The claimant had good cause attributable to the employer to resign, where, during the performance of his regular job duties, a co-worker had verbally threatened him with physical harm. However, the claimant did not make reasonable efforts to preserve his job before leaving, as he did not give the employer an opportunity to address his concerns before resigning the day after the incident. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0078 5945 86

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 separated from his position with the employer on October 18, 2022. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 21, 2022. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on March 2, 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 not 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 employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 had good cause attributable to the employer to resign pursuant to G.L. c. 151A, § 25(e)(1), due to the employer's failure to address a coworker's threatening statements, and that he made reasonable efforts to preserve his employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a full-time dispatcher for the employer, an aviation company, from approximately November 2021 until October 18, 2022, when he separated from his employment.

2. The claimant's direct report was the manager.

3. The claimant was responsible for assigning fueling schedules for employees based upon the employer's computer software.

4. On October 18, 2022, the claimant scheduled a fueler (co-worker A) his daily fueling assignments.

5. Upon receiving the assignments, co-worker A approached the claimant and began to yell, "I am going to fuck you up", "I have two balls between my legs", and "you don't know who you are messing with."

6. Immediately after the confrontation, the claimant sent a group text message to the manager, operations manager (operations manager A), and general manager, informing the three individuals of the threats he received.

7. When the claimant did not receive a response, he sent a text message to the manager stating, "Well, the numbers on I6 don't lie. Gave him all big load with a little over an hour in between flights. I understand if I'm giving you little load back to back to back then yes, but that's not the case."

8. The manager response, "I sent it to (operations manager and general manager). We are always going to have people that think they are being overworked because they aren't used to be actually worked and this won't be the first time we talked to (co-worker A) about this."

9. Following the text message to the manager and group text message, the claimant did not receive further information regarding the threats made by co-worker A.

10. The claimant did not go to work the next day after not receiving information regarding the threats made against him by co-worker A.

11. The claimant resigned from his employment on October 18, 2022, due to the threats made by co-worker A.

12. On October 19, 2022, the claimant received a text from an unknown employee asking, "So, you coming in" to which the claimant responded, "1. I quit; 2. I'm missing hours, especially last Friday my day off that I work, and last weeks Saturday; 3. Fuck [Person A]. Fuck [Person B]."

13. Following the claimant's resignation, the fueler was discharged in December 2022, due to on-going issues with regards to his employment.

14. Following the claimant's resignation, the manager, general manager, and operations manager A all left the employer.

15. In approximately January 2023, the employer reached out to the claimant to seek his interest in coming back to the employment.

16. The claimant was aware the fueler, manager, operations manager A, and general manager were no longer with the organization.

17. On January 26, 2023, the claimant was re-hired by the employer.

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 original 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 made reasonable efforts to preserve his employment.

Because the claimant voluntarily left his job, his eligibility for benefits is properly analyzed under the following provisions of G.L. c. 151A, § 25(e), which provide, 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 terms of these provisions place the burden of proof upon the claimant.

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). 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).

Here, the review examiner found that a co-worker verbally threatened the claimant while the claimant was performing his regular job duties. *See* Findings of Fact ## 4–5. With these statements, the co-worker unequivocally articulated his desire to inflict bodily harm on the claimant. Because the co-worker's statements to the claimant may be reasonably viewed as a

direct threat to the claimant's health and safety, the claimant established that he had a reasonable workplace complaint and it could constitute good cause attributable to the employer to resign.[1] However, our analysis does not end here.

To be eligible for benefits, a claimant must also show that he made reasonable efforts to preserve his employment prior to resigning or that such attempts would be futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984).

We have considered whether the co-worker's behavior might fall under a separate provision in G.L. c. 151A, § 25(e), which provides that a claimant may not be disqualified if he separated from employment due to sexual, racial, or other unreasonable harassment. The DUA regulations under 430 CMR 4.04(5)(c)(1), states that a claimant is relieved of preservation efforts if:

> . . . he or she establishes to the satisfaction of the Commissioner that his or her reason for leaving work and separation from employment is due to:
>
> a. sexual, racial or other unreasonable harassment by an employer, its agents or supervisory employees and the employer, its agents or supervisory employees knew or should have known of such harassment,

"Other unreasonable harassment – includes, but is not limited to, incidents of harassment related to age, religious creed, national origin, or handicap of any individual." 430 CMR 4.04(5)(a)(3).[2]

While we acknowledge that the claimant had a valid workplace complaint, we do not believe that the conduct at issue constitutes other unreasonable harassment within the meaning of 430 CMR 4.04. That is because there is insufficient evidence in the record to show that the co-worker's behavior was based upon the claimant's sex, race, age, religious creed, national origin, or disability. From the facts presented, we also do not believe there was "other unreasonable harassment," where the claimant's complaint stemmed from an isolated incident, and not from any ongoing pattern of inappropriate behavior towards him by the co-worker. Consequently, the claimant was obligated to make reasonable efforts to preserve his job before resigning.

The review examiner concluded that the claimant made a reasonable attempt to preserve because he immediately sent a group text message to three members of the employer's managerial staff about the threats he received and resigned only after he did not hear back from the employer by

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[1] Exhibits 1 and 4 contain text message screen shots that corroborate the claimant's testimony regarding the incident in question. Finding of Fact # 12 references a claim by the claimant that he was "missing hours of work," which suggests that the claimant had also resigned due to issues relating to his pay. While the claimant testified that he had been dissatisfied with payroll issues at one time, he also testified that he specifically quit over the co-worker's threatening statements. The claimant had also indicated in one of his fact-finding questionnaire responses that the employer had resolved the payroll issue. *See* Exhibit 2.
While not explicitly incorporated into the review examiner's findings, these exhibits and this portion of the claimant's testimony 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).

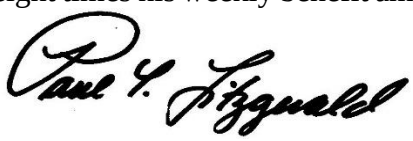
[2] 430 CMR 4.04(5)(b) further provides that "sexual, racial, or other unreasonable harassment may result from conduct by the employer or …co-employees…"

the following day. *See* Findings of Fact ## 6 and 10. However, we do not believe that the review examiner's analysis went far enough.

When the claimant decided not to report to work and to resign from his position the day after the incident, he did not discuss the reasons behind his decision to leave. Although the claimant contacted managerial staff about the co-worker's threats on the date of the incident, his text messages, sent on the day of the incident, are insufficient to constitute a meaningful preservation effort. The employer did not have an opportunity to consider and discuss with the claimant any potential means of addressing this concern. Nor did the claimant establish that any attempt to resolve these concerns would have been futile. To that end, Finding of Fact # 8 indicates that the claimant's supervisor acknowledged the claimant's text messages, informed him that he forwarded the messages to upper-level management staff, and intended to speak with the co-worker about the incident. This finding suggests that the claimant's supervisor was taking prompt steps to address the situation with those who had greater authority to take action. As a result, we conclude that the claimant did not make reasonable steps to preserve his employment.

We, therefore, conclude as a matter of law that the claimant has not met his burden to show that he left his employment for good cause attributable to the employer within the meaning of G.L. c. 151A, § 25(e)(1), as he failed to make reasonable efforts to preserve his job before resigning.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning October 16, 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.



BOSTON, MASSACHUSETTS
DATE OF DECISION - September 15, 2023

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