

Where the claimant was subjected to several incidents of sexual harassment and unwanted touching by a supervisory employee, and was still required to work alongside this individual after reporting these incidents to the employer, the claimant resigned with good cause attributable to the employer.

**Board of Review
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Issue ID: 0024 6649 39

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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from her position with the employer on January 31, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 29, 2018. 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 5, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left her 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 remanded the case to the review examiner to allow the claimant an opportunity to testify and offer other evidence. Both parties attended the remand hearing, conducted over two dates. 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 voluntarily left her employment without good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law.

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 as a Street Car Motor Person for the employer, a public transportation provider, from April 27, 2015 through January 31, 2018.

2. The claimant was hired to work part-time with the employer.
3. On an unknown date, after the claimant was out for work due to an injury, following that absence the claimant returned to work in a full-time capacity with the employer. The claimant informed the employer that she did not want to work full-time, but remained as a full-time employee.
4. Sometime thereafter, the claimant inquired of the employer about returning to part-time status. The claimant was informed that once you begin working full-time, you cannot return to part-time status.
5. The employer had a Leave of Absence policy, which included Small Necessities Leave of Absence (SNLA). The claimant was aware of the employer's leave policy, as she had taken leave at times during the course of her employment with the employer.
6. Throughout the course of her employment, the claimant had been issued some disciplinary action from the employer due to her attendance.
7. Beginning in June of 2015, the claimant was working with one of the employer's Inspectors. She worked with him on and off, when she was scheduled to work in the area that he was overseeing.
8. When the claimant was assigned to the Inspector's area, the claimant would be required to report to the Inspector if there were any issues related to driving/operating the employer vehicle. (The Inspector could report directly to the claimant's location to handle the issue(s) or could provide the assistance by radio transmission.)
9. In September, 2017, the claimant was working with the Inspector every Saturday, as he was overseeing the claimant's assigned area.
10. On September 16, 2017, the claimant experienced an issue with the Inspector. While the claimant was working, the Inspector held her train back, coming to her train telling her that he liked her and wanted her to come to dinner at his house. The claimant refused. The Inspector then continued to ask the claimant for a hug, whereupon again she refused. After her train was held for 8 to 10 minutes by the Inspector, the claimant gave the Inspector a hug to get him to leave the train. The Inspector then tried to kiss the claimant, whereupon the claimant directed profanity at the Inspector and instructed him to get off the train. The claimant did not report the incident to the employer at that time.
11. On October 9, 2017, the Inspector informed the claimant that she would not be operating the train that day and that they were going to "have some fun". The claimant was instructed to report to the yard. The Inspector followed the claimant to the yard and he tried to get on the train with the claimant. The

claimant locked him out. The Inspector then notified the claimant that she would be performing the other driver's trip, even though that driver had reported to perform her assigned work. (The Inspector has the authority to have an employee work in place of another, but should not do so if the employee being replaced has reported to work.) At the conclusion of her shift on October 9, 2017, the Inspector followed the claimant to her vehicle, which was parked off of the work premises.

12. After the October 9th incident, the claimant reported the Inspector to the Yard Captain. The claimant then provided a statement to her Supervisor, including information on the September 16th incident. The Supervisor spoke with the Inspector. Thereafter the Supervisor informed the claimant that the Inspector had stated that the claimant did not want to perform her 10:26 p.m. trip and he had no idea why. The Supervisor informed the claimant that he believed the claimant's statements as being truthful, because she was very specific with the information provided. The Supervisor also informed the claimant that the Inspector had not reported that the claimant had directed profanity at him, as the claimant admitted she had. The claimant submitted a written statement to the employer regarding the allegations.
13. The employer investigated the information provided by the claimant. The claimant was not working with the Inspector from that time until November 29, 2017. On November 29, 2017, the claimant was notified by the employer that the investigation was concluded and it was her word against the Inspector's. (Thereafter, the employer no longer prohibited the claimant being scheduled to work with the Inspector.)
14. On December 2, 2017, the claimant was informed by the Supervisor that she would have to perform a trip with the Inspector. The claimant refused indicating that she was being assigned to work in an area with the Inspector where there were no cameras. The claimant indicated that she was staying back in the yard and not getting on the train with the Inspector. At that time, the Supervisor informed the claimant that he understood, but she was being given a directive from her Supervisor and had to do it. The Supervisor instructed the claimant to seek assistance, providing her with a telephone number to call. He also informed the claimant that she should call out each Saturday to avoid [sic] working with the Inspector.
15. Thereafter, the claimant was still being scheduled to work with the Inspector, whereupon she refused, staying back in the yard to work.
16. The claimant did not have another "incident" with the Inspector after October 9, 2017, but on at least one occasion, after the employer's investigation had concluded, when the Inspector saw the claimant, he waved to her as if they were friendly. (The claimant was upset by the Inspector waving, believing that he thought the situation was funny.)

17. The claimant was unable to determine when the Inspector would be on the work premises, as he was reporting on his days off to work overtime hours.
18. The claimant was feeling anxious about reporting to work, fearing that she would run into the Inspector. The claimant was feeling uncomfortable at work, feeling that she had done the wrong thing by speaking up against the Inspector. The claimant had been experiencing anxiety, accompanied by stomach pain, since September, 2017.
19. The claimant saw a therapist regarding her symptoms. The claimant was initially given two weeks off from work due to her stress and anxiety. The claimant was not provided with any recommendation on work. (The claimant saw her doctor a second time where the doctor recommended a psychiatrist, but the claimant refused as she did not want medication.)
20. At the suggestion of her therapist, the claimant requested that the Inspector be given a permanent stay away from the claimant. The employer denied the request.
21. The claimant was at work on January 14, 2018. The claimant was off from work thereafter.
22. On January 26, 2018, the claimant called another Supervisor about her paycheck. The claimant informed the Supervisor that she would still see the Inspector at work, and he would wave. The Supervisor asked the claimant if she wanted her to handle it, because he would not mess with her. The claimant indicated that she just wanted the information on record. The claimant was informed that she should not leave over the Inspector and they would place the claimant at [Station A]. The agreed to return to work the next day.
23. The claimant spoke to another Supervisor, informing her that the Inspector was waving at her. The Supervisor indicated that she would try to keep the claimant and the Inspector apart when at work and instructed the claimant to file another appeal. (The employer attempted to keep the claimant and the Inspector scheduled at different locations each day, but was not always successful in doing so.)
24. The claimant would obtain her work schedule by utilizing the employer's bidding process.
25. The claimant was working 40-hours per week on a split shift, from 5:00 a.m. to 9:00 a.m. and from 2:00 p.m. to 5:00 p.m. (The claimant would work her 8 hours, but had breaks in-between and would sometimes be at work for 12 to 13 hours per day.)
26. In January, 2018, the claimant's children, were 3, 9 and 13 years old. The claimant's children would attend school from 6:45 a.m. to 3:30 p.m. The

claimant's parents would watch the children when they were released from school each day, until the claimant returned home. The claimant routinely got home from work at or around 10:00 p.m. to 11:00 p.m.

27. The claimant was aware that, if she obtained part-time hours, she would be out of work by 2:00 p.m. and she would be able to spend more time with her children. In addition, the claimant felt that she would be able to avoid the Inspector, who would normally be starting work at 5:30 p.m.
28. The claimant returned to work on January 27, 2018. The claimant made a verbal request of the Supervisor to work part-time, 25 hours per week. The claimant informed the Supervisor that she wanted to be home for her children and that she was trying to avoid being around the Inspector. At that time, the claimant was given the employer document to complete.
29. The claimant worked on January 27, 2018, and January 28, 2018. The claimant was next scheduled to work on January 31, 2018.
30. On January 29, 2018, the claimant completed that document to formally request the reduction in hours to part-time (dated January 27, 2018). Within that document the claimant indicated in part, "First, I would like to thank you for reaching out to me. I appreciate your concern and for once I felt like someone at this job actually cared for me and I wasn't just a badge number. Secondly, I feel as though my outside life from work permits me to perform my job duties 100%. Although this is an excellent job I worry about how I can get through day to day without worrying about my home life. My biggest mistake I believe I made was going full time. I'm trying to make the best of this experience. I am personally asking for you to kindly reconsider me going back to part-time. I weighed out all my options and I believe that's what's best for me to continue my career here." The claimant went on in that document to discuss her children and her responsibility to them. The claimant did not provide any information regarding her desire to avoid the Inspector within that document.
31. The claimant was working on January 31, 2018. The claimant was scheduled to work from 7:05 a.m. to 3:57 p.m. The claimant was on her break at or around 1:30 p.m. During her break, the claimant contacted the Supervisor, as she wanted to know if there would be a long term resolution to her issues with the Inspector, as she attempted to avoid him on a daily basis. The claimant asked the Supervisor if she had an answer on her request for part-time. The Supervisor said it would not be granted. The claimant informed the Supervisor that she would not be returning to work that day.
32. On January 31, 2018, when another Supervisor attempted to locate the claimant but was unable to do so, the employer issued the claimant an AWOL (Absent Without Leave) for that date, indicating that the claimant could not be reached at or around 3:00 p.m. (If the claimant had not resigned, the employer would have met with the claimant to discuss the January 31st incident to determine if

discipline would be issued. Based upon her prior disciplinary history, if the employer determined discipline was warranted, the next step would have been to issue the claimant a 70-day suspension pending discharge.)

33. Thereafter on that same day, the claimant called the employer back, offering her resignation to the Division Chief. The claimant decided to resign her position to spend additional time with her children and due to her concerns about still working with or around the Inspector.
34. The claimant was scheduled to report for an exit interview on February 9, 2018. The claimant did not appear at that interview, instead leaving a written note, indicating "I (name and employee number) will like to resign from my position." The Light Rail Supervisor attempted to reach the claimant by telephone three to four times thereafter, but was unsuccessful in reaching the claimant and the claimant did not return the employer's calls.
35. The claimant was a member of the union. The union was aware of the issues with the Inspector.
36. The claimant filed her claim for unemployment benefits on February 12, 2018. The effective date of the claim is February 11, 2018.

Credibility Assessment:

The employer's witness was not present at the time of any of the incidents that were reported as having occurred between the claimant and the Inspector, and had no direct involvement in any of the circumstances surrounding the claimant's separation from work. When questioned as to why the other witness(es) involved were not in attendance, she indicated that they did not normally attend the hearings.

The claimant provided direct, consistent and specific information, including dates, as to incidents occurring with the Inspector and the dates and times she placed the employer on notice of those incidents. Further, the claimant's testimony that she wanted a reduction in her hours of work, not only to assist with her family obligations, but to avoid being around the Inspector at work, was deemed to be credible, as it made sense based upon the totality of the circumstances.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant voluntarily left her employment without good cause. Rather, after remand, we believe that the

review examiner's consolidated findings of fact support the conclusion that the claimant resigned her employment due to the employer's failure to adequately protect her from workplace sexual harassment.

As it was undisputed that the claimant resigned her employment, G.L. c. 151A, § 25(e)(1), applies. It 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).

The review examiner found that the claimant resigned her employment for two reasons: due to the employer's failure to adequately address her complaints of sexual harassment by an Inspector, and due to a desire to spend more time with her children. It was clear from the claimant's testimony that her concerns about the Inspector were the primary factor in the claimant's resignation. While in the period leading up to the claimant's resignation, the claimant made a number of requests and complaints regarding the Inspector, the record does not indicate any changes to the claimant's childcare or domestic circumstances¹. This suggests that the claimant's workplace concerns were the primary reason for her resignation. When a claimant contends that the separation was for good cause attributable to the employer, 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).

The review examiner credited all of the claimant's testimony regarding the alleged harassment, contrary to the employer's official conclusion. "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). As the consolidated findings are supported by substantial evidence and the review examiner's credibility assessment is reasonable, the Board is compelled to accept these findings.

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* Ferguson v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985). The findings establish that the Inspector — a coworker who had supervisory control over the claimant during the workday — repeatedly sexually harassed the claimant. During one incident, on September 16, 2017, the Inspector assaulted the claimant, forcing the claimant to hug him and grabbing her in an attempt to kiss her. In another incident, on October 9, 2017, the Inspector changed work assignments in order to be alone with the claimant and retaliated against her when she rebuffed his advances. Though not included in the findings, the claimant submitted documentary evidence

¹ 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).

indicating that the Inspector also engaged in online harassment on several occasions. *See* Remand Exhibit # 3.

Based on the above facts, the claimant had a reasonable workplace complaint. Though the claimant filed a formal complaint about the harassment, the employer concluded that the claimant's allegations were unsubstantiated. Thus, though the employer kept the claimant and the Inspector from working together during the course of the investigation, beginning in December 2017, the claimant was once again required to work with the Inspector. As a result of her fear of having to see the Inspector, the claimant experienced stress and anxiety. In light of this and the severity of the harassment, we conclude that it was unreasonable to require the claimant to work alongside her harasser.

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). A claimant must show reasonable efforts to preserve her employment, not that she had “no choice to do otherwise.” Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2006) (citation omitted). In this case, not only did the claimant file a complaint alleging harassment, she made several other efforts to address the situation during the last two months of her employment. The claimant attended therapy and took a temporary leave of absence due to her work-related anxiety. The claimant also requested to be permanently separated from the Inspector and requested a change to part-time status in hopes of working at different times than the Inspector. Both of these requests were denied.

We, therefore, conclude as a matter of law that the claimant voluntarily left work with good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 3, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – January 30, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

JRK/rh