Where the claimant was forced to care for infants in a classroom that was repeatedly over the state mandated safe teacher-to-student ratio, and the employer often said that nothing could be done, the claimant's resignation is held to have been for good cause attributable to the employer. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0071 0265 62

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 26, 2021. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 12, 2021. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 24, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without showing 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 remanded the case to the review examiner to afford the claimant an opportunity to participate and present evidence, as well as to obtain further information about the circumstances of her separation. Both parties 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 show good cause attributable to the employer or urgent, compelling, and necessitous reasons for leaving, is supported by substantial and credible evidence and is free from error of law, in light of the record after remand that shows she was required to continually work at an unsafe staffing level which violated state guidelines.

Findings of Fact

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

1. The claimant worked as a full-time Lead Teacher for the infant room for the employer, an early education and care center, between September 21, 2001, and May 26, 2021, when she separated.

2. The claimant's immediate supervisor was employer's Program Director (Program Director).

3. The employer experienced staffing issues at times, including in 2021.

4. The claimant was responsible for taking care of a classroom of children, assisted by another teacher, depending on the number of children in the classroom.

5. The employer's work as an early education and care center is governed by strict state-imposed ratio guidelines, which outline the number of teachers required to be present in a classroom depending on the number and ages of the children present.

6. To be "over ratio" in the context of the claimant's job means that there are too many children present compared to the number of adults present, in violation of state-imposed standards.

7. When the claimant's classroom was "over ratio," the claimant was supposed to call the manager at the workplace to get an additional adult in the room to assist with the care of the children present. Each time the claimant's classroom was "over ratio," she called the manager on duty to report that she needed additional help in her classroom.

8. The claimant and the claimant's coworker (coworker) were assigned to the same classroom.

9. The coworker's usual reporting time was 8:00 a.m.

10. In 2021, the coworker was late to work three to five times a week. The coworker would appear at work between 8:30 and 9:00 a.m. The coworker was late because she had to bring her own child to school. Each time the coworker was late, the claimant called the manager on duty for a backup teacher to assist her with the classroom when her classroom became "over ratio."

11. When the coworker was late, the claimant was alone in her classroom of children.

12. When the coworker was late, the claimant would ask for additional help to supervise the children in her classroom, however help was often not available, resulting in the claimant's classroom being "over ratio."

13. During times when the claimant's classroom was "over ratio," the claimant struggled to take care of all of the children present. The claimant was concerned

that there were safety issues with one adult present with the number of children she was responsible to provide care for.

14. The claimant needed to change, feed, watch, and provide care for the children, and when the claimant was the only adult present, the claimant struggled to keep up with the tasks she was supposed to be performing.

15. The claimant became fearful for the safety of the children in her classroom.

16. In 2021, when the coworker was late, the claimant reported the "over ratio" issue to the Program Director and the Assistant Director (Assistant Director) each day that the coworker was late because it meant that the claimant needed assistance in her classroom.

17. In 2021, the claimant spoke to the Program Director every time her classroom was "over ratio," informing the Program Director that the coworker was late and that the claimant had too many children to take care of at the moment, resulting in the classroom being "over ratio." The claimant expressed safety concerns to the Program Director as a result of the "over ratio" status of her classroom. The Program Director told the claimant, at times, that she did not have another person at that time to assist. The Program Director told the claimant that there was nothing she could do, leaving the claimant "over ratio."

18. In 2021, the claimant also spoke to the Assistant Director approximately fifteen times prior to resigning. The claimant told the Assistant Director about the coworker being late, resulting in the claimant being "over ratio" in her classroom, and that the claimant was concerned for the safety of the children in her care, as a result of the classroom ratio. The Assistant Director told the claimant that she would put another person with the claimant when possible.

19. If the Assistant Director or Program Director had an additional teacher, they would send the additional available teacher to assist the claimant, but sometimes there was no one available to help the claimant manage her classroom.

20. Even after repeated complaints to the Program Director and Assistant Director, the claimant still experienced being "over ratio" as a result of her coworker being late and the claimant felt unsafe while watching her classroom of children.

21. The claimant decided to quit her job because she felt that children were not safe at the employer's workplace, given that her classroom was out of ratio at times.

22. On May 19, 2021, the claimant gave her one week's notice to the Program Director. May 26, 2021, was going to be the claimant's last day of work.

23. The employer enjoyed having the claimant work for them and wanted to try to retain the claimant as an employee.

24. The employer was limited with what they could do to retain the claimant, given the staffing issues they were having.

25. The employer offered the claimant to take a vacation. The claimant declined the employer's offer to take a vacation because she did not feel that she needed time to rest, nor did she believe a vacation would remedy the safety issues when her classroom was out of ratio.

26. The claimant would have been eligible for a leave of absence, but did not ask the employer for one because the claimant did not believe it would help if she returned to an unsafe out of ratio classroom.

27. The employer also offered the claimant a transfer to one of the employer's multiple locations. The claimant declined the employers transfer offer because she felt that she would encounter the same issues at a different location.

28. The claimant last worked for the employer on May 21, 2021.

29. The claimant called out of work for her last three shifts on May 24, 25, and 26, 2021, because she had received a vaccine and was not feeling well.

30. On May 26, 2021, the [sic] quit her job with the employer.

31. The employer had work available to the claimant at the time that the claimant quit.

Credibility Assessment:

The employer's witness at the remand hearing had no direct knowledge of the happenings at the location where the claimant worked. The witness did admit that the employer, at times, had staffing shortages, including prior to the claimant leaving, but that the employer was limited with what they could do for the claimant, given the staffing levels. As such, it is concluded that the claimant's classroom was over ratio at times, and the claimant's testimony regarding the same is accepted as credible.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

However, based upon the consolidated findings and as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant resigned from her employment, her eligibility for benefits 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.

These statutory provisions expressly assign the burden of proof to the claimant.

When a claimant contends that the separation was for good cause attributable to the employer, we must first address whether the claimant 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). 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).

Here, the review examiner found that the claimant resigned due to the employer's repeated expectation that the claimant perform her work in a classroom that was understaffed. Specifically, her coworker was a half-hour to an hour late three to five times a week. *See* Consolidated Findings ## 8 and 10.

General and subjective dissatisfaction with working conditions does not provide good cause to leave employment under G.L. c. 151A, § 25(e)(1). Sohler v. Dir. of Division of Employment Security, 377 Mass. 785, 789 (1979). However, in this case before us, we believe that the claimant's concerns went well beyond mere general, subjective dissatisfaction. The children in her classroom were infants, and the state Department of Early Intervention and Care mandated a minimum teacher-to-student ratio of one teacher to three children. *See* Consolidated Finding # 5.[1] Because a coworker was chronically late to work, the claimant was required to care for five infants by herself in violation of the state-imposed ratio. *See* Consolidated Findings ## 6, 10–12. When alone with the five infants, the claimant was not able to provide all of the care expected of her, including change, feed, watch, and care for all of the children. *See* Consolidated Findings ## 13 and 14. It was not just the amount of work; the claimant was genuinely concerned about the children's safety. *See* Consolidated Findings ## 13 and 15.

[1] Testimony about the source of this state mandate as well as the specific teacher to student ratio, 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).

Given that the state's guidelines are self-evidently safety driven, we believe that her concerns about working above ratio were a valid workplace complaint. Because the employer's failure to ensure the proper number of teachers in the classroom was not a reasonable way to operate its business, we are satisfied that the claimant has met her burden to show that she left for good cause attributable to the employer.

However, our analysis does not stop there. The 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).

The consolidated findings show that, every time it occurred in 2021, the claimant complained about being over-ratio and asked for a second adult to step in to the manager on duty, to her supervisor, and about 15 times to the Assistant Director but was often told that nothing could be done. *See* Consolidated Findings ## 10, 12, and 16–20. Since the employer's offers for the claimant to take a vacation, a leave of absence, or transfer to another location would not have resolved the under-staffing problem, the claimant may not be penalized for failing to take advantage of them. *See* Consolidated Findings ## 25–27.[2] The claimant has satisfied her burden to show that, prior to resigning, she made a reasonable attempt to remedy the situation and that further attempts would have been futile.

We, therefore, conclude as a matter of law that the claimant resigned from employment 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 May 23, 2021, and for subsequent weeks if otherwise eligible.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2023

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS

[2] We note that during the remand hearing, the employer's Human Resources Generalist testified that adequate staffing was an issue in all classroom and at all of their locations. This testimony is also part of the unchallenged evidence in the record.

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