

Claimant cashier/barista failed to establish good cause attributable to the employer for quitting, where her various complaints about Jamaican and Dominican coworkers amounted to personality conflicts with peers, and the employer's management attempted to address every issue the claimant raised about her coworkers after each of her various complaints.

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Issue ID: 0024 9449 62

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 reverse.

The claimant resigned from her position with the employer on March 2, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 6, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on May 24, 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 entitled to benefits pursuant to 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 to present testimony and evidence. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessments. 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 quit with good cause attributable to the employer because of unremediated harassment, 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 immigrated to the United States from Greece in 2004 to marry. She had a baby with her husband and then separated from him around 2008. She has no family in this country to advise her as to legal practices in the United States.
2. In November of 2016, the claimant began working, as a cashier, for the employer, a contract food service company. She was assigned to a location in an office building. The General Manager for this location had started working at the location in October 2016. After working with the employer for a while, the claimant asked to be trained as a barista so that she could also work at the coffee station. The employer trained her and she then began working as cashier in the café from either 8 or 9 a.m. to 2 p.m., when the café closed. She would then move over to the coffee bar for the rest of the shift if there were a need in that area.
3. On the day after Thanksgiving in 2016, the claimant came to work out of uniform. She was wearing jeans instead of black pants. This was because her drier [sic] had broken and she could not wash the pants. The claimant brought her 11-year-old daughter with her to work that day because there was no school. It had been very difficult to get into work because the buses were not running on a normal schedule. This created stress for the claimant before she even arrived at work. The General Manager saw the claimant out of uniform and told her she had either to change into black pants or go home. The claimant was mortified to have been spoken to like this in front of her daughter. She also noticed that another employee who worked in the kitchen was not in black pants but was allowed to work. She assumed that she was treated differently because he was from Latin America and she was from Greece. She complained to her Manager about how the General Manager had spoken to her.
4. The Manager told the General Manager of the claimant's complaint and the General Manager reached out to apologize to the claimant. The claimant accepted his apology as sincere. The General Manager made a special effort going forward to be more careful in his interactions with the claimant realizing that she was very sensitive and could take offense where he meant none.
5. The kitchen employee was treated differently in regards to the uniform because he was not working directly with the public. His appearance was therefore not as important as it was for someone in the claimant's role.
6. The claimant worked the breakfast/lunch register for approximately half a year before she started working in the café as a barista.
7. When the claimant started working as a barista, she worked with an Iranian woman and they got along very well.

8. The Iranian woman left when she found another job, [sic] at around this time the employer hired a new employee, hereafter referred to as C, who was Jamaican.
9. The claimant is compulsive about cleaning. Whenever things were slow, she would clean.
10. Once C was hired, the claimant perceived that management was less friendly towards her. It appeared to her that the managers did not greet her in the same manner as they previously.
11. C made fun of the claimant's poor English and her need to clean all the time. She would swear and use foul language. The claimant felt that this new employee was bullying her. She complained to the General Manager about this.
12. The General Manager spoke to C and the claimant separately about the conflict between them. C denied behaving in the manner the claimant had accused her of. The manager did not observe any of the alleged behavior himself. He therefore did not discipline C but instead coached her on what the employer considered proper behavior and about not reacting to a personality conflicts [sic] while in view of the public. In addition, he counseled the claimant that, if she had a problem with C in the future, she should inform him and not react in the café or coffee bar where the public could observe [sic] her. The General Manager separated the two employees so that there would be less interaction and less chance for conflict.
13. The claimant told the General Manager that C admitted to smoking marijuana. The General Manager told her that so long as she was doing it on her own time and not at work, it was not a problem. The claimant did not know that it became legal in 2016 for adults to use marijuana and did not understand why the General Manager did not take disciplinary action against C if he knew she was engaging in this behavior. The General Manager explained that the employer did not have a process for drug testing at work and action could only be taken against C if she was observed smoking at work or obviously under the influence at work and that this had not happened.
14. The claimant continued to complain to the manager about C but the General Manager was not made aware of these ongoing issues. The employer, in relation to this personality conflict, did nothing additional.
15. In the Fall of 2017, the employer hired a Dominican woman, hereafter referred to as J. In early February 2018, the Manager instructed the claimant to help J in the café. When the claimant went to help J, J stated that she did not need help and told the claimant to go away. The claimant did not think it was J's place to tell her what to do. She told J that she was not her boss and

that the manager had told her to work here so this was where she was going to work.

16. The claimant did not say anything additional to the new employee but sent a text to the manager complaining about this attitude and behavior. He informed the General Manager of the text but did not respond to the claimant.
17. The employer had more than one Dominican employees [sic] and they all tended to speak to the claimant in a bossy tone, telling her how to do things. The claimant resented this and complained to the Manager and the General Manager. The General Manager did not agree that the Dominican Employees were being rude but did believe that the claimant perceived their behavior in this manner. He would speak to the Dominican employees about changing the manner in which they interacted with the claimant. He also coached the claimant that she needed to be able to receive direction from her co-workers. He also told her that even if she was not comfortable with how they spoke to her, she still needed to remain professional in her interactions with her co-workers and not react to them, especially in front of customers. He told her to continue to bring any the issues she had to a manager. The General Manager and the Manager both counseled the claimant to work on letting her issues with these employees go so she could continue to do her job effectively.
18. If the General Manager had perceived the behavior of the Dominican employees in the same manner that the claimant did, he would likely have given them written warnings.
19. When things were quiet, J would play on her phone and the claimant would move things around to clean. The claimant would move the coffee urn in order to clean under and around it. While there was a designated place for the Urn, this fact had not been communicated specifically the staff. J had noticed that the place that happened to be designated by the employer for the urn worked better for the flow of service. She therefore told the claimant not to move the urn in the manner that she had been doing. The claimant again found it inappropriate for a newly hired co-worker to be telling her what to do.
20. The manager was out of state on and around February 8, 2017 and the General Manager was overseeing the café and coffee bar.
21. The claimant complained to the General Manager that she and J were unable to work together. The General Manager spoke to J who told him about the issue with the Urn that took place on or about February 8, 2018. She also told him that the claimant wanted to do things in a different way than everyone else and that this made it difficult for them to work together.
22. The claimant and J continued to have conflicts over the following 2 weeks until the claimant again went to speak to the General Manager on Friday February [23], 2018. She was visibly upset and stated she could not work with

- J and that she going to quit. She meant that she was going to quit the barista part of her job, but the General Manager was under the impression she wanted to quit her full job.
23. The General Manager agreed to talk to J about the problems. He also agreed to remove the claimant from barista duties and instead having [sic] her stock the café so that she would not have to work with J in the coffee bar. He also told the claimant that he did not believe that J was actually attacking her personally. He stated that he believed the problem was that they had different work styles. The claimant talked to the General Manager about how she had difficulty transitioning from the way things were doing in Greece to how they were done in the U.S. She talked about how she just wanted to make sure everything was clean and well structured. The General Manager told her that her effort was appreciated but that she needed to learn not to take disagreements with her co-workers personally. He told her that, if she had an issue with a co-worker, she needed to not engage the co-worker and instead bring the issue to him. The claimant returned to work.
 24. The claimant worked without any significant issues from Monday, February 26, 2018 through Thursday, March 1, 2018.
 25. On Friday, March 2, 2018, the claimant was assigned to relieve an employee, hereafter referred to as F, at one of the registers. When the claimant worked at a register, she would move the scanner to a where it was more comfortable for her to use, given her height and prevalent hand. When the claimant approached the register to take over for her shift, F told her not to rearrange her stuff, meaning the scanner. The claimant became upset that F was directing her how to arrange her workstation during her shift and expressed to F that it was not her place to tell her what to do or how to do it. The General Manager was in the area and heard the two employees arguing.
 26. The claimant approached the General Manager to discuss the issue between her and F. He told the claimant that she had a problem and asked her to leave the café with him so that they could talk privately. He and the claimant went to another area to talk. They spoke for around 10 -15 minutes.
 27. The General Manger believed that the reason the claimant was having personality conflicts at work was that when a co-worker expressed disagreement with the claimant as to how something should be done the claimant took it as a personal attack on herself rather than a difference of opinion. During the conversation, the General Manager told the claimant there would be always be [sic] negative people in any workplace, and that, until she learned to manage these conflicts without making them personal, she was going to keep having these interpersonal conflicts that would interfere with her doing her job. His intent in making these statements was to coach the claimant so that she could improve her interpersonal relationships at work. He had not meant to blame her for the conflicts.

28. The claimant perceived that the General Manager was blaming her for her co-workers' disrespectful attitude towards her. She did not believe she was doing anything wrong. She wanted him to discipline the other employees so that they would either change their behavior or face discharge. She felt that she had been complaining for a year about these problems and that he had not taken any real action to correct them. During this final conversation, she was so upset that she broke down in tears. She was visibly upset. She told the General Manager that he should not be blaming her and stated that she wished she had never come to America. The General Manager tried to explain that he had not intended to blame her but rather to coach her on how to manage the conflicts better. She was too upset to hear this message and/or believe it. The General Manager, aware that the claimant was very upset, suggested that she go to the rest room and collect herself.
29. The claimant went to rest room as suggested. She was mortified that she had been seen crying by co-workers, customers and managers.
30. While in the bathroom, the claimant decided to resign. Her reason for resigning was her belief that the manager was unfairly blaming her for the issue with her co-worker. In addition, the claimant felt that she had to resigned [sic] immediately, without notice, because she [sic] it would be humiliating to continue to work with people who had seen her crying as a result of the situation with the co-worker.
31. After approximately 10 minutes, the claimant returned to the kitchen, out of uniform and with her purse in hand. The General Manager asked her if she was resigning and she said yes. He asked her for her badge but she refused to give it to him. She exited the kitchen. The General Manager found the manager and asked him to escort the claimant out of the building and retrieve her badge.
32. The front house supervisor, who had the most seniority and got along with everyone, tried to stop the claimant from leaving. The manager saw this happening and told her to let the claimant go. This interaction added to the claimant's sense that management had been intentionally unsupportive and that they wanted her to leave.
33. When she was hired, the claimant signed off that she received a handbook. This handbook included information about a hotline she could call if she had a problem. This hotline number was also posted, along with directions on its use, on a bulletin board near the time clock along with a number of other documents. The employer also tried to review policies and procedures at bi annual employee staff meetings.
34. The claimant did not read the whole employee handbook or notice the hotline number on the bulletin board. She was therefore unaware that she could call

the hotline to get assistance if she was not satisfied with how the General Manager resolved a concern of hers.

35. No one called the claimant to ask her about why she had left or to try to resolve the situation. This also caused her to think they wanted her to resign.
36. When the claimant failed to report for work on Monday, March 5, 2018, the employer accepted her actions and her affirmative statement on the prior Friday that she was resigning, as evidence that she had in fact resigned. The managers began to process the paperwork necessary to terminate her employment.
37. If the claimant had reported to work on Monday, March 5, 2018, she would have been disciplined for leaving work without permission the prior Friday but would have been allowed to continue in her employment.
38. During the course of her employment, the claimant worked directly with 15-18 employee in total. She complained to the General Manager about 4-5 employees in total. The three employees discussed in the above fact [sic] where [sic] the most serious conflicts. Until the claimant resigned, the General Manager had believed that the claimant had been satisfied with how he had handled the conflicts.
39. On March 14, 2018, the claimant filed a claim for unemployment benefits, which was effective March 11, 2018.
40. On April 6, 2018, DUA issued a Notice of Disqualification, with Issue 0024 9449 62-02, stating that the claimant was disqualified under Section 25(e)(1) from receiving benefits for a period starting February 25, 2018.

Credibility Assessment:

1. The General Manager's testimony was found to be very credible. He readily admitted when he was not certain about facts as well as to facts that were less than flattering to himself or the employer. He also appeared to be more removed emotionally in his interactions with the claimant and from the claimant's interactions with her co-workers.
2. The claimant's testimony was found to be credible so far as it reflected the claimant's true perception of her experience. Her perceptions, however, appeared to be affected by the intensity of her emotional experience. Given this, the General Manager's testimony was found more credible in most cases if there was a conflict.

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.

The review examiner awarded benefits after analyzing the claimant's separation 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 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. On the basis of the claimant's undisputed testimony at the initial hearing, the review examiner concluded the claimant had met her burden. We remanded the case to allow the employer to present testimony and evidence. After remand, we conclude that the claimant has not met her burden.

We note at the outset that in addition to establishing good cause attributable to the employer for quitting, an employee who quits also has the burden to show that she made a reasonable attempt to preserve her job, or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984). We conclude, again, that the claimant has not met her burden.

Initially, the review examiner credited the claimant's unrefuted testimony that she was subjected to various incidents of workplace harassment for a year, and that the employer failed to address her concerns. The review examiner effectively concluded that the claimant quit for good cause attributable to the employer.

After remand, where both the employer's manager and general manager testified about their efforts to address the claimant's complaints, the review examiner credited the general manager's testimony regarding how the employer responded to each of her various workplace complaints.

Taken as a whole, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant quit because of various personality conflicts with her coworkers, which did not constitute good cause attributable to the employer for quitting.

The claimant raised one legitimate complaint of workplace harassment, when coworker C made fun of her accent and "bullied" her in an unspecified manner. The review examiner credited the general manager's testimony that he took steps to separate the claimant and reduce the likelihood of further friction. We also note that the claimant accused C of marijuana use, which the employer properly replied was not a workplace issue unless it impeded C's work.

We further note that, thereafter, the claimant's workplace complaints focused on two different employees. The review examiner's findings show that each time an issue was brought to the general manager's attention, he addressed it with the claimant and the employee about whom she complained, and took action designed to reduce the likelihood of further conflicts. After the claimant's issues with coworker J, the general manager restructured the claimant's job duties to minimize her interactions with J, he told the claimant that he appreciated her efforts, and he talked her out of resigning on February 23, 2018.

The final episode that prompted the claimant to quit involved yet another coworker, F, whom the claimant accused of rudely telling her not to rearrange her workspace at a cashier's station. Again, the claimant questioned an employee with "less seniority" telling her what to do. This time, the claimant's conflict with this coworker was loud enough to attract the attention of the general manager. He removed the claimant from the situation to discuss things with her privately. But the claimant was dissatisfied with the general manager's comments and actions, she did not believe she had done anything wrong, and wanted him to discipline her coworkers. She was visibly upset, cried, complained she should not be blamed for the conflicts, and said she wished she had never come to America. The general manager told her to go to the restroom to collect herself, and she decided to resign while she was in the restroom. The review examiner found the claimant quit because she believed the general manager was blaming her for the [latest] issue with her coworker, and did not give notice because it would be humiliating to work with people who had seen her crying. The claimant's belief that she had not done anything wrong ignores that her own conduct with that coworker — where she felt the "less senior" coworker F had a bad attitude — created enough of a commotion for the general manager to notice on the floor.

We note that while the review examiner credited the claimant's testimony as credible "so far as it reflected [her] true perception of her experience," the review examiner also credited the general manager's testimony. In fact, the review examiner credited the general manager's testimony over the claimant's where their testimony conflicted. This is particularly critical where the claimant argued the employer failed to address her various complaints about her coworkers, and the general manager provided credible testimony about what he said to the claimant as well as to the people about whom she had complained. Such assessments 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). We believe the review examiner's assessments are reasonable in relation to the evidence presented.

The review examiner's consolidated findings show a pattern of personality conflicts between the claimant and her coworkers. Although the review examiner credited her complaint that coworker C mocked her English, the employer addressed the matter and the claimant's complaints about C took a back seat to complaints about coworkers J and F. Again, when the general manager was apprised about issues between the claimant and these coworkers, he addressed them.

The final incident that prompted the claimant to walk out — the dispute with F about rearranging the cashier's workspace — also did not constitute unreasonable workplace harassment. Moreover, even if we concluded that the claimant's series of personality conflicts with

coworkers did constitute good cause attributable to the employer for quitting, the review examiner's findings and credibility assessments support the conclusion that the employer continued to try to work with the claimant to resolve her personality conflicts and to coach her on a more productive approach to the workplace. The employer also had a hotline and a human resources department if the claimant was unsatisfied with the actions taken by the general manager and her manager. The review examiner also found that had the claimant chosen to return to work as scheduled on Monday, March 5, she would have been permitted to do so, although she would have received discipline for leaving work before the end of her shift. The employer's willingness to continue to work with the claimant suggests that further attempts to preserve her job would not have been futile.

We, therefore, conclude as a matter of law that the claimant quit without good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1). We further conclude that she left without making reasonable attempts to preserve her job before quitting and without establishing that further attempts to preserve would have been futile.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending March 3, 2018, 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 - December 21, 2018



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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.

JPC/rh