Coworkers continuously made fun of the claimant, blamed his mistakes on his being from Africa, mocked his accent, targeted him with aggressive behavior throughout his employment, and the claimant told his supervisor about it at least seven times. Held his separation was due to unreasonable harassment under G.L. c. 151A, § 25(e).

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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 his position with the employer on March 23, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 24, 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 denied benefits in a decision rendered on May 31, 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, he 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 obtain more specific evidence about the claimant's alleged incidents of mistreatment by his coworkers. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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 is disqualified under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the consolidated findings show that coworkers continuously harassed the claimant throughout his employment because he came from Ghana.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. From June 1, 2016, until March 23, 2018, the claimant worked, initially on a temporary basis, and beginning on December 12, 2016, as a full-time (40 hours per week) computer user support technician for the employer, a desktop support services company.

2. The claimant reported to the employer's supervisor (the supervisor), his direct supervisor.

3. At no time throughout his employment was the claimant issued any written warnings or other forms of discipline.

4. The claimant is a black man originally from the country of Ghana.

5. Throughout his employment, the claimant worked with the employer's co-worker 1 (CW1), a white male of Irish descent, the employer's co-worker 2 (CW2), a Hispanic black male of Honduran descent, and the employer's co-worker 3 (CW3), a white American female.

6. The claimant generally worked at a station located at the employer's lab (the lab).

7. On multiple occasions, the employer's IT field engineer (the engineer) witnessed CW2 make jokes about the claimant's Ghanaian accent, imitate and mock his accent, and make jokes about the way he dressed in front of CW3 and the employer's team lead (the TL), a white Puerto Rican male.

8. The TL did not have a supervisory role over the claimant.

9. On one occasion, the engineer witnessed CW2 make fun of the fact that the claimant did not wear brand name designer clothing.

10. On other occasions, if the claimant made a mistake in the course of his duties, CW2 would say statements out loud, in front of the claimant and the engineer, such as, "It's because he's from Africa," or, "It's because he's from Ghana." CW3 and the TL, who were generally around when CW2 made such statements, would laugh at CW2's statements.

11. The engineer perceived CW2, CW3, and the TL to be a "tight knit group," and something of a "clique."

12. While the claimant would generally ignore and not respond to CW2's statements when made in his presence, on one occasion he told him, "Don't talk to me like that," in the engineer's presence.

13. The engineer never witnessed the TL make any specific negative statements regarding the claimant.

14. The engineer never witnessed the TL say anything or make any effort to put a stop to CW2's comments.

15. Although the engineer witnessed CW2 making fun of the claimant's clothes and accent, and CW3 and the TL laughing, he did not do anything about it nor did he report it to any supervisor because he perceived that his job might be put in jeopardy.

16. On some occasions, the engineer informed the claimant when others would make fun of his accent behind his back. After informing the claimant, the engineer generally perceived the claimant to be sad and disappointed. The claimant told the engineer that he could not get a good night's sleep because of the issues he had experienced at work.

17. The engineer never observed CW1 make statements about the claimant.

18. On or around July 15, 2016, around 2 p.m., the TL told the claimant that he would be training him on a ticketing system. During the training, when the claimant could not immediately complete a specific task, the TL told him, "Don't let me give up on you," and rolled his eyes. The claimant perceived the TL's statement and rolling of the eyes to be "demeaning."

19. The claimant, for unknown reasons, did not complain to anyone at the employer's workplace about the July 15, 2016, incident with the TL.

20. On or around August 16, 2016, while the claimant was being trained by CW1 in the lab, CW3 walked into the lab, with what the claimant perceived to be a disapproving look on [her] face and yelled at him, "If you're not doing anything, you need to take [work] tickets." The engineer, who was present during the incident, perceived CW3's yelling to be harassing towards the claimant.

21. The claimant, having not seen CW3 yell at anyone else before, perceived that she was doing so because of his national origin.

22. That same day, the claimant sent an email to the supervisor complaining about how CW3 had yelled at him. The supervisor responded to the claimant by saying that she would "handle it."

23. On or around August 16, 2016, around 3 p.m., while the claimant was in the lab, CW2 approached him. CW2, who generally left at 5 p.m., told the claimant that he was going home for the day, if he had any questions about anything work-related he should ask someone else, and left. The claimant perceived CW2's statements to be "weird," and thought that there was some ulterior motive behind them.

24. That same day, as he was leaving work around 5 p.m., the claimant ran into the engineer. The engineer told the claimant that he should be careful what he says in front of CW2 because he had been saying "untrue things" about the claimant at work.

25. On or around that time, the claimant sent an email to the supervisor and told her that the engineer had informed him that CW2 had been saying "untrue things" about him at work. The supervisor responded to the claimant by saying that she would "handle it."

26. On the next day, on or around August 17, 2016, CW3 apologized to the claimant, said that he did not deserve to be yelled at by her the day before, and asked the claimant if he would forgive her. The claimant told CW3 that he forgave her.

27. Sometime around September or October 2016, the employer discharged the engineer as a result of a lack of work.

28. On or around March 2017, the employer hired a help desk support specialist (the specialist).

29. The specialist reported to the supervisor and the TL.

30. The specialist and the claimant became friendly with one another. Throughout the specialist's employment, the claimant provided him with guidance and the specialist came to think of him as somewhat of a mentor.

31. On March 15, 2017, as the claimant was working at the lab, CW1 came in and asked the claimant if he had removed an Ethernet cable from a laptop. The claimant, who had not done so, told him, "No." CW1 then asked the claimant twice more if he was sure he had not removed the Ethernet cable, to which the claimant repeated that he had not. CW1 then told the claimant, in what the claimant perceived to be an agitated tone, "Whatever." The claimant responded to CW1 by also saying, "Whatever." After the specialist told the claimant and CW1 to keep quiet, CW1 left the lab.

32. The claimant, who had never witnessed CW1 confronting other employees or telling anyone else, "Whatever," perceived that he did so because of the claimant's national origin.

33. Later on that day, the supervisor walked into the lab, and the claimant told her that CW1 had accused him of removing his Ethernet cable and had said, "Whatever" to him. The supervisor told the claimant that she would "handle it."

34. On March 16, 2017, CW1 apologized to the claimant, told him that he had been having a bad day on March 15, 2017, told him that no one deserved what

he had done to him, and asked him to forgive him. The claimant told CW1, "Ok."

35. On or around late March/early April 2017, CW1 walked into the lab, got the claimant's attention, and told him that he had "taken his job," as a result of the claimant having taken over some duties which had been done in the past by CW1. The claimant told CW1 that he had not taken his job and that he was just performing a duty which had been assigned to him by the supervisor. Although the claimant did not believe that this was related to his national origin, the comment bothered him because he understood that CW1 had agreed to have the supervisor assign the claimant his duties. CW1 then told the claimant that he was joking and that he was not being serious.

36. The specialist observed, on at least 3 [sic] separate occasions throughout his employment, CW1 and CW2 imitating and making fun of the claimant's Ghanaian accent in a mocking manner, sometimes in the employer's lunchroom before staff meetings.

37. The specialist, not feeling comfortable doing so, did nothing to interfere or become involved with CW1 and CW2's imitating and making fun of the claimant's accent and generally stood there in silence.

38. The specialist did not report any of the behavior to the supervisor or the TL because he did not feel like he could trust his superiors, believed he could face retaliation, and out of a desire to remain "under the radar."

39. The specialist, feeling that he could trust the claimant and finding him to be "nice to talk to," told him on at least 3 separate occasions that CW1 and CW2 had imitated and mocked his Ghanaian accent. The specialist did not inform the claimant that he did not interfere and remained silent during these incidents.

40. Whenever the specialist informed him about CW1 and CW2 making fun of his accent, the claimant typically responded by saying something along the lines of, "Are you serious?" or "That's terrible." The claimant never said anything negative regarding CW1 or CW2 to the specialist.

41. On June 21, 2017, around 5 p.m., as the claimant was leaving to go home, CW3 walked into the lab and asked him, "Why didn't you put the trash out?" The claimant then put his bag down, picked up the trash, and put it outside.

42. The claimant, who had never heard CW3 ask anyone else to take out the lab's trash, and not being the only person who used trash, perceived that she did so because of the claimant's national origin.

43. The claimant sent an email to the supervisor and the employer's account manager stating that employer needed to figure out a better way to deal with trash. The claimant was displeased that he received no response to this email.

44. On or around June 28, 2017, as the claimant was leaving to go home, CW3 again asked him, "Why don't you put the trash bin out before leaving?" The claimant told CW3 that it was not his responsibility and left work for the day.

45. The claimant, this being the second time that CW3 had asked him to take out the trash, and having never seen her ask anyone else to do so, perceived that she did so because of his national origin.

46. The next day, on or around June 29, 2017, the claimant discussed the prior day's incident regarding CW3 and the trash with the supervisor. The supervisor told the claimant that she would "handle it." The claimant never received a resolution regarding the trash incident with CW3.

47. On September 12, 2017, as the claimant was in the lab, CW2 asked him, in the presence of CW1, why he had not taken out the trash the previous day. The claimant responded by saying, "I'm not the trash boy." CW2 then told the claimant that no one else was someone else's trash boy either.

48. On September 12, 2017, the claimant, perceiving that he had been asked to take the trash out as a result of his national origin, told the supervisor that CW2 had asked him to take out the trash. The supervisor told the claimant that she would "take care of it." The claimant did not receive a resolution regarding the trash incident with CW2.

49. On or around December 2017, the employer discharged the specialist without providing him with a reason. The specialist did not question his discharge and did not ask anyone to provide him with a reason. The reasons for which the specialist was discharged remain unknown.

50. On January 10, 2018, as the claimant was exiting the lab, the TL, who was entering the lab, hit the claimant's ankle with a heavy industrial recycling bin that he was pushing into the lab. The claimant experienced pain in his ankle and said, "Ouch." The claimant and the TL made eye contact, and after the claimant perceived the TL to put on a disapproving look on his face, the TL walked away. The TL did not apologize to the claimant.

51. As a result of the disapproving look on his face, the claimant believed that the TL had intentionally hit him with the recycling bin.

52. The claimant, who had never seen the TL hit anyone else, perceived that he had done so intentionally as a result of the claimant's national origin.

53. On January 11, 2018, the claimant spoke with the supervisor and told her that TL had hit him with a recycling bin the day before. The supervisor told the claimant that she would "handle it." The claimant never heard another word about the January 10, 2018 incident again.

54. The claimant experienced sleeplessness, nervousness, and anxiety as a result of his experiences with his co-workers in the workplace.

55. At no time, however, was the claimant diagnosed with a condition nor did he seek medical attention for the symptoms he was experiencing because of work.

56. On February 2, 2018, the claimant had eye surgery and was told by his doctor not to allow anything liquid to go into his right eye.

57. On March 15, 2018 and March 16, 2018, the claimant worked through his lunch break.

58. On March 16, 2018, as a result of having worked through his lunch break on March 15, 2018, and March 16, 2018, the claimant left work at 3 p.m. rather than his normal 5 p.m. departure time.

59. The claimant did not inform the supervisor that he left work early on March 16, 2018 because the supervisor was not in the office at the time.

60. On March 16, 2018, around 3–4 p.m., the supervisor sent the claimant an email asking him where he was. The claimant was displeased by the supervisor's email because he had observed other co-workers come to work late and leave early, and he had not seen the supervisor do anything about those co-workers.

61. The claimant would not have quit for the incident that took place with the supervisor on March 16, 2018, but the incident contributed towards his dissatisfaction.

62. On March 19, 2018, as a result of the claimant recollecting things said by his co-workers over time about his accent, his perceived national origin discrimination, and experiencing headaches, the claimant sent a text to the supervisor informing her that he would not be reporting to work on that day. The supervisor responded to the claimant's text by saying, "Get well soon."

63. The events on March 19, 2018, did not play a role in the claimant's initial decision to quit.

64. On March 20, 2018, the claimant reported to work.

65. Nothing took place on March 20, 2018, that played a role in the claimant's initial decision to quit.

66. On March 21, 2018, as a result of a snowstorm being forecasted, and having been told by his doctor not to allow anything liquid to go onto his eye, the claimant sent the supervisor either an email or a text message informing her that he was going to work from home. The supervisor did not immediately respond to the claimant.

67. On March 21, 2018, while working from home, the claimant was cc'd on an email to the supervisor from one of the employer's technicians (the technician) asking about a particular laptop (the laptop) which had been assigned to the claimant to work on March 19, 2018. The claimant responded to the email saying that he had not been at work on March 19, 2018 and the work had not been done on the laptop.

68. On March 21, 2018, in the afternoon, the claimant received an email from the supervisor asking him why he had not completed the work on the laptop. The claimant responded to the email saying that he had been out on March 19, 2018, the day he had been scheduled to work on the laptop.

69. The claimant, perceiving that the supervisor, who knew that the claimant had been out on March 19, 2018, had unfairly targeted him by asking him why he had not completed the work on the laptop, and as a result of his general dissatisfaction at work, decided to quit his employment.

70. The claimant did not believe that the supervisor asked him why he had not completed work on the laptop as a result of her targeting him due to his national origin.

71. On March 21, 2018, after going home, the claimant sent an email to the supervisor informing her that he was resigning from his employment effective April 4, 2018.

72. On March 22, 2018, the claimant met with the supervisor. The supervisor begged the claimant not to resign, saying that she valued his work and that she never received any complaints about him. After the supervisor told the claimant that he might be receiving a raise in the future, the claimant, who enjoyed the nature of his work, rescinded his resignation.

73. After rescinding his resignation, the claimant was not subjected to any other allegedly discriminatory treatment of harassment because of his national origin.

74. On March 23, 2018, around 9 a.m., the claimant attended a weekly team meeting via Skype. The claimant dialed into the meeting from his work

station at the lab. Although the claimant was present during the Skype meeting, he did not actively participate in it.

75. On March 23, 2018, around 10 a.m., the TL approached the claimant at his work station, while the claimant was wearing a double headset which he used in the course of his duties, and asked him if he was in the Skype meeting earlier that morning. The claimant told the TL that he was in the meeting. The TL then repeated the same question, asking the claimant if he had been in the Skype meeting. The claimant again reiterated that he had been present in the meeting.

76. The TL then noticed that the claimant was on "Do Not Disturb" on Skype, and asked him, "Why are you on 'Do Not Disturb' on Skype?" The claimant told the TL that he was in "Do Not Disturb" because he was busy doing his work as usual. The TL then got close to the claimant and whispered something in his ear, which the claimant could not discern what it was. The TL then left the lab without saying another word.

77. Moments later, the TL returned to the lab, and yelled at the claimant, "Why do you have a double headset on?" The claimant then looked at the TL but did not answer him. The TL then told the claimant that he should not be wearing a double headset so that people do not have to yell at him. The claimant remained silent and continued looking at the TL, at which point the TL proceeded to walk out of the lab. Within seconds, the TL returned to the lab and told the claimant, "Don't let me come into the lab again."

78. Minutes later, the TL came back into the lab and asked the claimant, "Are you still on 'Do Not Disturb'?" The claimant told the TL, "I'm always on 'Do Not Disturb' when I work. Why can't I be on 'Do Not Disturb'?" The TL then started walking out of the lab, and as he was leaving, he told the claimant, "You are here causing problems."

79. The claimant, who had never seen the TL speak to anyone else in the manner he spoke to him on March 23, 2018, perceived that the TL was singling him out as a result of his national origin.

80. Nothing regarding the exchange between the claimant and the TL on March 23, 2018 had to do with the claimant's national origin.

81. On March 23, 2018, after the incident with the TL, and as a result of his general job dissatisfaction, the claimant decided to quit his employment effective immediately.

82. The claimant then sent an instant message to the supervisor, which read, in relevant part, "Hi [the supervisor], I want you to come to the lab and retrieve [. . .] [the employer] related items. It's impossible to work over here any longer. I am not going to go into details right now but may be in the future."

83. After waiting approximately 5 to 10 minutes without hearing from her, the claimant copied the language of the instant message into an email and emailed it to the supervisor. After waiting approximately another 10 minutes and still without a response from the supervisor, the claimant printed the email, left a copy on the supervisor's desk, and left the employer's workplace.

84. Prior to quitting his employment, the claimant did not complain to the supervisor about his exchange with the TL on March 23, 2018, because he felt he had made enough efforts to complain to the supervisor about his perceived discrimination in the workplace. The claimant did not believe that further complaints to her would bring about any further action.

85. At no time prior to resigning his employment did the claimant complain to the employer's human resources department or anyone else at the employer's workplace other than the supervisor.

86. The employer's human resources department was located at the employer's headquarters in Arizona. The claimant made no effort to reach out to the human resources department because he believed that by complaining to the supervisor he was doing what he was supposed to do.

87. On March 25, 2018, the claimant filed a claim for unemployment benefits with an effective date of March 25, 2018.

88. In a questionnaire submitted to the Department of Unemployment Assistance (DUA), the claimant made no mention of the TL imitating his accent or otherwise mocking him during their interaction on March 23, 2018.

Credibility Assessment:

During the initial hearing, and on a questionnaire submitted to the DUA after filing for benefits, the claimant gave a very detailed account of the events between himself and the TL on March 23, 2018. At no point, however, did the claimant mention that the TL imitated or made fun of his accent on March 23, 2018. During the remand hearing on September 14, 2018, however, the claimant added a key detail and contended that, on March 23, 2018, after he told the TL that he had been in the Skype meeting earlier that morning, the TL looked at another co-worker and, imitating the claimant's accent, said, "Yes, I was in the meeting." When asked by this Review Examiner why he had not stated this either on his written documents to the DUA or during the initial hearing, the claimant merely stated that he "forgot." The claimant, however, had clear recollections of incidents and statements with several co-workers going back to mid-2016, which he included in his initial questionnaire and some which were discussed during the initial hearing. Therefore, it is concluded that his contention that he forgot a key comment made during his final day at work is not credible. As such, it is concluded that the TL did not imitate the claimant's accent on March 23, 2018,

and that the final incident which resulted in him resigning from his position had nothing to do with the claimant's national origin.

The claimant contended that he quit his job as a result of national origin discrimination. In support of this claim, the claimant provided the engineer's and the specialist's testimony detailing how other co-workers would imitate his accent and mock the fact that he was from Ghana. Additionally, the claimant testified regarding many incidents and interactions with co-workers which displeased him, many of which he perceived were because of his national origin. However, where the claimant was aware of the comments regarding his accent for almost two years prior to resigning, and where it has already been concluded that the incident on March 23, 2018, had nothing to do with his national origin, I find that the claimant did not quit as a result of national origin discrimination. Instead, where the claimant explained displeasure regarding many job-related interactions over the course of an almost 2-year period with his co-workers, and where many of those interactions could not reasonably be characterized as being the result of the claimant being singled out due to his national origin — particularly the final interactions that took place in his last week of employment — it is concluded that the claimant quit as a result of his general dissatisfaction and perceived mistreatment at work.

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 Findings ## 13 and 14 are misleading in that they wrongfully suggest that the engineer never observed TL participate in negative behavior regarding the claimant.[1] In Consolidated Finding # 36, the review examiner mistakenly refers to the specialist observing on at least 3 occasions CW1 and CW2 imitating and making fun of the claimant's accent. The specialist testified that this occurred on at least 30 occasions.[2] We also reject the portions of Consolidated Findings ## 69 and 81, which attribute the claimant's decision to quit to general job dissatisfaction, as that is not supported by substantial evidence. Finally, we reject Consolidated Findings ## 73 and 80, as well as the credibility assessment underlying these findings, because they are unreasonable in relation to the evidence presented. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe the review examiner's original legal conclusion that the claimant is ineligible for benefits is not supported by the record.

[1] The engineer testified that TL would laugh when CW3 made jokes about the claimant (*see* Consolidated Finding # 15), asked questions, wanted to know more, seemed engaged, and never once did TL, as team leader, say that her behavior was inappropriate. While not explicitly incorporated into the review examiner's findings, this testimony is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

[2] This testimony is also part of the unchallenged evidence in the record.

The review examiner's decision concludes that the claimant is ineligible for benefits on the ground that the claimant failed to sustain his burden to show that he voluntarily left his employment for good cause attributable to the employer under G.L. c. 151A, § 25(e)(1). The decision goes so far as to state that the claimant did not have a valid workplace complaint.[3] We disagree.

The claimant is an immigrant from Ghana. Consolidated Finding # 4. On appeal, he argued that he resigned due to coworkers' harassment on the basis of his national origin, which occurred throughout his employment. The sixth paragraph of G.L. c. 151A, § 25(e), provides as follows:

> An individual shall not be disqualified, under the provisions of this subsection, from receiving benefits if it is established to the satisfaction of the commissioner that the reason for leaving work and that such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.

The DUA has also promulgated regulations, which clarify this statutory provision. Specifically, 430 CMR 4.04(5)(a)3 defines "other unreasonable harassment" as follows:

> 3. Other unreasonable harassment—includes, but is not limited to, incidents of harassment related to age, religious creed, *national origin*, or handicap of any individual.

430 CMR 4.04(5)(b) further provides, in relevant part, as follows:

> Sexual, racial or other unreasonable harassment may result from conduct by the employer or . . . co-employees . . . .

Under 430 CMR 4.04(5)(c), the regulation also states, in relevant part:

> 3. In all cases involving allegations of harassment (*other than allegations of* sexual, racial or other *unreasonable harassment* as defined at 430 CMR 4.04(7)(a)[4]) by an employer, . . . a claimant shall not be disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1) if he or she establishes to the satisfaction of the Commissioner that,
>
> > a. The employer, its agents or supervisory employees knew or should have known of the harassment and the employer failed to take immediate and appropriate corrective action; and

[3] *See* the original hearing decision, entered as Remand Exhibit 1.

[4] We believe this citation to subparagraph (7)(a) is a typographical error, inasmuch as "sexual, racial, or other unreasonable harassment" are defined under subparagraph (5)(a). Subparagraph (7)(a) pertains to re-employment services.

> b. He or she took reasonable steps to preserve his or her employment, which may include notifying the employer of the harassment, unless the circumstances indicate that such efforts would be futile or result in retaliation.

Finally, we consider 430 CMR 4.04(5)(d), which states:

> In determining whether a claimant's reasons for leaving work is due to harassment, the Division will look at the *totality of the factual circumstances* resulting in the claimant's separation from employment, such as the nature of the alleged harassment and the context in which the alleged harassing incidents occurred.

(Emphasis added.)

After remand, the consolidated findings are replete with instances where coworkers CW1 and CW2 imitated, mocked, or made fun of the claimant's Ghanaian accent. *See* Consolidated Findings ## 7, 15, 16, and 36. Consolidated Finding # 10 provides that, on more than one occasion, when the claimant made a mistake, CW2 openly stated in front of the claimant and others, "[i]t's because he's from Africa" or "[i]t's because he's from Ghana," triggering laughter from CW3 and TL. While on most occasions, the same coworkers did this outside of the claimant's presence, the specialist relayed at least a few of these statements to the claimant. *See* Consolidated Findings # 36 and 39. The review examiner found that the coworkers' conduct upset the claimant. *See, e.g.,* Consolidated Findings ## 12, 16, 40, and 54. We can see no spin of the evidence which would interpret mocking a claimant's accent or explicitly attributing the claimant's mistake to being from Ghana as anything but harassment on the basis of the claimant's national origin.

In his credibility assessment, the review examiner concludes that the claimant's resignation had nothing to do with national origin discrimination. 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). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) In this case, we believe the review examiner's conclusion is unreasonable in relation to the evidence presented.

First, the review examiner fails to give due weight to the claimant's two witnesses at the remand hearing, an engineer who worked for the employer in 2016 and a specialist who worked there from about March through December, 2017. *See* Consolidated Findings ## 27, 28, and 49. Although not helpful with specific dates, these witnesses provided undisputed testimony confirming the coworkers' behavior (described above) during the witnesses' tenure of employment, which overlapped the claimant's for two different substantial periods of time. Yet, in considering the claimant's reason for quitting, the credibility assessment dismisses their

testimony and the numerous findings which capture their testimony as merely "perceived mistreatment at work."

The fact that the claimant continued working for almost two years in this environment does not change our decision. As the findings show, he tried to ignore the harassment (*see* Consolidated Finding # 12,) sometimes defended himself (*see* Consolidated Findings ## 12 and 47,) tried to be forgiving on the two occasions when coworkers apologized (*see* Consolidated Findings ## 26 and 34), and complained to his supervisor at least seven times (*see* Consolidated Findings ## 22, 25, 33. 43, 46, 48, and 53), but the mistreatment continued. The review examiner decided that because the offensive conduct went on for two years, it could not have entered into the claimant's reasons for resigning. Again, we think this ignores the weight of the evidence, particularly his own Consolidated Finding # 54, which states that the claimant experienced sleeplessness, nervousness, and anxiety as a result of his coworkers' conduct. A more reasonable interpretation of this record is that the claimant had simply reached a breaking point.

Second, the review examiner focuses too narrowly on the incidents of March 23, 2018, looking at TL's behavior in isolation. The DUA's regulation at 430 CMR 4.04(5)(d) requires us to consider the totality of the circumstances. In addition to mocking his accent and making jokes about being from Africa at the claimant's expense, the consolidated findings reveal that coworkers would say untrue things about the claimant at meetings and ridiculed him when he could not complete a task, either directly or with their body language. He was yelled at, singled out for taking out the trash, criticized for not performing work that was not his responsibility to do (repair tickets), interrogated about taking an Ethernet cable that he did not remove, and hit with a heavy recycling bin, to name a few. Yet, because the claimant forgot to mention that TL also mocked him on March 23, 2018, until he testified during the remand hearing, the review examiner discredits two years' worth of other harassing incidents.

To be sure, not every incident described in the consolidated findings amounts to unreasonable harassment on the basis of national origin. However, in light of the coworkers' numerous mean and aggressive behaviors towards the claimant interspersed with explicit jokes and ridicule about being from Ghana, the only reasonable inference is that the majority of their conduct was intentional harassment based upon the claimant's national origin.

Because we conclude that the claimant quit due to unreasonable harassment, he is not required to show reasonable efforts to preserve his job before quitting. *See* 430 CMR 4.04(5)(c)3; *see also* Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of Division of Employment and Training, 54 Mass. App. Ct. 405, 410–411 (2002) ("In cases involving allegations of sexual harassment, . . . claimant need not show that she took all or even 'reasonable steps' to preserve her employment."). All he needs to show is that "the employer or its supervisory personnel knew or should have known of such harassment." G.L. c. 151A, § 25(e). As stated above, the review examiner found that the claimant brought his coworkers' mistreatment to his supervisor's attention at least seven times. The findings further show that he started complaining to her in August, 2016, two months after he started working there, on March 15, 2017, in late June, 2017, on September 12, 2017, on January 11, 2018, and, finally, on March 22, 2108. In short, his supervisor had been made well aware of their behavior.

We note that, even if we were not to view the coworkers' mistreatment as based upon the claimant's national origin but simply harassment generally, this record shows that the claimant made a reasonable effort to preserve his employment before resigning. Because the harassment continued to occur after he complained to his supervisor multiple times, the claimant could reasonably believe that any further attempts would have been futile. *See* Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984).

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he voluntarily left his employment due to unreasonable harassment within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 18, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 31, 2018

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

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