

**Although the claimant had a valid complaint against his supervisor, he is disqualified under G.L. c. 151A, § 25(e)(1), because he did not share his concerns with upper management and did not show that taking such a reasonable step to preserve his employment would have been futile.**

**Board of Review  
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**Issue ID: 0025 0971 41**

## **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 his position with the employer on March 16, 2018. He 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 by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 1, 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 not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 efforts to preserve the claimant's employment before resigning would have been futile, is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant was employed as a full-time carpenter's apprentice for the employer, a construction company, from April 2017 until March 16, 2018.
2. The claimant's immediate supervisor was the project foreman (the Foreman).

3. The Foreman is the claimant's brother.
4. The employer's director of project management (the Director) hired the claimant.
5. At the time the Director hired the claimant, the Foreman told the Director he would take the claimant on as a trainee.
6. Throughout the claimant's employment, he worked as the Foreman's apprentice.
7. On March 16, 2018, the claimant asked the Foreman a question.
8. In response to the question, the Foreman said, "I told you yesterday," and threw a tool at the claimant.
9. After the Foreman threw a tool at the claimant, he followed the claimant around the job site, yelling at him and throwing tools at him.
10. The claimant was afraid the Foreman would physically harm him.
11. The claimant believed if he responded, he and the Foreman would have a physical altercation.
12. While the Foreman was yelling at the claimant and throwing tools at him, the claimant said, "I'm done," and left the jobsite.
13. The claimant did not contact the Director because the Foreman was his direct supervisor, and [he] did not believe the employer could place him on another jobsite.
14. The claimant resigned from his position on March 16, 2018, because he feared he and the Foreman would have a physical altercation.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that any attempt by the claimant to preserve his employment would have been futile.

Because it is undisputed that the claimant voluntarily resigned from employment, his eligibility for benefits must be decided pursuant to G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

Under this section of the law, it is the claimant's burden to establish that his separation was for good cause attributable to the employer. The review examiner concluded the claimant met his burden and had resigned for good cause attributable to the employer.

The review examiner found that the claimant's supervisor yelled at the claimant and threw some tools at him when the claimant asked him a question about his work duties. In light of this finding establishing that the claimant was subjected to physical aggression by his supervisor, we agree with the review examiner's conclusion that the claimant had a valid complaint against the employer. However, we disagree with the review examiner's conclusion that an attempt by the claimant to preserve his employment would have been futile.

The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action also has the burden to show that he 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). In this case, the claimant made no such efforts. The review examiner found that, following the claimant's confrontation with the Foreman, he did not contact the director regarding the Foreman's behavior because he did not believe the employer could place him at a different job site with a different foreman. The claimant, however, has failed to establish that his belief in this regard was reasonable. Rather, the findings and record before us indicate that it was mere speculation on the claimant's part that the employer could not address his concerns. We further note that, in her decision, the review examiner concludes that, because the Foreman hired the claimant, any attempt by the claimant to preserve his employment would have been futile. There is, however no substantial or credible evidence in the record to support this conclusion. On the contrary, the record before us suggests that the claimant possessed a viable and reasonable course of action by which he could attempt to preserve his employment — namely, to report the Foreman's conduct to his director and request a transfer to a different work site. The claimant did not undertake this reasonable course of action and has not met his burden of showing that undertaking such a course would have been futile.

We, therefore, conclude as a matter of law that because the claimant did not take reasonable steps to preserve his employment before resigning, as required under Massachusetts law, he is disqualified pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending March 17, 2018, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 20, 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](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SVL/rh