

Given that the working environment posed a health risk to the claimant and his supervisors did not address his concerns, the claimant demonstrated good cause attributable to the employer to resign under G.L. c. 151A, § 25(e)(1). Though he did not pursue a leave of absence prior to resigning, he is still eligible for benefits, because he had taken other steps to preserve.

**Board of Review
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Issue ID: 0074 4108 51

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 his position with the employer and filed a claim for unemployment benefits with the DUA, effective December 12, 2021, which was approved in a determination issued on April 4, 2022. 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 October 22, 2022. 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 afford the claimant an opportunity to testify. 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 to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant resigned due to the work environment and his high risk of complications if he were to contract COVID-19.

Findings of Fact

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

1. On December 12, 2019, the claimant started working full time for the employer, a human services agency, as a Production Associate. The claimant worked at

the employer's retail store in [City], Massachusetts. The claimant was paid approximately \$13.00 per hour.

2. The claimant was scheduled to work 5 days per week for 40 hours per week. The claimant was initially scheduled to work from 9:00 a.m. until 5:30 p.m.
3. The claimant worked onsite at the employer's retail facility.
4. The claimant's supervisor was the Store Manager.
5. The claimant's job duty at the employer's establishment required the claimant to sort through donated items from the public.
6. In March 2020, the employer's establishment temporarily closed the retail facilities due to government required shutdowns in connection with the COVID-19 pandemic.
7. The claimant's last week of work for the employer prior to the employer placing the claimant on a temporary furlough was the week running from Sunday, March 29, 2020, through Saturday, April 4, 2020. The employer subsequently placed the claimant on furlough status.
8. The claimant filed an initial 2020-01 unemployment claim, effective the week beginning April 5, 2020.
9. The claimant returned to work with the employer's establishment during the week running from July 12, 2020, through July 18, 2020. At this time, the claimant was working 5 days per week from 10:00 a.m. until 6:30 p.m. At this time, the claimant was restored to full time work.
10. Upon returning to work from the furlough status, the employer was providing the claimant and the other workers with masks and gloves to perform their work tasks in light of the COVID-19 pandemic. The employer was encouraging workers to socially distance. The claimant and the other workers could not socially distance due to the nature of their work tasks. The claimant and the other workers sanitized the employer's establishment to the best of their ability [sic].
11. The employer required the donated items bags to sit for 48 hours prior to workers having to sort through the items.
12. The claimant became nervous working in the employer's establishment in light of the COVID-19 pandemic as the employer's establishment was not sanitary. The claimant was required to sort through dirty and unsanitary items located in donation bags during the COVID-19 pandemic. The employer's establishment was an unsafe work environment in light of the COVID-19 pandemic.

13. The workers at the employer's establishment were becoming ill with the COVID-19 virus.
14. The claimant was at high risk for medical complications if exposed to the COVID-19 virus due to an underline [sic] medical issues [sic] that the claimant has of Hepatitis C.
15. Prior to quitting, the claimant complained to the Store Manager and the Assistant Store Manager that the employer's establishment was unsanitary in light of the COVID-19 pandemic.
16. After the claimant complained to management about the unsanitary condition of the employer's establishment, the employer's establishment continued to be unsanitary.
17. During the last week of May 2021, the claimant notified the employer verbally and in writing that he was resigning and offered a notice period.
18. The claimant's last date of work for the employer was on June 12, 2021. The employer allowed the claimant to work out his notice period.
19. The claimant did not quit his job at the employer's establishment for another job offer. At the time [the] claimant resigned from his job, the claimant did not have a job offer pending. At the time the claimant quit his job at the employer's establishment, the claimant was exploring other employment opportunities.
20. After the claimant provided his notice to the employer's establishment, the claimant was provided a job offer from the 2nd employer's establishment. The 2nd employer's establishment is a towing company. The claimant does not recall the specific date the claimant was provided with the job offer from the 2nd employer's establishment.
21. Prior to quitting, the claimant did not ask the employer for a leave of absence from work. The claimant was eligible for a leave of absence from work.
22. The claimant quit his job at the employer's establishment because the employer's establishment was an unsanitary work environment in light of the COVID-19 pandemic.
23. The claimant subsequently started working full-time for the 2nd employer. The claimant does not know [the] specific date the claimant started working for the 2nd employer. The claimant does not know when the claimant received the job offer of new employment or what manner the claimant received the job offer. The job position with the 2nd employer's establishment was a permanent job position. The claimant worked approximately 40-50 hours per week for the 2nd employer. The claimant was paid as a W-2 worker for the 2nd employer. The claimant does not know how much in gross earnings the claimant earned with

the 2nd employer. The claimant has had about three other jobs since working for the 2nd employer. The claimant does not have paycheck information available from the 2nd employer's establishment. The claimant was paid approximately \$15–\$16 per hour from the 2nd employer.

24. The claimant's last date of work for the 2nd employer was on December 6, 2021. The 2nd employer discharged the claimant for a lack of work. At this time, the claimant was separated from work from the 2nd employer's establishment. The claimant has not returned to work for the 2nd employer and the separation is permanent.
25. The claimant filed an initial unemployment [sic] 2021-01 unemployment claim, effective the week beginning December 12, 2021.
26. On a questionnaire the claimant submitted to the DUA regarding the 2nd employer, the claimant listed his job title as a light truck driver. On this questionnaire, the claimant listed his start date of work with the 2nd employer as June 9, 2021.
27. On April 21, 2022, the Department of Unemployment Assistance issued a Notice of Approval, Issue Identification Number 0076 1520 81, granting the claimant benefits under Section 25(e)(2) of the Law commencing the week beginning December 12, 2021, with regards to the claimant's separation from work from the 2nd employer's establishment.
28. On April 4, 2022, the Department of Unemployment Assistance issued a Notice of Approval, Issue Identification Number 0074 4108 51, granting the claimant benefits under Section 25(e) of the Law commencing the week beginning June 6, 2021, with regards to the instant employer and subsequently thereafter if otherwise eligible. The instant employer appealed the Notice of Approval.

Credibility Assessment:

During the hearing, the employer contended that the employer's establishment was not unsafe, and the employer did not know if the employer's location where the claimant worked was unsanitary in light of the COVID-19 pandemic. The claimant's testimony to the contrary is assigned more weight, where the claimant's testimony was more specific compared to the employer's testimony about this information.

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, 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 employment, his eligibility for benefits is analyzed pursuant to the following provisions under G.L. c. 151A, § 25(e), which provide, in pertinent 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 . . . [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 place the burden of proof upon the claimant.

In this case, the review examiner found that the claimant quit over an unsanitary work environment in light of the COVID-19 pandemic. Consolidated Finding # 22. 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).

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, "intolerable working conditions [which] has generally been understood to import substandard sanitation, temperature, ventilation, or other like factors which may contribute to the physiological discomfort or demise of exposed employees" does. Id.

In this case, the consolidated findings show that the claimant's work environment presented a health risk to him during the COVID-19 public health emergency, because the claimant was required to sort through dirty and unsanitary items located in donation bags as part of his regular job duties, and other employees, who worked near the claimant, were becoming ill with the COVID-19 virus. *See* Consolidated Findings ## 10, 12, and 13. Consolidated Finding # 14 establishes that the claimant was at high risk for medical complications if he were to be exposed to the COVID-19 virus due to a medical condition. Given this evidence that connects the claimant's work environment to his health risk, he has demonstrated that the working conditions were intolerable for him.

Further, the consolidated findings show that the claimant complained to more than one supervisor about the unsanitary conditions, but nothing was done. Consolidated Findings ## 15–16. Inasmuch as the employer did not change the working conditions, we are satisfied that the claimant's resignation was for good cause attributable to the employer.

However, our analysis does not end here. 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 he

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).

Here, the review examiner found that the claimant did not request a leave of absence prior to resigning. Consolidated Finding # 21. However, although an employee is expected to make reasonable attempts to preserve his employment before quitting, the Supreme Judicial Court has expressly rejected the notion that, to be eligible for benefits, an employee is required to request a leave of absence. Id. In this case, the claimant had taken other steps to preserve his employment before submitting his resignation. He complained about the unsanitary conditions to two supervisors, and he, along with his co-workers, also sanitized the employer's establishment to the best of their abilities. Consolidated Findings ## 10 and 15. Under these circumstances, the claimant's efforts were reasonable.

We, therefore, conclude as a matter of law that the claimant has shown that he separated 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 June 13, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 10, 2024



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.

JMO/rh