

Claimant, who established that her supervisor yelled & cursed at his staff, and threw a chair once in the workplace, did not show that she could not have attempted to preserve her employment before resigning. Although she did not contact the supervisor's manager because he falsely told her he was friends with the manager, she reached out to human resources to complain after she quit, undercutting her claim that there was no information posted in the workplace as to whom she could complain.

**Board of Review
19 Staniford St.
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0033 1033 45

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 her position with the employer on December 16, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 20, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on April 3, 2020. 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 entitled to benefits 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 remanded the case to the review examiner to allow the employer an opportunity to present testimony and other evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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's decision to quit because of her supervisor's conduct constituted good cause attributable to the employer, and that the claimant was not required to try to preserve her job because her supervisor was treating her with hostility, 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. In May, 2019, the claimant started working fulltime for the employer, a group home for individuals with brain injuries, as a team lead. The claimant was usually scheduled to work Monday through Friday from 3 p.m. until 11 p.m. The claimant was paid \$14 per hour.
2. The claimant's supervisor was the House Supervisor.
3. The House Supervisor's supervisor was the Director.
4. The House Supervisor was treating the claimant and other workers in a hostile manner.
5. The House Supervisor weekly yelled and cursed at the claimant and the other workers.
6. On one occasion, the House Supervisor threw a chair out of anger while at work.
7. On December 13, 2019, the claimant was absent from work due to her child being hospitalized. The claimant is a single mother, and is responsible for the child[.]
8. On December 15, 2019, the claimant's child was released from the hospital. The claimant had to observe the child the following day.
9. On December 16, 2019, the claimant had a telephone conversation with the House Supervisor. The claimant informed the House Supervisor that she was going to be absent from work on that day due to her child still recovering from the medical issue. The claimant informed the House Supervisor that the claimant was planning on reporting to work the following day. The House Supervisor cursed at the claimant during this telephone conversation and informed the claimant that it was fucking unacceptable. The claimant subsequently hung up on the House Supervisor.
10. On December 16, 2019, the claimant subsequently initiated a telephone call back to the House Supervisor. During this telephone conversation, the claimant informed the House Supervisor that she was quitting. The claimant's resignation was effective immediately.
11. On December 16, 2019, the claimant also sent an e-mail letter of resignation to the employer.
12. The claimant quit her job at the employer's establishment because the House Supervisor, the claimant's supervisor, was treating the claimant in a hostile manner.

13. The claimant did not make any complaints to the employer about the House Supervisor's behavior to preserve her job with the employer prior to quitting. The claimant believed that complaining would not have helped as the House Supervisor had informed the claimant in the past that the Program Director, the House Supervisor's supervisor, was allegedly friends with the House Supervisor. The claimant also did not have any contact information available to speak with the employer's Human Resources Department about her concerns.
14. The Program Director was not friends with the House Supervisor as alleged by the House Supervisor. The Program Director only supervised the House Supervisor. The Program Director would have attempted to help to resolve the issues that the claimant was experiencing with the House Supervisor if the Program Director was aware of the issues.
15. After the claimant resigned, the claimant got into contact with the employer's employee relations department by initially contacting the payroll department. The payroll department referred the claimant to the employee relations department. The claimant reported the hostile work environment being caused by the House Supervisor to the employee relations department after the claimant had already resigned.

Credibility Assessment:

During the hearing, the employer's Program Director contended that the House Supervisor was not cursing and yelling at the claimant. However, the claimant's contention to the contrary is assigned more weight where the claimant's testimony was more specific compared to the testimony of the Program Director during the hearing.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. Upon such review, the Board adopts the review examiner's consolidated 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 the claimant was not obligated to make any efforts to preserve her job before quitting.

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, . . .

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that her separation was for good cause attributable to the employer. Based on the claimant's undisputed testimony, the review examiner initially concluded the claimant had met her burden. We remanded the case to take testimony and evidence from the employer. After remand, we conclude that the claimant has not met her burden.

Initially, the review examiner found that the claimant quit her job because her supervisor was treating her in a hostile manner. *See Consolidated Finding # 12.* After remand, the review examiner's consolidated findings regarding the supervisor's conduct were unchanged. The supervisor treated the claimant and other employees in a hostile manner by yelling and cursing at the claimant and her coworkers. On one occasion, the supervisor threw a chair in the workplace out of anger. *See Consolidated Findings ## 4–6.*

The review examiner also found that the claimant was absent from work on December 13, 2019, because her child had been hospitalized. The child was released from the hospital on Sunday, December 15, 2019, but the claimant had to observe them the next day. *See Consolidated Findings ## 7–8.*

On Monday, December 16, 2019, the claimant called to tell her supervisor that she would be absent that day as well, because her child was still recovering from their illness, but that she expected to be in the next day. The supervisor cursed at the claimant, telling her it was “fucking unacceptable,” and the claimant hung up on him. *See Consolidated Finding # 9.* Subsequently, the claimant called the supervisor back and told him she was quitting, effective immediately. She also sent an email informing the employer of her resignation. *See Consolidated Finding ## 10–11; Hearings Exhibit # 4, p. 2.*

The review examiner credited the claimant's testimony regarding the supervisor's conduct over that of the employer's witness, the program manager. The supervisor was not present to testify. The review examiner noted that the claimant's testimony was more specific than the program manager's testimony. We also note that the program manager merely testified that she was not present when the supervisor yelled or cursed at his staff, so the claimant's testimony about what she observed was by nature more specific than the manager's statement that the supervisor never engaged in such conduct around her. Such credibility 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).

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). We agree that the supervisor's behavior, including yelling, cursing, and throwing furniture, is not reasonable or acceptable, and that it constituted good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

But in addition to establishing good cause attributable to the employer for quitting, an employee who quits also has the burden to show that she made a reasonable attempt to preserve her employment before leaving, or that such attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984); 430 CMR 4.04(5)(c)(3)(b). The review examiner initially concluded that because it was the claimant’s supervisor who treated her poorly, she was not obligated to make efforts to preserve her job before quitting. We disagree.

We have considered whether the supervisor’s hostile behavior might fall under a separate provision in G.L. c. 151A, § 25(e), which provides that a claimant may not be disqualified if she separated from employment due to sexual, racial, or other unreasonable harassment. The DUA regulations under 430 CMR 4.04(5)(c)(1), states that a claimant is relieved of preservation efforts if:

. . . he or she establishes to the satisfaction of the Commissioner that his or her reason for leaving work and separation from employment is due to:

a. sexual, racial or other unreasonable harassment by an employer, its agents or supervisory employees and the employer, its agents or supervisory employees knew or should have known of such harassment,

“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)(a)(3).

While we acknowledge that the claimant had a valid workplace complaint, we do not believe the conduct at issue constitutes unreasonable harassment within the meaning of 430 CMR 4.04. That is because there is insufficient evidence in the record to show that the supervisor’s behavior was based upon the claimant’s sex, race, age, religious creed, national origin, or disability. Consequently, the claimant was obligated to make reasonable efforts to preserve her job before resigning.

After remand, the review examiner found that, prior to quitting, the claimant never complained to the employer about her supervisor. In rendering this finding, the review examiner cited two reasons for the claimant’s failure to do so: (1) the supervisor alleged he had a social friendship with the program manager, so the claimant did not believe it would be helpful to complain to the manager; and (2) the employer did not post any information in the workplace about how to reach its human resources department. *See Finding # 13*. Neither of these reasons is persuasive, and neither is sufficient to overcome the obligation to make reasonable attempts to preserve before quitting.

Following remand, the review examiner specifically found that the program manager was not friends with the supervisor, and she would have attempted to resolve the issues that prompted the claimant to quit, had the claimant complained to her about them. *See Consolidated Finding # 14*. Thus, it would not have been futile to contact the program manager with her complaints.

Second, even if the claimant’s failure to contact the program manager was understandable, it is clear she was capable of finding a means to contact the human resources department yet failed to do so before quitting. While the employer may not have posted its human resources information in the workplace, the claimant was nevertheless able to use the information she had available to

reach out to human resources after she had resigned. *See* Consolidated Finding # 15. The claimant's own post-resignation conduct undercuts her claim that it was impossible to contact human resources to intervene with her supervisor. Thus, we cannot conclude that the claimant made reasonable attempts to preserve her job (or established that such efforts would have been futile) before quitting.

We, therefore, conclude as a matter of law that the claimant quit without good cause attributable to the employer under G.L. c. 151A, § 25(e)(1), where she failed to make reasonable attempts to preserve her job before quitting.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending December 21, 2019, 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.



Paul T.

BOSTON, MASSACHUSETTS

Fitzgerald, Esq.

DATE OF DECISION - June 22, 2020

Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano declines to sign the majority opinion.

**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, 2020¹. 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

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.

¹ *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.

JPC