In response to the claimant's complaint about a coworker making sexually harassing gestures in her office, the employer did initiate an investigation. However, the coworker's conduct continued after the complaint, her supervisor openly discussed his doubts about the merits of the complaint in the office, and he engaged her in a conversation about the investigation in the presence of the coworker. Held the claimant had good cause attributable to the employer to resign and she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1). In instances of alleged sexual harassment, claimants are not required to make reasonable efforts to preserve their employment.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0052 8999 53

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 September 2, 2020. She re-opened an existing claim for unemployment benefits with the DUA. However, in a determination issued on February 19, 2021, the DUA denied benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties,[1] the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 26, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left her job without making reasonable efforts to preserve her employment, 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 remanded the case to the review examiner to admit documents into evidence and to address additional circumstances surrounding the claimant's decision to leave her employment. Only the claimant attended the remand hearing. 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 failed to take reasonable steps to preserve her employment because she resigned before the employer could investigate her sexual harassment complaint, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

[1] The employer participated only in the first of two hearing sessions.

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

1. The claimant worked full-time as a marketing manager for the employer's property appraisal business from 7/6/20 until 9/2/20. The claimant worked from 9:30 a.m. until 6:30 p.m. on Monday through Friday and was paid $45,000 per year. The claimant's supervisor was the first partner.

2. On 8/24/20, the second partner of the business notified the claimant that a second employee would be sitting with her in her workspace while the two participated in a virtual meeting with the first partner and two other employees. The second employee worked as an evaluation analyst and was a co-worker/peer of the claimant. The second partner directed the second employee to sit with the claimant during the meeting because the second employee's computer was having difficulty starting up and the second employee would not be able to join the meeting timely. During the meeting, the claimant was told that she was being assigned to work with the second employee on a specific task. The claimant expressed concerns that there was a lack of social distancing by having the second employee participate in the meeting from her workspace; she also expressed concern about maintaining social distancing while having to work with the second employee. The claimant said that she preferred to speak with the second employee through electronic formats, such as virtual meetings or emails. The second partner told the claimant that she was acting inappropriately and that she was not allowed to speak this way during his call. The second partner was upset by the claimant's conduct and that she raised the social distancing concern in a public forum; he ended the call. The claimant subsequently spoke with the first partner and her concerns about COVID-19 were discussed. The first partner told the claimant that she did not need to interact in person with the second employee, she could work from home and use virtual meetings when she needed to interact with the second employee.

3. On 8/25/20, the claimant initiated a second conversation with the first partner. The claimant told the first partner that she was not comfortable working with the second employee because he had his hands in his pockets while in her office on the previous day and it appeared he was touching his genitals. The first partner told the claimant that he was concerned by this and did not want her to feel uncomfortable, but he had known the second employee for 45 years and observed that the second employee often stood with his hands in his pockets while rocking back and forth. The first partner stated that he did not believe the second employee was touching himself. The first partner subsequently contacted a business acquaintance who is an employment attorney to discuss the claimant's allegation. The first partner told the attorney that he has known the second employee for a long time and did not believe the second employee engaged in the alleged behavior. The attorney told the first partner that the second employee may be engaging in the behavior alleged by the claimant. The first partner realized that needed to properly investigate the claimant's complaint. The attorney recommended the first partner hire an attorney and

have an impartial investigation done. The attorney recommended a second attorney; the first partner contacted and hired the second attorney to investigate the claimant's allegations about the second employee.

4. During the week beginning 8/23/20, the claimant worked in the employer's office on Monday, 8/24/20; Tuesday, 8/25/20; and Thursday, 8/27/20. The claimant worked from home on the other days of the work week.

5. Between July 6, 2020, and September 2, 2020, the second employee came to the claimant's office at [sic] ten to fifteen times to say hello, to ask how things were going, and to review emails that the claimant sent through "mail chimp." The claimant trained the second employee on the use of mail chimp during one of the times he visited her office. The second employee allegedly made the gesture, as described by the claimant, at least eight times. When the second employee allegedly made this gesture, he continued talking about whatever the topic of his initial conversation was. The claimant responded by asking the second employee to socially distance himself.

6. Between July 6, 2020, and September 2, 2020, the claimant was the only female employee of the employer.

7. It is unknown if, prior to hiring the claimant, whether [sic] the employer hired other female job applicants.

8. Between July 6, 2020, and September 2, 2020, the employer did not have a Human Resources Department. It is unknown why the employer did not have a Human Resources Department.

9. After making a complaint about the second employee's behavior, the claimant was relieved of her social media work and was assigned to work on transferring text from a book into a Microsoft Word document. The claimant observed that the second partner did not correspond with her. The first partner reassigned the claimant to work on the book project to avoid her interacting with the second employee and the second partner. The first partner hoped that the employees would be able to move beyond the incident that occurred on 8/24/20. The first partner told the claimant that he hoped she could be friends again with the second employee and the second partner.

10. The claimant overheard a conversation that was held in the first partner's office. The claimant heard statements that she was "rude", "crazy", and "lying".

11. On 9/1/20, the claimant observed the second employee enter a meeting with the person who the claimant believed was an investigator. The claimant went to the first partner's office to say goodbye at the end of her shift. The first partner was standing in the doorway of his office. The first partner told the claimant that an attorney was hired to investigate her complaint about the second employee's behavior. The first partner provided the claimant with the contact

information for the attorney. The claimant told the first partner that she had to leave and that he could not keep her at work after her end time. The claimant was aware that the second employee was still working; the first partner was unaware that the second employee was still at the office. The claimant was not told that she had to meet with the first partner or that she could not leave the workplace.

12. On 9/2/20, the claimant informed the first partner that she was quitting because she felt unsafe. The claimant felt unsafe because she was afraid to be in the office alone with the second employee and feared what he might do. The claimant quit due to the report of sexual harassment made to the employer and related experiences at work. The claimant also quit because she felt that social distancing was not adhered to by the company.

13. On 9/4/20, the claimant sent the first partner an email message that reads in relevant part: "This email is in response to your September 2nd, 2020 email at 6:27pm. In regards to our Microsoft Teams video call at 9:50am on September 2nd, 2020, I explained to you my uncomfortability with you keeping me in the office past 6:30pm on September 1st 2020, my scheduled leaving time, alone with you and (Second employee) to talk about the investigation. This made me feel uncomfortable and unsafe in the office. In your email from September 1st at 11:39am you said this investigation would be handled with sensitivity and confidentiality. Speaking publicly about the investigation did not show confidentiality. Along with comments you made that 'my perception is wrong.' In regards to (second partner's) Litigation Correction, I have sent him all attorney connections he has received thru his personal Linkedin as of September 2nd 2020 via email (email address). I have placed the Dell computer, charger, computer mouse, my badge, and your white binder in the vestibule of building (number & name) as advised by your email…" The employer paid the claimant her regular wages through 9/11/20.

14. The claimant reopened an existing unemployment insurance claim for the week beginning 9/13/20.

15. On 2/19/21, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 25(e)(1) of the law.

16. On 2/25/21, the claimant appealed the Notice of Disqualification.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except to note that, as discussed further below, Consolidated Findings ## 10 and 11 fail to capture material undisputed details pertaining to a conversation about the claimant, as well as about where

the coworker (the second employee) was standing when the first partner spoke to the claimant on September 1, 2020. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The consolidated findings show that the claimant resigned from the employer for reasons related to a complaint about a coworker's sexual harassment. *See* Consolidated Findings ## 3, 5, and 12. Thus, her eligibility for benefits is governed by the following statutory provisions under G.L. c. 151A, § 25(e), which state, in relevant part:

> [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 sixth paragraph of G.L. c. 151A, § 25(e), provides as follows:

> An individual shall not be disqualified, under the provisions of this subsection, from receiving benefits if it is established to the satisfaction of the commissioner that the reason for leaving work and that such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.
>
> For the purposes of this paragraph, the term "sexual harassment" shall mean sexual advances, . . . and other verbal or physical conduct of a sexual nature when . . .(c) such advances, … or conduct have the purpose of effect of creating an intimidating, hostile, humiliating or sexually offensive work environment. . . .

The DUA has also promulgated regulations, which clarify these statutory provisions. 430 CMR 4.04(5) provides, in relevant part, as follows:

> (b) Sexual, racial or other unreasonable harassment may result from conduct by the employer or . . . co-employees. . . .
>
> (d) In determining whether a claimant's reasons for leaving work is due to harassment, the Division will look at the totality of the factual circumstances resulting in the claimant's separation from employment, such as the nature of the alleged harassment and the context in which the alleged harassing incidents occurred.

In her decision, the review examiner focused more on the claimant's conduct after submitting her complaint of sexual harassment than on the sexual harassment itself or the employer's actions in addressing it. When a claimant contends that the separation was for good cause attributable to the employer, the focus is on the employer's conduct. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980).

Consolidated Findings ## 3 and 4 indicate that, on at least eight occasions between July 6, 2020, and September 2, 2020, the coworker went into the claimant's office, and, with his hands in his pockets, made gestures which the claimant observed to be rubbing his genitals. More specifically, the claimant testified that the coworker would stand three feet from her, ignoring the employer's six-foot social distancing requirement, and would talk with her while his hands were in his pockets and he played with his penis. It made her feel extremely uncomfortable, and she complained to the employer (the first partner). *See* Consolidated Finding # 9.[2] The coworker's behavior meets the definition of sexual harassment under G.L. c. 151A, § 25(e) and 430 CMR 4.04(5).

Although the first partner expressed doubt that the coworker would engage in such behavior, the record indicates that he was not in the claimant's office when the incidents occurred. To his credit, in response to the sexual harassment complaint, the partner obtained legal advice and hired an attorney to conduct an investigation. *See* Consolidated Finding # 3. However, this was not all the partner did in response to the complaint.

The record shows that this was a small office; only five people worked there, and the claimant was the only female. *See* Consolidated Finding # 6. After making her complaint, the employer relieved her of her assigned social media work, and the second partner stopped responding to her emails. *See* Consolidated Finding # 9. The partner left the door to his office open while discussing the claimant's sexual harassment allegations. *See* Consolidated Finding # 10. In addition to overhearing statements that she was "rude," "crazy," and "lying," the claimant heard the partner say that her perception of the coworker's behavior was wrong, and that while her work was okay, she was not someone they wanted to work with. *See* Consolidated Finding # 10.[3]

As written, Consolidated Finding # 11 indicates that, at the end of the workday on September 1, 2020, the first partner merely took the opportunity to notify the claimant that there would be an investigation into her sexual harassment complaint and states that he was unaware that the coworker was still in the office. The finding fails to capture important undisputed details offered by both parties. The partner testified that the conversation lasted about 10–15 minutes, and that he observed that the claimant seemed very uncomfortable. The claimant testified that the coworker was standing in the same common area space as the partner was speaking.

In our view, the claimant has demonstrated that, after she reported experiencing sexual harassment in the workplace to the employer, her supervisor was careless about keeping his discussions about the complaint from others, openly challenged its merits, and failed to keep the coworker away from the claimant. We believe that the claimant could reasonably feel unsafe working in that environment and had good cause attributable to the employer to resign. *See* Consolidated Finding # 12.

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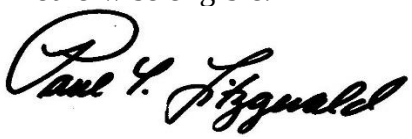
[2] We note that the claimant also testified that two of the eight instances took place after she complained to the employer. While not explicitly incorporated into the review examiner's findings, the portions of the claimant's testimony described here are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

[3] These additional statements were also offered as part of the claimant's undisputed testimony.

Nonetheless, because the claimant quit before the sexual harassment investigation could proceed, the review examiner disqualified the claimant pursuant to G.L. c. 151A, § 25(e)(1), on the ground that she did not make a reasonable attempt to resolve the problem before resigning. Ordinarily, to meet the burden to show good cause attributable to the employer, a claimant must also show that she made a reasonable effort to correct the situation before leaving. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). However, the Massachusetts Appeals Court has held that, in cases involving allegations of sexual harassment, a claimant need not show that she took all, or even reasonable, steps to preserve her employment. Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of Division of Employment and Training, 54 Mass. App. Ct. 405, 410–411 (2002). Therefore, she may not be disqualified for failing to wait for the employer to conduct its investigation.

We, therefore, conclude as a matter of law that the claimant has met her burden to show that she left her job for good cause attributable to the employer pursuant to 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 August 30, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - October 28, 2022

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.

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