

**Where the claimant quit her position because she reasonably believed that she would soon be terminated for poor performance, the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(1).**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
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: 0043 8471 07**

### 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 May 22, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 15, 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 February 22, 2021. 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 remanded the case to the review examiner to allow the employer to testify and afford both parties an opportunity to present additional evidence. The remand hearing took place over two separate sessions. While both parties attended the first session, only the claimant attended the second session. Thereafter, the review examiner issued her 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 the claimant did not have a reasonable belief that her termination for poor performance was imminent, 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 Controller, for the employer, an Information Technology Professional Services Provider, from September 28, 2011 until May 22, 2020, when she resigned.

2. The claimant worked a full-time schedule of hours.
3. During the claimant's tenure, she generally had a yearly performance review.
4. The claimant usually just had her performance review meeting with her supervisor.
5. The claimant had the same supervisor since 2013.
6. At the end of 2018/start of 2019, the claimant continued to have the same supervisor, but the supervisor had been promoted and given much more responsibility.
7. The claimant felt that the relationship between her and her supervisor got much worse once he was promoted and his communication with her became poor.
8. The claimant had her 2018 performance review on March 13, 2019. Although the claimant's overall "score" on the review was not stellar, it was still a good review. The supervisor informed the claimant of some areas of improvement.
9. The claimant attempted to preserve her employment by meeting with human resources on a regular basis.
10. During 2019[,] every several weeks, the claimant often spoke to human resources and brought up her worries about how she was be [sic] treated by her supervisor and that she felt the supervisor was communicating poorly with her. Although human resources empathized with the claimant, she was informed that not much could be done, and it was not likely that things would change.
11. In January 2020, a consultant the employer brought in recommended that the claimant and the supervisor meet together to hash out any issues that the two of them had with each other.
12. The meeting that was recommended by the consultant never happened.
13. The next formal meeting the claimant had with her supervisor was for her next review, which was given on February 18, 2020. The supervisor had human resources in attendance during the meeting.
14. The claimant did not previously have human resources present at her reviews.
15. The review given to the claimant on February 18, 2020 was much worse than the review from the year before. The overall score was poor.
16. The claimant disagreed with her ratings on the performance review given to her on February 18, 2020.

17. The claimant met with her supervisor and human resources on February 26, 2020 and March 4, 2020 to go over her responses to the performance review.
18. The employer informed the claimant after the meetings that the review would not be changed.
19. The claimant felt the review was unfair and inaccurate.
20. On or about March 5, 2020, the claimant attempted to speak to another manager about the issues with her supervisor, but was told that the other manager did not want to get involved. The claimant went to speak to this manager in another attempt to try to preserve her job.
21. The claimant was never put on a performance improvement plan.
22. The claimant never received any disciplinary action from the employer.
23. The claimant felt that her supervisor was having human resources present at her yearly reviews in order to start a paper trail so that the employer could eventually terminate her employment.
24. The claimant decided that she was going to quit.
25. The claimant quit because she believed that her discharge with the instant employer was imminent.
26. On March 9, 2020, the claimant informed her employer she was going to resign, effective April 23, 2020.
27. The claimant and the employer agreed to extend the claimant's notice period in order to give the claimant ample time to train her replacement.
28. The claimant's last day of work was on May 22, 2020.
29. The claimant filed for unemployment benefits and received an effective date of May 24, 2020.

### 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except to the extent that portions of Findings of Fact ## 9 and 20 state a legal conclusion that the claimant's actions constituted efforts to preserve her employment. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division

of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). We also reject Finding of Fact # 14, because the claimant provided unchallenged testimony that the employer’s Human Resources representative attended both of the claimant’s performance review meetings in 2019 and 2020.<sup>1</sup> In adopting the remaining 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 was ineligible for benefits.

There is no dispute that the claimant quit her position. She submitted her resignation on March 9, 2020, and the effective date of the resignation and separation was May 22, 2020. Consolidated Findings ## 26 and 28. Because the claimant quit her job, we analyze the claimant’s separation under G.L. c. 151A, § 25(e)(1), which provides, in relevant 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 . . . [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.

Under this section of law, the claimant has the burden to show that she is eligible to receive benefits. Crane v. Comm’r of Department of Employment and Training, 414 Mass. 658, 661 (1993).

The claimant resigned her position, because she was informed by the employer’s Human Resources representative that things were unlikely to change, she had received a poor performance review from her supervisor, and she believed that her discharge from the employer was imminent. Consolidated Findings ## 10, 15, and 25. It is well-settled that an employee who resigns under a reasonable belief that they are facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. See Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G.L. c. 151A, § 25(e)(2).<sup>2</sup> For example, impending separations based on imminent layoff or poor job performance are not disqualifying reasons under § 25(e)(2), and an employee who quits in reasonable anticipation of such would be eligible for benefits. See White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–599 (1981); Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion).

The review examiner found that, after she received a good performance evaluation for the year 2018, the claimant’s communication with her supervisor subsequently became poor. Consolidated Findings ## 7–8. Although an outside consultant recommended that the claimant and her

---

<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).

<sup>2</sup> Although the inquiry touches on G.L. c. 151A, § 25(e)(2), because the claimant quit, she still has the burden to show that her separation was imminent.

supervisor meet to resolve any issues, such a meeting never happened. Consolidated Findings of Fact ## 11–12. Instead, the claimant received a review for the year 2019, attended by the claimant’s supervisor and the employer’s Human Resources representative, where she received a poor score overall score. Consolidated Finding # 13. At some point, the Human Resources representative had informed the claimant that not much could be done, and it was not likely that things would change. Consolidated Finding # 10. For these reasons, the claimant decided to resign and separate from her employment as of May 22, 2020.

The consolidated findings of fact show that the claimant reasonably believed that she was going to soon be terminated. The claimant believed that her supervisor had human resources present at her 2020 yearly review to start a paper trail, so that the employer could eventually terminate her employment. Consolidated Finding # 12. The claimant testified that the leadership culture at the employer had changed as a result of her supervisor’s assumption of additional responsibilities, and that her work was no longer a priority for the employer, which contributed to the poor communication she experienced with him. *See* Consolidated Finding # 7. Moreover, in its fact-finding response to the DUA, the employer confirmed the claimant’s suspicions when it reported that the claimant’s job was in jeopardy due to poor performance, and that the claimant had been made aware of this fact through the performance reviews. *See* Remand Exhibit 6.<sup>3</sup> Under these circumstances, we think the claimant could reasonably have believed that she was going to be terminated in the near future.

The record indicates that if the claimant had been terminated, it would have been for a performance-based reason. An inability to do the job to the employer’s standards, despite her best efforts, is not a disqualifying circumstance under G.L. c. 151A, § 25(e)(2). *See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979).

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits is not supported by substantial and credible evidence and constitutes an error of law, because the claimant has shown that she resigned under the reasonable belief that she was going to be imminently discharged for non-disqualifying, performance-based reasons. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

---

<sup>3</sup> Both the claimant’s testimony about the change in culture and poor communication, and the employer’s completed DUA fact-finding questionnaire are also part of the unchallenged evidence in the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 17, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 30, 2021**



Michael J. Albano  
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

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.

JMO/rh