Based upon the employer's statements and criticism of her work, the claimant reasonably believed she was about to be discharged for poor performance. Since the criticism, warranted or not, came from the owner of a small business, there was little the claimant could do to preserve her job before resigning. She may not be disqualified under G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0036 4431 23

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 November 14, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 28, 2020. The employer 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 denied benefits in a decision rendered on August 24, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without having good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, she 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.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is ineligible for benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the record shows that the claimant resigned because she believed that her supervisor, the company owner, was about to fire her for poor performance.

Findings of Fact

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

1. The claimant worked part-time as a bookkeeper for the employer, a landscaping company, from 11/04/2019 until 11/14/2019, when she separated.

2. The claimant's direct supervisor was the owner.

3. The employer previously was using a temporary staffing firm to fill the bookkeeper position. The position was empty for approximately two (2) weeks prior to the claimant being hired.

4. The claimant has thirty-five (35) years of experience in accounting. The claimant is familiar with the QuickBooks application for bookkeeping and has been using it for the past ten (10) years.

5. The owner is a landscaper and only knows basic aspects of QuickBooks. The owner relies on a bookkeeper to handle the company's finances.

6. At the end of each day the claimant worked, the owner would check-in and ask how the day went and if the claimant had any concerns or issues.

7. During each check-in, the claimant never expressed any concerns or issues to the owner regarding either the work assigned to the claimant or the owner's expectations.

8. On 11/14/2019, at the end of the claimant's workday, the claimant and the owner discussed the claimant's work for the week.

9. The employer had been watching and evaluating the claimant during her first week at work. The purpose of the discussion on 11/14/2019 was to provide mentoring of the claimant.

10. The owner brought up his concerns with the way the claimant was performing her work. The employer was concerned about the posting of vendor invoices and the proper way to handle loans in the QuickBooks system.

11. The owner was also concerned about the claimant taking too long to perform the functions expected of her and of someone with her background and expertise.

12. The owner had doubts about the claimant's ability to do the required work.

13. The owner told the claimant that she did not know what she was doing.

14. The employer told the claimant that they could work on the concerns and issues that were discussed. The employer wanted the claimant to return after the weekend in order to reevaluate her work and to ensure the claimant understood what the owner expected of her.

15. If the claimant could not meet the owner's performance standards, then the owner would have another discussion about the job expectations and review the claimant's job.

16. The claimant and the owner were between four (4) and five (5) feet away from each other. The claimant's desk was in between them.

17. Neither the claimant nor the owner raised their voices, used threats, or profanity. The owner spoke to the claimant with a stern tone.

18. There was no one else present when the discussion occurred.

19. The claimant did not discuss her concerns about the meeting on 11/14/2019 with either human resources or with the owner.

20. Prior to 11/14/2019, the claimant did not ask the owner to sit and review the owner's bookkeeping system or the company's financial situation. The claimant did not express any struggles she was having with the assigned work to the owner.

21. On 11/14/2019, the claimant quit her job, with no notice, due to the conversation with the owner about the claimant's job performance.

22. The claimant took no steps to preserve her employment.

23. The claimant and the employer liked each other and were comfortable with each other.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We note that the portion of Finding of Fact # 14, which states that the employer told the claimant that they could work on the concerns and issues that were discussed is incomplete, as it fails to capture additional qualifying statements that the employer made to the claimant during the meeting. The portion of Finding of Fact # 19, which refers to human resources is also misleading, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant's resignation renders her ineligible for benefits.

Because the claimant resigned from her employment, we consider the following provisions under G.L. c. 151A, § 25(e):

> [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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

These provisions expressly place the burden of proof upon the claimant.

The review examiner denied benefits upon concluding that the claimant did not establish personal reasons beyond her control which caused her to leave her job. We agree that the claimant presented no such evidence. He further concluded that the claimant did not have good cause attributable to the employer to resign, because she failed to establish a reasonable workplace complaint, and further that she did not make any effort to preserve her employment before leaving her job. We consider these additional grounds.

In order to establish 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). Findings of Fact ## 10–13 provide that the employer's owner expressed concern about how the claimant was performing her work, including how she used QuickBooks and how long she was taking to complete her assigned tasks. Although he spoke in a stern manner during their meeting on November 14, 2019, and was somewhat blunt, both parties agreed that he was not yelling or threatening. *See* Finding of Fact # 17. Whether or not the claimant was taking too long, using Quickbooks properly, or knew how to perform her assigned tasks, we agree that the owner had the right to express his dissatisfaction with her work. In that sense, his conduct was reasonable and, we agree, did not create good cause attributable to the employer to resign.

However, the Supreme Judicial Court has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–598 (1981). In such a case, the inquiry focuses on whether, if the claimant had been discharged, the separation would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2). The review examiner failed to consider this alternate basis for eligibility.

We believe that the record demonstrates that the claimant had a reasonable belief that she was about to be fired. The findings provide that the owner had doubts about the claimant's ability to do her job, that she was taking too long, and he challenged the way she posted invoices and processed loans. He told her that she did not know what she was doing. Findings of Fact ## 10–13. In addition, he did so in a stern manner. *See* Finding of Fact # 17. These facts are not in dispute.

Finding of Fact # 14 states that the employer told the claimant that they could work on the concerns that were discussed, and that the employer wanted the claimant to return after the weekend in order to evaluate her work and ensure that she knew what was expected. However, this finding is derived exclusively from a series of questions posed to the employer about what he meant during the

November 14, 2019, meeting, when he said to the claimant, "we'll see how things go." Thus, the finding reflects the *employer's* state of mind. At issue is the *claimant's* state of mind.

During the hearing, the review examiner asked the claimant directly whether, at the time she quit, she believed that she was going to be fired. She answered, "yes, absolutely." Regardless of the employer's intent on November 14th, the claimant's statement as to her belief was not disputed.[1] Thus, the question before us is a mixed question of law and fact — whether the facts show that the claimant's belief was reasonable. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("[a]pplication of law to fact has long been a matter entrusted to the informed judgment of the board of review").

The claimant testified that she believed that she would be fired because, after the employer conveyed his dissatisfaction with how she was doing her work, the claimant asked if she should come in the next day and he told her to come in and "we'll see how it goes." She testified that she understood him to mean, "we'll see if I keep you tomorrow or let you go."

The review examiner then asked the employer what he meant by "we'll see how things go?" The employer responded, "I said, . . . 'let's work on this and see what happens. In other words, if you couldn't meet the performance standard, then we would have a, *probably,* another conversation to find out if this is the right job for her, the right position." (Emphasis added.) He asserted that the claimant was not at risk of being fired at the time she quit, but he would give it another week. He further testified that he was alarmed by what he saw in the first seven days of her work and told her that he was losing sleep over it.[2]

We can reasonably infer from the employer's testimony, particularly from his use of the word "probably," that he was considering firing the claimant with or without another conversation, if not the next day, then after the following week. The standard that the claimant must meet is a reasonable belief that she is about to be fired. We are unaware of any hard and fast rule that it be the next day as opposed to the next week. Under these circumstances, we believe she has met her burden.

It is also evident from the findings that the employer was considering letting the claimant go because of her job performance. "When a worker is ill equipped for his job . . ., any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

Our analysis does not stop here. To be eligible for benefits, the claimant must also demonstrate that she made a reasonable effort to preserve her job or show that such an attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). In the review examiner's view, the claimant did not make any effort to preserve her job before resigning. In reaching his conclusion, the review examiner states that the owner checked in with the claimant, and that she never expressed any concerns or issues to the owner about the assigned work,

[1] We have supplemented the findings of fact, as necessary, with the unchallenged testimony from both parties at the hearing. *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).

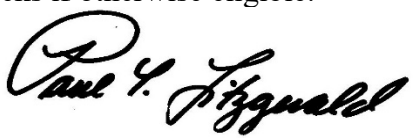
[2] These statement by the claimant and the employer are also part of the uncontested evidence in the record.

expectations, or any struggles she was having prior to November 14, 2019. *See* Findings of Fact ## 6, 7, and 20. However, the claimant did not quit because she was having difficulty with the work. Nothing in the record suggests that she was even aware that she was not meeting her employer's expectations until their meeting on November 14th. *See* Finding of Fact # 9. Therefore, it is unreasonable to expect her do have done something to fix it before then.

Finding of Fact # 19 states that the claimant did not discuss her concerns about the meeting with either human resources or the owner. First, it is unclear whether the employer had a human resource department. The claimant was unsure except to say that she believed the employer had help with that, and the review examiner never asked the employer.[3] Second, we take into account that the employer was challenging how the claimant was using Quickbooks, even though she had the extensive bookkeeping experience, including 10 years using the software, and the employer had only a basic understanding of it. *See* Findings of Fact ## 4, 5, and 10. Given the disparity in their training, it is difficult to imagine how the claimant, as a subordinate, could respond, except to disagree with him. This is particularly so where this was a small business, and the criticism was coming from the owner. *See* Finding of Fact # 2. There is no indication that there was anyone else that she could approach to change the owner's view of her work. In short, the record suggests that preservation efforts would have been futile.

We, therefore, conclude as a matter of law that, because the claimant voluntarily left her employment under the reasonable belief that she was about to be discharged for performance reasons, she may not be disqualified under 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 November 10, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - October 26, 2021

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
(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.

[3] This is also part of the unchallenged evidence in the record.

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.

AB/rh