

Claimant who quit because he was allegedly passed over for promotions due to his Hispanic ethnicity did not establish good cause attributable to the employer, where review examiner credited employer's testimony that the employer promoted employees of Hispanic origin with more experience than the claimant had. Where the claimant did not bring any further complaints to human resources before walking off the job, he also failed to make reasonable efforts to preserve. Held he is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0078 0191 12

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 on August 5, 2022. He filed a claim for unemployment benefits with the DUA, effective July 31, 2022, which was denied in a determination issued on August 26, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 4, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was entitled to benefits 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 employer's appeal, we remanded the case to the review examiner to allow the employer to present testimony and evidence, to ask the parties to clarify some of the issues raised by the claimant at the initial hearing, and to ensure that the review examiner entered into evidence and considered the employer's proffered documents. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 quit for good cause attributable to the employer after being treated unfairly and not receiving opportunities for advancement that non-Hispanic coworkers had been given, 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 and credibility assessment are set forth below in their entirety:

1. The claimant worked full-time as an assembler for the employer from 10/2/17 until 8/5/22. At the end of his employment, he was paid \$24.00 per hour.
2. When an employee has a work concern, they are to bring it to the supervisor and then to their supervisor's supervisor or to the HR Manager if they need further resolution.
3. Throughout his years of employment, the claimant spoke with the HR Manager about different concerns like the need for time off during the COVID-19 pandemic or for pay increases.
4. The HR Manager attempted to answer all his questions about the leave process during the pandemic to the best of her ability considering it was new and confusing to her due to ever evolving state and federal laws and regulations.
5. The claimant is Hispanic.
6. The claimant's Lead was Hispanic/Italian.
7. The claimant's supervisor was also Hispanic.
8. The employer has hired and promoted many Hispanic individuals.
9. In 2018, the claimant began full-time school at a university to obtain his bachelor's degree in software engineering.
10. The employer paid for the claimant's college tuition in full. The employer paid \$37,166.56.
11. The employer made its last payment about a month prior to the claimant quitting his job.
12. In 2020, the employer was hiring a Test Technician. The employer interviewed three internal candidates. The claimant, Coworker A, and Coworker B were interviewed.
13. Coworker A and Coworker B had more years of experience than the claimant.
14. The applicants shared similar skills, so the employer hired the applicant with the most seniority and offered the job to Coworker A. Coworker A accepted the job.
15. In or around December 2020, a coworker yelled, "You can't do that" when the claimant placed something in a bin.

16. The claimant reported the coworker to the VP.
17. The coworker never yelled at the claimant again.
18. In 2019, the Lead in the Mechanical Department retired. His position remained open for a long time.
19. The claimant asked the VP about the position, and he told him that he would let him know.
20. The claimant also spoke to his supervisor about the Lead position and his supervisor told him he could be a great fit and he would let him know if heard anything more about it.
21. On 2/3/21, the claimant emailed the VP and HR Manager indicating that he felt he worked very hard for the company and believed there were disparities in how he and his colleagues were being offered opportunities within the company. The claimant asked for information on the employer's hiring processes.
22. The employer spoke with him that week and followed up with an email thanking him for his hard work and reminding him that he received a raise over and above the cost of living that most others received. The HR Manager encouraged him to apply for positions he felt he was qualified for and reminded him that her door was always open and encouraged him to come speak to her before things simmer so she can investigate his concerns.
23. In or around August 2021, Coworker B was offered and accepted a position as a Lead. Coworker B had more years of experience than the claimant.
24. In December 2021, another Hispanic male was promoted from an electro-mechanical assembler to a Lead position. The claimant would not have been considered for this Lead position because he was not on the electro-mechanical side.
25. In 2022, a female, non-Hispanic coworker often watched the claimant while he worked and complained to management about things such as where he parked, what time he arrived at work, or how he performed his work.
26. The claimant never reported the female coworker to the VP or to the HR Manager. He voiced his concerns about her to his Lead only.
27. After the claimant resigned from his position, a different coworker reported the female coworker to the HR Manager for inappropriate behavior.
28. The HR Manager disciplined the female coworker for her behavior.

29. In March 2022, the employer was hiring a Software Developer II because the Hispanic male that held the position moved away. The position required a bachelor's degree and knowledge of specific computer languages.
30. The claimant applied for the position, but he did not have a bachelor's degree or the required computer language knowledge.
31. The hiring manager told the claimant that he reviewed his resume and experience and felt he was not qualified for the position.
32. The claimant asked the hiring manager if he could intern for the position, but the employer did not have an internship opportunity for that position.
33. The claimant did not speak with the HR Manager about not being hired for the Software Developer II before he resigned.
34. The Software Developer II position is still open.
35. In June 2022, the employer hired a coworker who had not worked there as long as the claimant, as the Lead in the Mechanical Department. The new Lead was Hispanic and Italian.
36. The claimant was upset that he was not chosen for the position and thought it was unfair that it was not posted, and the employer did not interview candidates for it.
37. A short time later, the claimant went to the HR Manager because he was upset about not getting promoted to the Lead Mechanical position. He asked her for more money, and she explained that he was getting paid based upon the role he was in. The claimant replied that he was "doing more than what his role required."
38. The HR Manager told him they would discuss it more later.
39. That month, the claimant received a 6.7% merit increase in pay.
40. On Friday, 8/5/22, the claimant spoke with his supervisor about his feeling that he was not given the same growth opportunities in the workplace that others received.
41. The claimant's supervisor agreed with the claimant but told him there was nothing he could do about it.
42. The claimant told his supervisor "Fuck this place" and left work without finishing his shift.

43. On Tuesday, 8/9/22, the HR Manager called him and left a voicemail telling him to contact her to talk about his conversation that he had with his supervisor and told him that not showing up for work was not good and he could be considered to have abandoned his job.
44. On Wednesday, 8/10/22, the HR Manager emailed the claimant indicating that the day was his third day of failing to call or show up for work and that he was considered to have abandoned his job. She wished him good luck and told him he would receive COBRA information.
45. The claimant received the voicemail and email but never contacted the employer.
46. In November 2022, the claimant completed his degree requirements and received his bachelor's degree in software engineering.
47. The claimant believed the employer hired employees and promoted them when they finished their schooling or training because he witnessed them do this while he was employed with them.
48. The claimant chose not to stay with the employer long enough to find out if he would be hired in a different position after he got his bachelor's degree.

Credibility Assessment:

The claimant's assertion that the employer treated him differently because he was Hispanic was not credible and not supported by the evidence. During the original hearing, the claimant's testimony was often vague but the employer was not present to rebut his claims. After hearing from both sides, the evidence revealed the employer hired and promoted many Hispanics and treated the claimant no differently than other employees. The evidence revealed the employer gave him significant raises and merit increases, even more than other employees, during his employment. The employer hired a person with more experience for one position the claimant applied for. The claimant was not selected for another position because he did not hold the required degree and skill set.

The evidence further revealed the claimant quit his job without notice and without speaking to the HR Manager about any current concerns shortly after the employer made their last installment payment for his school tuition, shortly after they gave him a large merit increase, and because he was upset because he was not chosen for a Lead position that went to a different Hispanic employee. Prior to quitting, he did not speak with the HR Manager about any issues with the female employee he believed was watching and reporting on his work. If he had, the HR Manager would have addressed the issue, similarly to how she did when another employee complained about her [sic] after the claimant quit. The HR Manager's testimony was very credible and supported by the emails and other documentation in the record. The fact that he chose not to speak with the HR Manager before he abruptly

quit is unreasonable considering she had listened to and addressed his complaints in the past and told him her door was always open. The claimant did not establish the employer was discriminatory, hostile, or unreasonable in any way.

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. 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 initial legal conclusion that the claimant is entitled to receive benefits in view of her consolidated findings of fact after remand.

The first question is whether to analyze the claimant's separation as a resignation or discharge. In this case, the employer considered the claimant to have abandoned his job after his third day of failing to call or show up for work. Consolidated Finding # 44. Under these circumstances, the separation is treated as a voluntary resignation. Olechnicky v. Dir. of Division of Employment Security, 325 Mass. 660, 661 (1950) (upholding the Board of Review's conclusion that the failure of an employee to notify his employer of the reason for absence is tantamount to a voluntary leaving of employment within the meaning of G.L. c. 151A, § 25(e)(1)).

Since the claimant left his job voluntarily, his separation is properly analyzed under 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 . . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes 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.

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

When a claimant contends that his 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. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 23 (1980).

In this case, the claimant contended that he quit because the employer had failed to address his complaints that he was being treated differently and unfairly as a person of Hispanic origin when opportunities arose for promotion within the company, and the employer failed to resolve his complaints about coworkers who treated him poorly. The review examiner's consolidated findings

set forth each of the claimant's allegations and how the employer responded when the claimant brought them forward. We see nothing in the review examiner's consolidated findings indicating that the employer acted unreasonably.

The claimant raised five examples of jobs he wanted but did not receive:

1. Where the claimant complained he did not receive a promotion to Test Technician in 2020, the review examiner found that the employer awarded the position to an employee who had more years of experience and more seniority with the employer than the claimant. *See Consolidated Findings ## 12–14.*
2. When the employer's Mechanical Department Lead retired in 2019, the claimant expressed interest in the position to the employer's vice president and to his own supervisor. After a period of time, the claimant emailed the vice president and the human resources manager on February 3, 2021, expressing his belief there were disparities in how the employer offered opportunities to staff and asking for information about hiring processes. The human resources manager spoke with him promptly and followed up their conversation with an email reminding him that her door was always open if he had any other questions. When the employer filled the position in approximately August of 2021, the position went to another coworker with more experience than the claimant. *See Consolidated Findings ## 18–23.*
3. The claimant complained that another Hispanic male was promoted from an electro-mechanical assembler to a lead position in December of 2021, but the review examiner found that claimant would not have been considered for this position because he did not work in the employer's electro-mechanical department. *See Consolidated Finding # 24.*
4. In March of 2022, the employer posted a software developer position that required a bachelor's degree and knowledge of specific computer languages. The claimant applied for the position, but he lacked the required degree and knowledge of computer languages. The hiring manager told the claimant that, after reviewing his resume, the claimant lacked the qualifications for the experience. The claimant did not raise his concerns about this position to the human resources manager, and the position remained unfilled as of the April 23, 2023, remand hearing. *See Consolidated Findings ## 29–34.*
5. In June of 2022, the employer promoted a coworker of Hispanic and Italian descent as lead in the claimant's Mechanical Department. The coworker had not worked for the employer as long as the claimant had, the claimant was upset that the position had not been posted and that he had not been promoted, and the claimant complained to the human resources manager that he was upset and that he wanted more money. The human resources manager said he was being paid based on his role, the claimant countered that he was doing more than his role required, the human resources manager said they would discuss it more later, and the claimant received a 6.7% merit pay increase later that month. *See Consolidated Findings ## 35–39.*

The claimant also cited two complaints about how he was treated by coworkers:

1. In approximately December of 2020, a coworker yelled at the claimant when he put something into an empty bin. The claimant complained about the coworker to the vice president and the coworker never yelled at the claimant again. *See Consolidated Findings ## 15–17.*
2. In 2022, a female coworker who was not Hispanic often watched the claimant in the workplace and complained to management about where he parked, what time he arrived at work, and how he performed his work. Although the claimant complained about her to his lead, he never brought his concerns to the vice president or to the human resources manager. After the claimant resigned from his job, a different coworker complained about the woman to the human resources manager, who disciplined the woman for her conduct. *See Consolidated Findings ## 25–28.*

The review examiner also found that, while working for the employer, the claimant began a full-time university program to earn his bachelor's degree in software engineering in 2018. The employer paid the claimant's tuition in full and made its last payment about one month before the claimant quit his job. *See Consolidated Findings ## 12–14.* The claimant completed his training program and earned his bachelor's degree in November of 2022. *See Consolidated Finding # 46.*

On Friday, August 5, 2022, the claimant told his supervisor that he felt he was not given the same opportunities for growth in the workplace that others received. The supervisor said he agreed with the claimant but there was nothing he could do about it, and the claimant said, "Fuck this place," and left work without finishing his shift. *See Consolidated Findings ## 40–42.*

After the claimant walked off his job, the human resources manager left him a voicemail message on Tuesday, August 9, 2022, asking him to call her and telling him that failing to report to work could constitute job abandonment. On Wednesday, August 10, 2022, the human resources manager sent an email telling the claimant that because he had failed to call or report to work for three consecutive days, he was considered to have abandoned his job. The claimant received the voicemail and email but did not contact the human resources manager. *See Consolidated Findings ## 43–45.*

Although the claimant contended that the employer had treated him differently and worse than non-Hispanic employees with regard to promotions he sought, the review examiner provided a detailed credibility assessment citing her reasons for accepting the employer's version of events over the claimant's, noting particularly that the employer had promoted many Hispanics and treated the claimant no differently than other employees, the claimant received raises and merit increases greater than other employees received, and the human resources manager's testimony was further corroborated by emails and other documents in the record. Such assessments are within the scope of the fact-finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).* In light of the evidence presented, we believe that her assessment is reasonable.

There is nothing in the record after remand to show that the employer had engaged in any unreasonable conduct that could constitute good cause for the claimant to separate from employment. Therefore, the claimant failed to establish that he left for good cause attributable to the employer.

Even if we concluded that the claimant established good cause attributable to the employer, an employee who quits also has the burden to show that he made a reasonable attempt to preserve his employment before leaving, or that such an attempt would have been futile. Guarino v. Director of Division of Employment Security, 393 Mass. 89, 93–94 (1984).

Here, the claimant did not speak with the human resources manager about any job dissatisfaction before he walked off the job mid-shift on August 5, 2022, despite the fact that she had listened to and addressed his workplace complaints in the past. By walking off the job without raising any concerns with the human resources manager, the claimant failed to make reasonable efforts to preserve his employment.

We, therefore, conclude as a matter of law that the claimant quit without good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1), and without making reasonable attempts to preserve his job before quitting.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending August 6, 2022, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2024



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.

