

**Where a manager witnessed a coworker physically assault the claimant, and the coworker had a history of similar incidents with the claimant and others, but the employer failed to take appropriate action to address the problem, the claimant had good cause to resign pursuant to § 25(e)(1).**

**Board of Review  
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**Issue ID: 0032 6120 14**

### 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 October 22, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 18, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties via telephone, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on January 22, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left her employment without good cause attributable to the employer and, thus, 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 make subsidiary findings from the existing record. 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, while the claimant was physically assaulted by her subordinate, she failed to take reasonable steps to preserve her employment before quitting, 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 assessment are set forth below in their entirety:

1. The claimant worked as a kitchen supervisor for the employer, a food services company. The claimant began work for the employer in June 2016. She worked full-time and earned \$14.35 per hour.

2. The employer's disciplinary procedures did not allow kitchen supervisors to discipline her subordinates. The managers were permitted to discipline employees.
3. The claimant's subordinates included a tray line worker (Worker [A]). Worker [A] had been disciplined by the employer for yelling and angry outbursts toward other employees. He had not directed his conduct toward the claimant.
4. On a day [sic] or about August, 2019, Worker [A] tipped over a large stack of trays near the claimant. He tipped them over near the claimant's foot. The claimant moved her foot to avoid getting hit by the trays.
5. Worker [A] then spoke at the claimant in an angry tone. Worker [A] did not speak to the claimant in English. The claimant did not know what he said.
6. The claimant complained to her manager about the Worker [A]. The employer did not take any disciplinary action.
7. Afterward Worker [A] often raised his voice when speaking with the claimant. He often loudly yelled at her in an angry manner. He often used his hands while speaking angrily. He did not touch the claimant.
8. The claimant continued to complain to her manager about Worker [A]. She told her that it was not fair for Worker [A] to speak with her and other people the way he did. The manager told the claimant that it was part of Worker [A]'s culture to speak with people the way he did.
9. The claimant sometimes worked with the Food Services Director (Director) to solve problems at the employer. She did not complain to the Director about Worker [A].
10. Early on October 8, 2019, Worker [A] threw an empty milk carton at the claimant. The claimant did not immediately report his conduct to the employer.
11. Later that morning the claimant was showing an employee how to operate a toaster oven. She was gesturing toward the toaster oven with her hand. Worker [A] approached the claimant. He was upset and spoke to her. The claimant did not know what he said. Worker [A] then tightly grabbed the arm the claimant was using to gesture toward the oven and swung it backward.
12. The claimant told Worker [A] not to touch her.
13. Worker [A] continued to grab the claimant by the lower arm and pull it back. The claimant continued to tell him not to touch her. After the third time she told him she did not want to be touched. She said to him: "You don't touch people."

14. The claimant's manager was standing near her and observed what happened. She did not say anything.
15. The manager reported Worker [A]'s conduct to the Director.
16. The claimant was aware of the employer's human resources department. She did not complain to the employer's human resources department.
17. During her shift the claimant decided she would leave the employer. At the end of her shift she left a resignation letter for the Director. In her letter she stated she was leaving because of the incident with Worker [A]. She gave two weeks' notice.
18. On October 9, 2019, the Director investigated the incident. The Director determined that Worker [A] had violated the employer's policies by touching the claimant. The Director disciplined Worker [A]. He told him it was not appropriate to communicate with his hands.
19. Between October 8, 2019, and the claimant's last day the employer allowed Worker [A] to continue to work alongside the claimant. The claimant attempted to avoid him.
20. The claimant last performed work for the employer on October 22, 2019.

#### Credibility Assessment:

The claimant presented detailed and reasonable testimony at the hearing regarding her interactions with Worker [A]. Worker [A] was not present at the hearing. The employer witness at the hearing, the Food Services Director, did not contest the claimant's testimony about her interactions with Worker [A]. Given this evidence the claimant's direct testimony is credible.

#### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Finding of fact # 3 is incomplete insofar as it states that Worker [A] had been previously warned for "yelling and angry outbursts." The claimant's testimony, on which this finding was based and which the review examiner's credibility assessment deems credible, was that Worker [A] had also physically touched other employees during such outbursts and had been warned for this. Similarly, finding of fact # 4 distorts the claimant's testimony, stating that Worker [A] "tipped" over the trays. In reality, the claimant's testimony, from which this finding is derived, was that Worker [A] deliberately "flipped" over the trays in an effort to hit her with them. In adopting the remaining findings, we deem them to be supported by substantial and credible

evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant left her employment without good cause attributable to the employer because she failed to adequately preserve her employment before quitting. Rather, we believe that the review examiner's consolidated findings of fact compel the conclusion that the claimant had good cause for leaving because the employer was aware of ongoing violent outbursts by one of the claimant's subordinates but failed to take reasonable steps to address this problem.

As the claimant voluntarily left her employment for reasons related to the conditions of her employment, G.L. c. 151A, § 25(e)(1), applies. That section of law 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 claimant bears the burden to prove good cause attributable to the employer. Crane v. Comm'r of Department of Employment and Training, 414 Mass. 658, 661 (1993). To determine if the claimant has carried her burden to show good cause, we must first address whether the claimant had a reasonable workplace complaint. See Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985). While general and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1), it is well-settled law that "intolerable working conditions" constitute good cause for leaving employment. Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979).

Here, the claimant quit after being physically assaulted by a subordinate on three separate occasions. In one incident, Worker [A] flipped over a track of trays at the claimant. In another incident, he threw a milk carton at the claimant's head<sup>1</sup>. In the final incident, he grabbed the claimant and bent her arm. We conclude that the claimant was reasonable in being concerned about her safety and that this concern could rise to the level of good cause for leaving her employment.

However, the analysis does not end there. 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).

In this case, the employer was clearly aware of Worker [A]'s history of similar behavior. The claimant had previously complained to the employer about Worker [A]'s angry outbursts in general, and about the specific incident in which he had flipped over a track of trays at the claimant.

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<sup>1</sup> 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).

He had also been disciplined for similar incidents towards other employees. Despite this, the record does not indicate that the employer took any concrete steps to protect its employees from further workplace violence. The claimant's manager witnessed the final incident and failed to intervene to stop Worker [A] or protect the claimant. We note that, after the claimant submitted her notice of resignation in response to this incident, Worker [A] was disciplined. However, he was merely warned that it was "not appropriate to communicate with his hands" but was not discharged by the employer and was allowed to continue working alongside the claimant during her two-week notice period. There is nothing in the record to suggest that, if the claimant had not tendered her resignation, the employer's course of action would have been any different. Based on the above, we conclude that further efforts to preserve her employment would have been futile.

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 25(e)(1), the claimant voluntarily left her employment with good cause attributable to the employer.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending October 26, 2019, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**

Stawicki, Esq.

**DATE OF DECISION - May 29, 2020**

Charlene A.

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**

**(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until July 1, 2020<sup>2</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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)

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<sup>2</sup> See Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.

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.

JRK/rh