

Claimant quit because of an insensitive text message from her boss following a death in the family. Given the personal and professional relationship between the two, the text message did not constitute good cause attributable to the employer to resign. Moreover, the claimant failed to make reasonable efforts to preserve her job before separation.

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Issue ID: 0025 5123 22

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 filed a claim for unemployment benefits, which was denied in a determination issued by the agency on May 19, 2018. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits attended by both parties, the review examiner reversed the agency's initial determination in a decision rendered on December 29, 2018.

Benefits were awarded after the review examiner concluded that the claimant voluntarily left her employment for good cause attributable to the employer and, thus, she may not be 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 accepted the employer's application for review and 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 the employer's text messages to the claimant following the death of the claimant's brother-in-law constituted good cause attributable to the employer to resign pursuant to G.L. c. 151A, § 25(e)(1), 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 worked full time as the Director of Finance for the employer, an information technology company, from January 2, 2010, until March 15, 2018, when she quit work.

2. The claimant worked Monday through Friday from 8:00 a.m. to 5:30 p.m. The claimant was permitted to flex her schedule based on her sons' school schedule.
3. The claimant was paid an approximate base annual salary of \$172,500.00.
4. The claimant's immediate supervisor was the Chief Operating Officer (the COO). The COO and her husband, the Chief Technology Officer (the CTO), who [sic] owned the company.
5. The claimant managed the husband and wife's personal finances and the finances of several companies they owned.
6. The claimant had a friendly relationship with the COO and the CTO. The claimant went on double dates with the COO and CTO.
7. In 2012 or 2013, the COO gave the claimant's telephone number to a friend of a professional basketball [sic] for business purposes. The claimant objected to her number being given to the individual. The claimant did not tell the COO or the CTO she objected to her number being given out.
8. The COO yelled at employees due to work performance issues.
9. The COO asked the claimant to file a homestead on her property in [City A]. The claimant didn't file the homestead. She told the COO she thought someone else had filed it. The failure to file the homestead cost the COO a lot of money.
10. In 2015, the COO instructed the claimant to wire money to a contractor. The claimant didn't wire the money. The deadline date for the building permit expired. The failure to wire the money cost the COO 5 million dollars.
11. Sometime around 2015, the Senior Logistics and Travel Manager complained to the claimant that she had been yelled at by the COO at a football tailgate party. She expressed discontentment in her job to the claimant.
12. During the claimant's employment, the CTO text [sic] the claimant to ask if his wife was acting worse than usual. The claimant expressed she felt the COO needed professional help because of her negative attitude towards employees.
13. Sometime in the fall 2013, the CTO lost his wallet. The claimant brought the wallet to the CTO. The CTO touched the claimant's buttocks and asked, if his wallet was there.

14. The claimant did not report the CTO's behavior to the COO because he never did it again and she didn't want to lose her high-paying job. The claimant didn't have much interaction with the CTO because he lived in [City A].
15. In 2014, the CTO and COO took the claimant's [sic] and other employees to lunch for a celebration of the claimant's birthday. The COO had everyone take a turn saying one bad observation about the claimant and one good observation about her. The COO made a negative comment about the claimant's hair, which the claimant objected to.
16. It was typical for the COO to have employees engage in the exercise when celebrating a birthday as a personal building tool to take the year to work on things others found were negative about him/her and be aware of aspects of themselves others thought were positive.
17. The claimant did not tell the COO or the CTO she objected to the exercise. The claimant laughed during the exercise.
18. Sometime in 2015, the COO showed the claimant an email forwarded to her by the CTO from their personal dog walker. The dog walker complained about the COO.
19. Sometime after the COO showed the claimant the email, the dog walker no longer worked for the employer.
20. Sometime between the years 2015 and 2016, the claimant went on a work trip with the COO. There were massages booked for the claimant and the COO. When they went to the massage, the claimant and the COO were in a couples' room. The claimant undressed in front of the COO. The claimant did not refuse the massage because it had been paid for by the COO. The claimant did not express any discomfort to the COO or the CTO.
21. In the Spring 2016, the claimant was at the COO's home in [City A]. The COO was upset about work. She picked up her laptop, raised it over her and said she should throw it in the ocean. The claimant objected to the COO's actions.
22. In April 2017, there was a harassment complaint at a company event. The claimant left the event before the incident took place. The COO had an affidavit for the claimant to sign about the incident. The claimant refused to sign it because she didn't witness the incident. The COO was angered that the claimant refused to sign it. The COO said the claimant was not remembering correctly. The COO called the claimant and told her she hoped she could sleep at night.

23. Sometime after April 2017, the company moved to a new location. The COO moved the claimant and her team to the basement level because it was a quiet private area for the financial team to work.
24. The claimant objected to being moved to the basement because she thought it was retaliation for not signing the affidavit.
1. On July 28, 2017, the claimant signed an Employment Agreement with a human resource company she suggested the employer hire. There was a complaint procedure within the agreement that advised the claimant to report any harassment to her supervisor or to the human resource company, if she felt it would not be properly handled by the supervisor. The human resource company handled the employer's payroll.
25. On Monday, October 17, 2016, the COO sent an email to the CTO and several other individuals including the claimant. In the email, the COO expressed her dissatisfaction of the mismanagement of an investment, which cost her millions of dollars. In the email, she said the claimant "has been a blind deaf and dumb when it comes to raising this project up into the light!"
26. The claimant didn't handle the investments. The COO was upset the claimant didn't bring the investment loss to her attention.
27. After the email was sent, the CTO sent a text message to the COO, which the claimant was on a group text with them. The CTO wrote to the COO, "As well as unnecessary...All loans are performing and small amounts" name of investor "manages this us for free!!!" name of COO "you can shot on employees, I wish you didn't But don't shit on friends!" The COO responded to his text, name of CTO "there is no communication...We are treated like mushrooms." The CTO responded, "Please stop If you want info ask for it politely...Demanding and being pushing is not a good strategy."
28. The claimant objected to the contents of the email that pertained to her. She sent the COO and CTO a text later that day that she would be out of work the following day. A couple of days later, the claimant asked the COO for an apology. The COO giggled and apologized to the claimant.
29. Sometime after October 17, 2016, the COO berated the claimant on a conference call with the investment people. The claimant objected to being berated because she didn't invest the money. The COO was upset that the claimant didn't notify the COO that the investments weren't prospering.
30. Sometime around October 2017, the COO offered to take the claimant and a few other employees to shop for an outfit for the upcoming holiday party. The COO offered to pay for the outfits. The claimant, the COO and two other female employees tried on dresses in a dressing room together. They weren't required to try on the dresses in the same dressing room.

31. The COO told the claimant a dress that she liked was not flattering on her because it showed too much of her legs at her age.
32. The claimant objected to the COO's statement.
33. The claimant did not tell the COO or the CTO she objected to the statement.
34. The claimant did not make a complaint to the employer's human resource company.
35. Each year at the Christmas party the COO would give "shout outs" to employees to recognize them for their work achievements. The employer's Chief of Staff suggested the COO publicly acknowledges [sic] the employees.
36. At the Christmas party in 2017, the claimant objected to the COO giving her a shout out because the COO yelled her name over and over until the claimant walked up front to be acknowledged.
37. The claimant did not complain to the COO or the CTO about the shout out.
38. The claimant did not complain about the shout out to the employer's human resource company.
39. In January 2018, the COO discovered that the CTO was having an illicit affair with a female. The CTO gave the mistress money from the company. The COO showed the claimant and the Chief of Staff a video of the mistress not wearing any underwear. The claimant told the COO she didn't want to see the video. The COO showed it to claimant anyway. The claimant watched the video. The COO showed the claimant the video to prove her husband was having an affair and to prevent the claimant from giving the CTO any funds without the COO's knowledge.
40. The claimant did not make a complaint about the video to the CTO or to the employer's human resource company.
41. The employer gave the claimant 20 days of paid time off each year.
42. When the claimant took time off from work, she informed the COO she was taking [the time] off. She did not request to take the time off from work. The claimant was never disciplined for taking time off from work without prior authorization from the employer.
43. In June, 2017, the claimant told the COO she was taking time off to drive her friend to the airport. The COO told the claimant she paid her enough that the friend could take and [sic] Uber to the airport. The claimant took the time off to drive her friend to the airport.

44. On Monday, February 26, 2018, at approximately 3:15 p.m., the claimant received a call from her ex-husband that she needed to get their two sons from the school bus because his niece had found her father, her ex-husband's brother, dead at home.
45. The claimant notified the employer's Chief of Staff she was leaving work to get her kids off the bus. She also explained the circumstances to her.
46. The Chief of Staff notified the COO the claimant left work and the reason why she left.
47. Later that day, the claimant text the COO to inform her that she left work. The COO responded, "I heard...Oh thought she killed him." The claimant responded, "Thank you for your condolences." COO responded, "I'm sorry...I misunderstood...Thought she said his daughter killed him...Sorry your former brother in law died...Glad it wasn't murder." The claimant responded, "Thank you. He was still my brother in law and I am very close with their family. I'm beside myself for his daughters."
48. The claimant did not work on Tuesday, February 27, 2018, due to the death of her brother-in-law.
49. The claimant worked on Wednesday, February 28, 2018.
50. On Thursday, March 1, 2018, at 7:55 a.m., the claimant sent the COO I text that read, "I'm leaving at noon today. Private family viewing at 3 followed by a small gathering at an Irish Bar. I have to grab the boys from school and head down there with them." The COO responded, "This death thing is a lot." The claimant responded, "I can resign if you like." The COO responded, "Yes well so can I, that's going to really help!" The claimant responded, "My family is my focus right now. Your work is getting done. If you feel like it's not, I'm happy to go in and clean out my desk and hand over my computer. But don't antagonize me about this!" COO responded, "Omg you're over reacting...All I said is this death thing is a lot, you're going nuclear." The claimant responded, "All you had to say was "OK I understand...Instead you tried to make me feel guilty about it...I wish you had more actual empathy." The COO responded, "Honestly I don't, but I understand your family has a need to over dramatize a normal very sad part of life...Generally for someone not related to you and part of a former marriage would rate a day off for the funeral." The claimant responded, "...I'm giving you my two weeks notice. Right now...Life is too short and I don't believe in your mission." The COO responded, "Ok well I believe for whatever reason you are over blowing this entire thing...I'm sure you will calm down." The claimant responded, "But you'll never change. So I'm serious. March 15. Last day. I'll call" (employee) "and see if her can get someone in I take over."

51. The COO objected to the claimant taking time off from work due to her ex brother in law's death because the claimant hadn't been married to his brother for several years. The COO felt the claimant's amount of time off from work was "unnatural" for the death of an ex-brother-in-law. The COO looked on the claimant's personal media site to find a picture of the ex-brother-in-law and couldn't find one. She didn't believe the claimant was close with him. The COO also objected to the claimant taking time off at the end of the month because it was the company's busy period and financials had to be filed by the claimant. The COO expected the claimant's sons to attend the services with their father and not the claimant.
52. The claimant's sons were close with their uncle.
53. The claimant had accrued paid time off to cover the time she was absent from work.
54. The claimant objected to the COO's text messages regarding her brother in law's death because she felt they were personal attacks against her family.
55. The COO felt the claimant's quitting work because of her text messages was an overreaction.
56. On March 1, 2018, at 9:21 a.m., the claimant sent the COO and CTO an email formally resigning from work effective March 15, 2018. She did not give a reason for her resignation in the email. In the email the claimant said, "I want to take this opportunity to thank you for the crazy/wild ride these last 8+ years."
57. The claimant quit work due to a personality conflict with the COO.
58. The CTO asked the claimant via email the reason she quit work. The claimant told the CTO to ask his wife. The CTO told the claimant he hoped she and his wife could work it out.
59. The claimant did not make a complaint to the employer's human resource company about the COO's text messages because it was against the owner of the company who employed the company and she didn't want the company to be viewed as a liability.
60. On March 8, 2018, at 4:55 p.m., the COO sent the claimant an email notifying her she wanted to plan a farewell lunch for the claimant. The COO wrote, "While we have had our issues over the years you have been a great employee and you will be missed."
61. The claimant responded by accepting the offer of the lunch and wrote, "I've loved my time here."

62. On March 14, 2018, the COO apologized to the claimant for the text messages she sent to her about her ex-brother-in-law's death. The COO asked the claimant to rescind her resignation. The claimant refused to rescind her resignation. The COO told the claimant she (the claimant) triggered her (the COO) to behave that way.
63. The COO asked the claimant to work a transition period after March 15, 2018.
64. The claimant agreed to work for the employer 10 hours a week at a rate of \$300.00 per hour.
65. The employer did not have the claimant work beyond March 15, 2018, because of the hourly rate she expected to be paid.
66. On March 15, 2018 at 3:04 p.m., the claimant sent an email to the COO and CTO. The email read: "One of my least favorite things about working is the boredom that comes with it. I want to thank you for never letting me be bored for one day over the 8.25 years! You should be so proud of what you've accomplished. I know I am proud to have been a part of it. I love you both!"
67. On April 26, 2018, the claimant electronically submitted a statement to the Department of Unemployment Assistance (the DUA) regarding her separation from employment. In the statement the claimant reported she quit work because the employer increased her hours of work beginning March 25, 2010, but did not increase her wages.
68. The claimant did not quit work because the employer increased her hours of work, but not her wages. The claimant reported this was the reason she quit work to avoid disparaging the COO and CTO.
69. The claimant received wage increases over the years she worked for the employer.
70. Several times the claimant told the COO, if she didn't receive the wage increase or the bonus, she requested she would find other employment.
71. In the additional comments section of the statement, the claimant reported, "I had a death in the family, and my employer chose to berate me and my family over text message when I said I had to leave early for a private viewing.
72. On May 17, 2018, the employer electronically submitted a statement to the DUA regarding the claimant's separation from employment. The employer reported the claimant quit work to seek other employment.
73. The claimant did not quit work for other employment.
74. The claimant did not have an offer of work prior to leaving employment.

75. The claimant obtained new employment with a previous employer after she quit work.

76. On May 19, 2018, the DUA issued the claimant a Notice of Disqualification under Section 25(e)(1) of the Law beginning March 11, 2018 because “You chose to leave work because of a personality conflict with the employer.”

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 conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact. In adopting the 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 quit for good cause attributable to the employer, and that she made reasonable attempts to preserve her job before separating.

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] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

The explicit language in G.L. c. 151A, § 25(e)(1), places the burden of persuasion on the claimant. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985). The review examiner concluded that the claimant met her burden. We disagree.

The findings establish that the claimant performed financial services both for the employer’s business, and personally for the employer’s husband and wife co-owners, the Chief Operating Officer (COO) and the Chief Technology Officer (CTO). The findings also indicate that, in addition to being an employee, the claimant had a personal friendship with both the COO and the CTO, and that, over the years, the boundaries between the claimant’s professional and personal relationships with the COO and the CTO became blurred. The COO in particular, sometimes treated the claimant as an employee and sometimes as a friend.

The findings describe numerous instances between 2012 and January, 2018, where the claimant took exception to some of the professional and personal conduct of both the COO and the CTO. *See Findings of Fact ## 7, 12, 13, 15, 21–24, 26, 29, 30, 32–33, 37, and 40.* However insensitive or misguided their behavior may have been, it is apparent that it did not cause the claimant to resign, inasmuch as the claimant continued to work for and socialize outside of work with them

for years.¹ The record does not indicate that their friendship was forced or that the claimant felt compelled to maintain it as a condition of keeping her job. Rather, we can infer from the fact that the COO threw her a farewell lunch and the content of the claimant's final emails to the employer that this friendship was voluntary and genuine. *See* Findings of Fact # 61, 62 and 67.

The review examiner ultimately and expressly found that the claimant quit her position due to a personally conflict with the COO. *See* Finding of Fact # 58. Specifically, she focused on the interactions between the COO and the claimant following the death of the claimant's brother-in-law at the end of February, 2018. Since the claimant submitted her resignation on March 1, 2018, we can reasonably infer that it was this incident that triggered her resignation.

When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). The review examiner concluded that the COO's text messages were sarcastic and insensitive. That may be, but even if the COO's messages lacked empathy and tact, given the findings in this case, they do not rise to the level of good cause attributable to the employer for the claimant to resign, particularly where the COO later apologized. In short, the claimant's response to a death in her family and the COO's reaction to that response created hard feelings, or as characterized by the review examiner, a personality conflict, between two individuals who had both a personal and professional relationship. We form no opinion about the claimant's personal reasons for leaving. We merely hold that it does not constitute good cause within the meaning of G.L. c. 151A, § 25(e)(1).

Even assuming, *arguendo*, that the personality conflict between the parties constituted good cause attributable to the employer, the claimant would not be eligible for benefits because she did not take reasonable steps to preserve her employment before leaving, as required under Massachusetts law. The Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt to correct the situation or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984).

The findings suggest that, after receiving the claimant's resignation, the employer remained open to continuing the employment relationship. Specifically, before the claimant left, the COO apologized for her text messages and asked the claimant to rescind her resignation. *See* Finding of Fact # 63. She also invited the claimant to continue working a transition period after her last day. *See* Finding of Fact # 64. Under these circumstances, we cannot conclude that any attempt by the claimant to preserve her employment would have been futile.

We, therefore, conclude as a matter of law that the claimant voluntarily left her job without good cause attributable to the employer within the meaning of G.L. c.151A, § 25(e)(1).

¹ To be sure, the CTO's inappropriate sexual behavior described in Finding of Fact # 13 would certainly amount to good cause to resign, but the incident took place in 2013. Apparently, it was an isolated incident, the claimant never reported it, and she continued working for more than four more years before deciding to leave her job. Therefore, we decline to attribute any weight to this incident as a cause for her separation.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending March 11, 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 - May 14, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**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.

MJA