Where the employer told the claimant it would try to arrange a transfer to a different work location and the claimant quit his job that day, the claimant did not have good cause attributable to the employer to resign over its failure to transfer him. However, he did demonstrate that he had grounds for leaving his job due to a supervisor's harassment within the meaning of 430 CMR 4.04(5)(c)(3), and he is eligible for benefits on that basis.

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Issue ID: 0054 0210 01

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. Benefits were denied on the ground that he did not have either good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving employment and, thus, he was ineligible pursuant to G.L. c. 151A, § 25(e)(1).

The claimant resigned from his position with his employer on September 18, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 1, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant,[1] the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on July 29, 2021. The claimant sought review by the Board, which dismissed the appeal on the ground that it did not have jurisdiction, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42. On February 8, 2022, the District Court concluded that the Board did have jurisdiction and ordered the Board to review the case on the merits.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not establish good cause attributable to the employer to leave his job within the meaning of G.L. c. 151A, § 25(e)(1), because he did not give the employer an adequate chance to address his concerns about a transfer or about a supervisor creating a toxic work environment, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the findings of fact, we reverse the review examiner's decision.

Findings of Fact

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

[1] Because the employer did not respond to the DUA's fact-finding questionnaire, it was not a party to these proceedings. For this reason, it was invited to participate in the hearing as a witness-only but did not attend.

1. The claimant was employed full-time as a residential coordinator for the employer, a school, from August, 2016, until September 18, 2020.

2. The claimant's supervisors were the dormitory coordinator (the DC), the head of the residential life program (the HRLP), and the head of the program (the HP). The HP oversaw the HRLP and the HRLP oversaw the DC.

3. The employer operates dormitories in different locations.

4. The claimant had a permanent restraining order against his ex-wife since approximately 2004.

5. In approximately 2018, a female co-worker (the FC) made allegations of sexual misconduct against the claimant. Following an investigation, the FC withdrew the allegations.

6. In approximately 2019, the claimant overheard two other co-workers discussing that the HRLP had tried to "set up" the claimant with the FC. It is unclear what the term "set up" meant in this context. The claimant reported the conversation to the employer and told them that he did not feel comfortable working with the HRLP. The employer investigated the incident and came to an agreement that the HRLP would not have direct contact with the claimant without another supervisor present (the Agreement).

7. In late August 2020, the claimant was assigned to a dormitory in [Location A] for the semester. The dormitory was close to the claimant's [A]'s residence.

8. In late August or early September 2020, the claimant went to the dormitory and realized that it was close to the [A]'s residence. Later in the same day, the claimant told the DC that he did not feel safe working at that location because of the proximity to his [A] and requested a transfer to a different location.

9. At an unknown time, the DC spoke to the HRLP about transferring the claimant to a different location.

10. At an unknown time in early September 2020, the DC went on a leave of absence.

11. In September 2020, following a staff meeting, the HRLP approached the claimant in the parking lot and told him that a transfer to a new location with the same shift was unlikely. The claimant was uncomfortable because the HRLP was approaching him despite the Agreement.

12. Following the HRLP approaching the claimant, the claimant sent an email to the HP requesting a meeting to discuss a transfer. A meeting was scheduled for

approximately September 16 or 17, 2020. The claimant did not mention the HRLP breaching the Agreement.

13. On approximately September 16 or 17, 2020, the claimant attended a meeting with the HP. The HRLP was also present. During the meeting, the claimant discussed his transfer request. The HRLP denied having previous knowledge of the transfer request. The claimant did not confront the HRLP about the denial of knowledge. The claimant did not discuss the Agreement.

14. Following the meeting, the claimant sent an email to the HP stating that the HRLP had lied in the meeting.

15. On September 18, 2020, the HP called the claimant and told him that the employer would try to find a different location for the claimant to work.

16. On September 18, 2020, the claimant quit his job because he did not believe his transfer request would be granted, because he did not believe the employer was abiding by the Agreement, and because he felt that the HRLP was creating a toxic work environment.

17. The school year began on September 20, 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's 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 is ineligible for benefits.

Because the claimant resigned from his employer, this case is properly analyzed pursuant to G.L. c. 151A, § 25(e), 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 . . . [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.

We also consider DUA regulations pertaining to separations in connection with allegations of harassment. In relevant part, 430 CMR 4.04(5) provides as follows:

> (c) 3. In all cases involving allegations of harassment (other than allegations of sexual, racial or other unreasonable harassment as defined at 430 CMR 4.04(7)(a))

> by an employer, its agents or supervisory employees, a claimant shall not be disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1) if he or she establishes to the satisfaction of the Commissioner that,
>
> > a. the employer, its agents or supervisory employees knew or should have known of the harassment and the employer failed to take immediate and appropriate corrective action; and
> >
> > b. he or she took reasonable steps to preserve his or her employment, which may include notifying the employer of the harassment, unless the circumstances indicate that such efforts would be futile or result in retaliation.
>
> (d) In determining whether a claimant's reason 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.

The express language of these provisions places the burden of proof upon the claimant.

The findings show that the claimant left his job for two reasons. One was that he did not believe the employer would grant his request to transfer to a work location. The second was connected to the Residential Life Supervisor. *See* Finding of Fact # 16. We consider both reasons.

The claimant worked as a residential coordinator for the employer, a school with residential dormitories in different locations. *See* Findings of Fact ## 1 and 3. Three weeks before students were scheduled to arrive on September 20, 2020, the claimant realized that he had been assigned to work in a dormitory located in close proximity to his [A], against whom he had a permanent restraining order. *See* Findings of Fact ## 7, 8, and 17. He promptly requested a transfer from his immediate supervisor, the dorm coordinator, who then went up the chain of command to ask the Residential Life Supervisor about transferring the claimant to a different location. *See* Findings of Fact # 4, and 7–9. However, shortly thereafter, the immediate supervisor took a leave of absence. *See* Finding of Fact # 10. At some point, the Residential Life Supervisor approached the claimant and told him that a transfer with the same shift was unlikely. *See* Finding of Fact # 11. The claimant contacted the Program Head and a meeting was held on September 16 or 17 to discuss the claimant's transfer request. *See* Findings of Fact ## 12 and 13. On September 18, 2020, the Program Head told the claimant that they would try to find a different location for him to work. *See* Finding of Fact # 15.

We agree with the review examiner that the claimant did not demonstrate good cause attributable to the employer to resign over its failure to transfer him to a new location. 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). Although it took three weeks, the findings indicate that the employer was making an effort to grant the claimant his request for a transfer. In this regard, we do not believe the employer's actions were unreasonable.

However, we do not agree with the review examiner's assessment of the claimant's second reason for leaving. Apparently, when the Residential Life Supervisor approached the claimant to say that a transfer was unlikely, this violated a 2019 agreement with the employer that the Residential Life Supervisor was to have no direct contact with the claimant without another supervisor present. *See* Finding of Fact # 6. In fact, the interaction made the claimant feel uncomfortable. *See* Finding of Fact # 11. Subsequently, when the claimant met with the Program Head, the Residential Life Supervisor was at the meeting. Despite having already told the claimant that his transfer request was unlikely, the Residential Life Supervisor denied knowing about it. *See* Findings of Fact ## 11 and 13. After the meeting, the claimant sent an email to the Program Head stating that the Residential Life Supervisor had lied. *See* Finding of Fact # 14.

Although not in the findings, the claimant also testified that, when the Program Head called him on September 18, 2020, he asked her why the Residential Life Supervisor had spoken to him directly when the employer had put in writing that he was not going to. He further testified that she had no response other than to say that she had misconstrued what was written.[2]

At some point after this call, the claimant resigned, in part, because he believed that the Residential Life Supervisor was creating a toxic work environment and the employer was not abiding by the agreement. *See* Finding of Fact # 16.

In his decision, the review examiner explains why he did not find the behavior of the Residential Life Supervisor or of the Program Head to be unreasonable. The review examiner acknowledges the claimant's testimony that, when the Residential Life Supervisor spoke to him in the parking lot about it being unlikely that he would get a transfer, the Residential Life Supervisor did so in a sneering manner, but the review examiner diminishes its importance because it only happened this one time, and the content of the conversation was about work. In doing so, he fails to consider that harassing behavior can happen as much in the tone of voice as the words used. We also believe that the review examiner failed to appreciate the history that preceded that interaction as well as the gravity of a written assurance that a supervisor will stay away from an employee. Such a written assurance indicates that the dynamic between the two was harmful to the claimant, if not to both of them, and that it was beyond repair. We see nothing in the record to excuse the Residential Life Supervisor for breaching that agreement even once.

The review examiner also did not put much weight in the claimant's assertion that the Residential Life Supervisor created a toxic work environment, because the claimant waited until after the meeting to speak to the Program Head about him violating the agreement. *See also* Finding of Fact # 12. This fails to consider that the claimant said he was taken aback to see the Residential Life Supervisor at the meeting.[3] It also fails to appreciate how hard it might be to personally confront another person, particularly a superior, where the relationship was so difficult that it required a stay-away directive.

[2] This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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] This portion of the claimant's testimony is also part of the unchallenged evidence in the record.

Lastly, the review examiner rejects the claimant's assertion of a toxic work environment because the claimant did not present any evidence that the Residential Life Supervisor would be involved in the claimant's workplace going forward. In our view, the claimant did not need to do this.

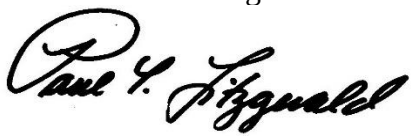
If the Residential Life Supervisor's conduct constituted harassment within the meaning of 430 CMR 4.04(5)(c)(3), the claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(1), if the employer or supervisory employees knew or should have known of the behavior and the employer failed to take immediate and appropriate corrective action. All that is necessary is that the claimant must have taken reasonable steps to preserve his job, which may include notifying the employer of the behavior, unless the circumstances indicated that doing so would be futile or result in retaliation. *See* 430 CMR 4.04(5)(c)(3)(a) and (b).

The regulations direct us to look at the totality of circumstances, such as the nature of the alleged harassment and the context in which the incidents occurred to determine whether such conduct constitutes harassment. *See* 430 CMR 4.04(5)(d). Here, we know that the Residential Life Supervisor has a history of engaging in some sort of behavior toward the claimant, which the employer determined warranted a written stay-away agreement. *See* Finding of Fact # 6. A year later, he breached the stay-away agreement by approaching the claimant in the parking lot without another supervisor present, then he lied to the Program Head about knowing of the claimant's transfer request. *See* Findings of Fact ## 11 and 13. Since there is no indication of extenuating circumstances for approaching the claimant, his violation of the agreement demonstrates harassing behavior. The lying shows that he is not trustworthy and suggests that he might engage in either or both behaviors again.

It is also evident from the record that the employer was aware of the dynamic, as it required them to sign the stay-away agreement. We think that the claimant took reasonable steps to stop the harassment when he asked for the agreement in 2019, and just before he resigned when he told the Program Head about the recent incidents. At that point, the Program Head's only response was that she had misconstrued what was written in the agreement. To be sure, the claimant could have waited to see if the Program Head did anything else to prevent further harassment. However, the Program Head could also have given him some assurance that it would not happen again. She did not. As such, we think the claimant could reasonably believe that the Residential Life Supervisor's behavior would continue.

We, therefore, conclude as a matter of law that the claimant has met his burden to demonstrate that he resigned due to harassment within the meaning of 430 CMR 4.04(5)(c)(3), and he 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 September 13, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2022

Paul T. Fitzgerald, Esq.
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 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