.

In regards to the claimant's testimony as to his belief the construction process was putting his health at risk, I find this testimony not credible. The claimant testified he notified the employer the construction was affecting his health. The claimant specifically testified he believed the construction noise was exacerbating his migraines. The program director directly refuted the claimant's allegation he reported this to her. For the reasons stated above regarding the program director's immediate efforts to meet with the claimant after he raised concerns in June 2017, I find it unlikely that the program director would ignore [sic] the claimant's complaint if he raised health concerns. Furthermore, it was unrefuted the employer was accommodating employed [sic] during the construction process. Had the claimant honestly believed his health was at risk, he would have addressed his concerns with the employer and requested an accommodation. I find the claimant's testimony he believed his health was at risk not credible.

Finally, this review examiner finds the claimant's testimony he believed the meeting on June 29, 2017 would be futile not credible. During the initial hearing the claimant indicated [sic] he did not attend the meeting due to illness. The claimant specifically stated he intended to attend the meeting but on the day of, he was suffering from a migraine. The claimant further testified he waited at home to see if his migraine would subside indicating he still had intention on the day of to attend the meeting. At no time prior to receiving the order from the court did the claimant allege he believed the meeting would be futile. During the times the program director attempted to meet with the claimant, it was clear his emails and the concerns raised within were what initiated the meeting. Given it was the claimant's concerns that initiated the June 29, 2017 meeting, there was no reason for the claimant to believe the meeting would have been futile. As such, I find the claimant's testimony in this regard not credible.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. We modify Consolidated Findings of Fact ## 42 and 43, to more accurately reflect the claimant's testimony throughout the proceedings that the specific reprimand he feared was the termination of his employment. In adopting the remaining findings, we deem 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.

Since the claimant resigned from his employment, we analyze his eligibility for benefits under 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 . . . .

After reviewing the claimant's appeal to the Board of Review, which was filed on December 26, 2017, the Board decided to affirm the review examiner's decision to deny unemployment benefits to the claimant. We affirmed the review examiner's decision because based on the initial record, because we agreed with the conclusion that it was the claimant's desire to avoid disciplinary action against him that prompted him to resign when he did rather than any concerns he had about his working conditions and how they might have affected his health. After the claimant appealed to the District Court, the case was remanded to the review examiner for the purpose of obtaining additional evidence pertaining to the claimant's concerns about his coworker and his health, as the court felt that these concerns may have contributed to the claimant's decision to quit his employment.

During the remand hearings and consistent the District Court's Order, the review examiner inquired at length into the claimant's relationship with his co-worker and issues related to the claimant's health. Following this inquiry, the review examiner issued extensive consolidated findings, as well as a detailed credibility assessment upon which she based her findings. As noted above we accept these findings because they are supported by substantial and credible evidence. The review examiner found that the claimant was not credible with respect to his allegations that his coworker used discriminatory and abusive language toward him. At best, the findings and record suggest that some type of personality conflict may have existed between the two. The review examiner did not find that the claimant quit because of his coworker's conduct. The review examiner also did not credit the claimant's testimony that the construction in the employer's building was negatively affecting his health and he quit due to any such negative impact. Rather, the review examiner found that, despite some other concerns, the claimant wanted to remain employed, and he resigned from his employment on June 29, 2017, only to avoid a possible reprimand from the employer after he was placed on administrative leave. As explained above, the specific reprimand the claimant feared was the termination of his employment. In light of these findings and the totality of the evidence in the record, the specific issue before us is whether the claimant quit his employment in reasonable anticipation of discharge.

Separation is not voluntary if an employee leaves work because of an objectively reasonable belief that he is about to be fired. Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984). Here, the claimant argued that his union representatives informed him that the meeting that the employer had set up for June 29, 2017, was to accuse the claimant of pretending to be a therapist, and he was facing a possible termination at that meeting. However, the review examiner found that the employer never told the union steward that the claimant was facing any disciplinary action at this meeting, and she further found that the union representative only informed the claimant that the meeting was taking place. Finally, the review examiner concluded that the claimant's testimony that he believed the meeting would be futile was not credible, as the evidence indicated that the meeting was in direct response to the concerns the claimant had raised, and which the employer was clearly attempting to address. In light of the above findings and the credibility assessment, we cannot conclude that the claimant quit his employment in reasonable anticipation of imminent discharge.

We, therefore, conclude as a matter of law that the claimant separated from his employment without good cause attributable to the employer, as meant under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending July 15, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - March 25, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



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](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.

SVL/rh