

Housekeeper, who was forced to clean and work around mold, resigned due to the consequent exacerbation of her pre-existing asthma and psoriasis. Given the unhealthy working environment and her supervisors' failure to bring her complaints to the administration, she had good cause to quit under § 25(e)(1). Though she did not pursue intermittent FMLA due to a mistaken belief that she would not qualify, she is eligible for benefits, because she had taken other steps to preserve.

**Board of Review
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Issue ID: 0024 9773 72

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 February 20, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 1, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 21, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, she was disqualified under G.L. c. 151A, § 25(e)(2). 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 obtain more evidence about the claimant's health, working environment, and reasons for leaving. 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 decision, which concluded that although the claimant reasonably believed her work environment was negatively affecting her health, she was ineligible for benefits because she did not pursue a medical leave of absence, 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 housekeeper for the instant employer, a university, and she was employed from 8/15/16 until her separation on 2/20/18.
2. The claimant has severe asthma.
3. The claimant was diagnosed with asthma and psoriasis twenty two years ago. (1)
4. The claimant's asthmatic condition became progressively worse the longer she was on the job and she believed that it was due to mold in the areas that she was cleaning.
5. The claimant's health conditions had been bothered by the work environment during the entire time that she worked, but her condition became worse in December 2017. At this time, it was so bad that her regularly prescribed medications were no longer working. (2)
6. The claimant complained about the mold to her supervisors, but nothing was done to improve the situation.
7. The claimant could see and took pictures of the mold infestation in the dormitory rooms on the ceiling, the walls, and the closets and on the air conditioner. The claimant was exposed to the conditions by working in the conditions and having to clean the mold. (3)
8. The claimant believed that her conditions were related to her work location because she was progressively getting worse and she had to use her inhalers more frequently. (4)
9. The claimant first complained to her immediate supervisor about the working conditions and the negative impact on her health in the summer of 2017. The supervisor told the claimant that she would have maintenance look into it. (5)
10. The supervisor did not bring this problem to the attention of administration.
11. According to the employer's procedures, the supervisor should have brought the mold situation to the administration's attention, and steps would have been taken to remediate the problem. The problem and the claimant's complaint were not brought to the administration's attention.
12. The claimant missed a lot of days here and there due to her health issues. Just prior to quitting, the claimant was sick from the beginning of the Christmas break until she resigned on 2/2/18. The claimant would have been scheduled to return from the Christmas break on 1/2/18. (6)

13. The Christmas break was from 12/23/17 through 1/2/18. After the Christmas break, the claimant began to fill out paper work for Family Medical Leave of Absence (FMLA) on an intermittent basis. The claimant had been sick for six weeks prior to the break and it was the hope of her doctor that if she was allowed intermittent time off, she would be able to continue to work.
14. The claimant had exhausted all of her personal time at work and before she left on Christmas break, she had been very sick and talked to her supervisor about taking off the day prior to the break. The claimant's supervisor advised her that if she took the day off before the holiday break, she would not be paid for the holiday and this would not look good on her record.
15. Prior to handing in the FMLA paper work, the claimant spoke with the assistant director of human resources about intermittent leave and the assistant director gave her some examples of how intermittent leave would work. [S]he indicated, for instance, if someone had cancer and needed time off for their treatments, then intermittent leave could be allowed.
16. A determination as to whether FMLA will be approved is made by the director of human resources and the assistant director of human resources and they can only make this determination upon the completion of the FMLA paper work.
17. After the claimant spoke with the assistant director, she believed that her leave would be denied because it was not as grave as cancer, and for this reason she never submitted the paperwork.
18. The claimant made a decision to resign her position due to her belief that her FMLA would not be approved.
19. The claimant first spoke to a physician about her health when she went to Urgent Care on 12/10/17. It was the doctor that brought up her work environment first, at this visit the doctor asked, "Where do you work? Do you work with chemicals?" The doctor told the claimant that working with chemicals would aggravate her asthma. (7)
20. The doctor recommended that she not return to work until she felt better. The doctor informed the claimant that her asthma was being affected by the work environment. She did not get this in writing. The claimant did have [sic] note from the doctor to stay out of work, but she gave that to the employer. (7a)(7b)
21. On 1/8/18, the claimant first spoke to the assistant director of human resources about the work environment and her need for FMLA. (8a)(8b)

22. The claimant's final discussion with the director and the assistant director of human resources was on 2/20/18. At this time, the claimant said she did not wish to put everybody through this, that is the leave paper work, because she did not believe she would be returning. (9a)(9b)
23. The director of human resources recalls that the claimant indicated that her psoriasis generally flared up in the summer months, and whether at work at this location or elsewhere, her condition caused her to have to wear long sleeves. She also told the employer that her asthma was affected by the cold. (9b) (1)
24. The claimant's job description called for cleaning with chemicals, however, the human resource director would have tried to provide the claimant with other accommodations. (11)

[Credibility Assessment:]

The employer's testimony as to what was discussed in the first and the final discussion is credible as the claimant could not recall. The employer on the other hand had a clear recollection on the meetings.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 18, which sets forth the claimant's reason for resigning is incomplete in that it fails to capture that the underlying reason for needing a leave of absence was health problems connected to working around mold. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant resigned from her employment, her eligibility for benefits is analyzed pursuant to the following provisions under G.L. c. 151A, § 25(e), which provide, in pertinent part:

[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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

These provisions place the burden of proof upon the claimant.

To determine if the claimant has carried her burden to show good cause under G.L. c. 151A, § 25(e)(1), we must first address whether the claimant had a reasonable workplace complaint. General and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1). Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). However, “intolerable working conditions [which] has generally been understood to import substandard sanitation, temperature, ventilation, or other like factors which may contribute to the physiological discomfort or demise of exposed employees” does. Id. In this case, the findings show that the claimant’s work environment, specifically working in and around mold, exacerbated her pre-existing asthma and psoriasis. *See Consolidated Findings ## 2–5, 7 and 8.* This was confirmed by her medical doctor. *See Consolidated Findings ## 19 and 20; Remand Exhibits 9 and 10.* Given the undisputed evidence connecting the claimant’s work environment to her health issues, we believe she had a reasonable workplace complaint.

To establish that the separation was for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1), 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 consolidated findings show that the claimant complained to more than one supervisor about the mold, but nothing was done. She complained as early as the summer of 2017. *See Consolidated Findings ## 6, 9 and 10.* The review examiner found that the immediate supervisor should have notified the administration, which would have taken steps to remediate the problem. Consolidated Finding # 11. That the employer’s supervisors did not follow protocol in failing to report the claimant’s health-related mold concerns to administration is a breakdown in the employer’s supervisory responsibilities. It is not the claimant’s fault.¹

The purpose of the unemployment statute is to provide temporary relief to “persons who are out of work . . . through no fault of their own.” Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted). Yet, despite having established unhealthy working conditions, her supervisors’ failure to respond to her complaints, and progressively deteriorating health symptoms over time, the review examiner denied benefits because the claimant failed to request intermittent FMLA. We can reasonably infer that, based upon what her physician wrote in Exhibit 10, the claimant may have been a good candidate for an intermittent FMLA. However, this does not mean she is ineligible for benefits.

Although an employee is expected to make reasonable attempts to preserve her employment before quitting, the Supreme Judicial Court has expressly rejected the notion that to be eligible for benefits, an employee is required to request a leave of absence. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 94 (1984). In this case, the claimant had taken steps to preserve her employment before submitting her resignation. She complained to two supervisors, used her inhaler more frequently, exhausted her use of other prescribed medications to the point

¹ Although not in the findings, the claimant testified that she did not go over her immediate supervisor’s head because she feared retaliation. At the remand hearing, the employer’s Director of Human Resources confirmed that the claimant told her of this fear during their meeting in January. 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).

where they no longer worked, and sought medical attention. *See Consolidated Findings ## 5, 6, 8, 9, and 19.* She did not pursue the intermittent leave of absence because she mistakenly believed she would be denied. *See Consolidated Finding # 17.* We decline to penalize the claimant for this misunderstanding and consequent failure to exhaust all efforts to preserve her employment. We do so particularly in light of the other steps she took to preserve her employment, and the SJC's clear statement that seeking a leave is not *quid pro quo* for unemployment eligibility. Under these circumstances, the claimant's efforts were reasonable. *See Fergione v. Dir. of Division of Employment Security*, 396 Mass. 281, 284 (1985) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief).

We, therefore, conclude as a matter of law that the claimant has shown that she separated from employment for 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 beginning February 18, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – October 24, 2018



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.

AB/rh