

**Store manager, who had been absent for health reasons, resigned for good cause attributable to the employer after her supervisor suggested she step down because she was getting older and her condition would get worse. Since she could not control her health or age, she could reasonably conclude that attempts to preserve her employment would be futile.**

**Board of Review  
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**Issue ID: 0033 5636 47**

#### 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 12, 2019. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 26, 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 affirmed the agency's initial determination and denied benefits in a decision rendered on April 3, 2020. 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, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that, prior to quitting her employment, the claimant failed to reasonably attempt to preserve her employment, 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 are set forth below in their entirety:

1. The claimant worked as a full-time shift lead supervisor for the employer, a retail store, between 02/28/2019 and approximately 10/12/2019, when she separated.
2. The claimant's immediate supervisor was the store manager. The claimant's upper level manager was the district manager.
3. The claimant has asthma and COPD.
4. On approximately 10/12/2019, the store manager met with the claimant to issue the claimant a warning for her attendance. The claimant had doctor's notes for her absences due to a stomach bug that the store manager did not accept.
5. During the meeting, the store manager said to the claimant, "We know you are going to get older and your condition is going to get worse. Maybe you should step down from your position" (the comment).
6. After the comment, the claimant became angry, started crying, had an asthma attack, and resigned effective immediately.
7. The claimant resigned because she disliked the comment from the store manager about her age and her health.
8. If the store manager did not make the comment, the claimant would not have resigned at that time for any other reason.
9. The claimant had been looking independently for another position in another store and nothing was open.
10. The claimant did not report the comment to the district manager or to the human resources department at any time. The claimant did not request a transfer to another location where the store manager did not 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate 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 the claimant must be disqualified for her failure to undertake attempts to preserve her employment, as any such attempts would have been futile.

Since the claimant voluntarily quit her employment, we analyze her eligibility for benefits 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 this statute, 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 carry her evidentiary burden, the claimant must first establish that she had a reasonable workplace complaint. *See* Fergione v. Dir. of Division of Employment Security, 396 Mass. 281, 284 (1985) (claimant need not show that she had no choice but to resign, merely that she had an objectively reasonable belief). Based on the record before her, which includes the claimant's undisputed testimony, the review examiner concluded that the claimant had a reasonable workplace complaint. We concur.

In determining whether a claimant's 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 specific conduct at issue is the store manager's October 12, 2019, statement to claimant regarding the claimant's future in her supervisory position. The review examiner found that on the date, the store manager met with the claimant in order to issue the claimant a warning for attendance. The review examiner found that the claimant has asthma and Chronic Obstructive Pulmonary Disease (COPD). The review examiner further found that during the course of the October 12, 2019 meeting, the store manager stated to the claimant "[w]e know you are going to get older and your condition is going to get worse. Maybe you should step down from your position." In essence, claimant's immediate supervisor was telling the claimant to step down from her current position, because of the claimant was older and had health conditions. We believe that this was inherently unreasonable conduct on the part of the employer and resulted in the claimant having a reasonable workplace complaint. We further believe that this complaint constituted good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1).

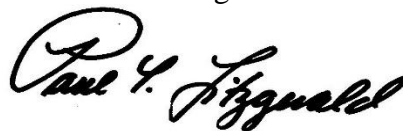
We next consider what reasonable attempts, if any, the claimant undertook to preserve her employment prior to quitting. The Massachusetts Supreme Judicial Court has held that an employee who voluntarily leaves employment due to an employer's action has the burden to show that she made a reasonable attempt 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). To satisfy the reasonable preservation requirement, a claimant does not have to establish that she had no choice but to resign. She merely needs to show that her actions were reasonable. Norfolk County Retirement System v. Dir. Of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 766 (2009).

As detailed above, the claimant was informed by her supervisor that she should step down from her position because of her age and health. In effect, the claimant was being unfairly demoted due to factors over which she has no control, as she could neither stop aging nor cure her medical conditions. Given these circumstances, we believe the claimant could reasonably conclude that she could not preserve her employment. We cannot conclude that, in light of the facts presented,

the claimant acted unreasonably in quitting her employment rather than accept an unfair demotion for reasons she could neither control nor alter.

We, therefore, conclude as a matter of law that the claimant separation was for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1)

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 13, 2019, and for subsequent weeks if otherwise eligible.



Paul T.

**BOSTON, MASSACHUSETTS**

Fitzgerald, Esq.

**DATE OF DECISION - May 22, 2020**

Chairman



Michael J. Albano

Member

Member Charlene A. Stawicki, 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 June 1, 2020<sup>1</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)

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.

PTF/rh

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<sup>1</sup> See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.