The claimant resigned his position because he was subjected to repeated instances of sexually charged comments. Held he did not need to show reasonable attempts to preserve his job before resigning due to sexual harassment and is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

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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 on March 22, 2023. He filed a claim for unemployment benefits with the DUA, effective March 26, 2023, which was denied in a determination issued on May 7, 2023. The claimant 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 denied benefits in a decision rendered on May 26, 2023. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left his employment without making reasonable efforts to preserve his employment and, thus, was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant is ineligible for benefits because he failed to make reasonable efforts to preserve his employment after resigning due to sexual harassment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a brand steward associate for the employer, a high-end retailer, between 12/6/2021 to 3/22/2023, when he separated.

2. The claimant moved from Massachusetts to Florida in October 2022 to transfer to the employer's [City A] store.

3. The claimant worked 30 hours per week, at $21 per hour.

4. The claimant's supervisor was the visual manager (manager).

5. The claimant is an Asian gay man.

6. On 10/28/2022, the claimant's manager texted the claimant about a 2 p.m. meeting and when the claimant asked where it would be, the manager texted back, "Office or nearest bar lol."

7. The claimant told the manager that he made an inappropriate comment and the manager responded that said it [sic] should not happen again.

8. On 3/7/2023, the claimant sent a resignation letter to the store manager, effective 4/27/2023, because he was not comfortable with the language by other employees in the workplace that he considered racial and sexual in nature.

9. The employer accepted the claimant's resignation but limited the notice period to 3/22/2023.

10. On 3/7/2023, the claimant sent a letter to HR (HR letter) outlining his allegations of what he termed "an accepted culture of inappropriate sexual and racial innuendos, comments and direct harassment."

11. The claimant did not talk with human resources (HR) about his complaints before 3/7/2023.

12. The claimant looked into transferring to a nearby store but there were no suitable available jobs there at that time.

13. The client [sic] was not on final warning at the time of his resignation.

14. The claimant did not request a leave of absence.

15. The claimant's last day of work was 3/22/2023.

16. The employer's corporate HR department conducted an investigation of the claimant's allegations as outlined in the HR letter by interviewing all individuals named and found all of the claimant's allegations were unsubstantiated.

17. HR told the claimant about the outcome of their investigation.

[Credibility Assessment:][1]

> Although the claimant testified that he was subjected to or overheard repeated comments of a sexual or racial manner that he did not find appropriate, he did not report any of the comments to HR until the day he tendered his resignation. The claimant maintained that he did not know there was a HR department, or he would have complained to HR sooner. While the claimant believed he had a valid workplace complaint, HR investigated the allegations and were unable to substantiate the allegations. The claimant further testified that he never heard back from HR after sending the letter, yet the ASGMO testified that he told the claimant about the results. The two accounts of the parties differed, which requires resolution. Given the totality of the testimony and the evidence presented, the employer's testimony was detailed, consistent and credible. The ASGMO discussed how he had interviewed associates mentioned in the letter and was unable to find witnesses to collaborate the claimant's allegations. Therefore, it found that HR did conduct an investigation, that the allegations were found to be unsupported, and that the ASGMO informed the claimant of the outcome.

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 except as follows. We set aside the portion of Finding of Fact # 16, which states that the claimant's allegations were unsubstantiated, as this mischaracterizes the evidence. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant was ineligible for benefits.

The findings show that the claimant resigned from the employer for reasons related to complaints of sexual harassment. *See* Findings of Fact ## 6, 7, 8, and 10. Thus, his eligibility for benefits is governed by the following statutory provisions under G.L. c. 151A, § 25(e), which state, in relevant 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. . . .

The sixth paragraph of G.L. c. 151A, § 25(e), provides as follows:

> An individual shall not be disqualified, under the provisions of this subsection, from receiving benefits if it is established to the satisfaction of the commissioner that the

[1] We have copied and pasted here the portion of the review examiner's decision, which includes the credibility assessment.

> reason for leaving work and that such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agents knew or should have known of such harassment.
>
> For the purposes of this paragraph, the term "sexual harassment" shall mean sexual advances, . . . and other verbal or physical conduct of a sexual nature when . . .(c) such advances, … or conduct have the purpose of effect of creating an intimidating, hostile, humiliating or sexually offensive work environment. . . .

The DUA has also promulgated regulations, which clarify these statutory provisions. 430 CMR 4.04(5)(a) defines sexual harassment, in relevant part, as follows:

> (2) Sexual harassment-sexual advances, requests for sexual favors, and other physical conduct of a sexual nature when . . .
>
> > (c) such advances, requests or conduct have the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment.

430 CMR 4.04(5) further provides, in relevant part, as follows:

> (b) Sexual, racial or other unreasonable harassment may result from conduct by the employer or the employer's agents, supervisory employees, co-employees or non-employees. Such conduct may occur in or off the worksite and on or off company time. . . .
>
> (c) 1. A claimant shall not be disqualified from receiving benefits under M.G.L. c. 151A, § 25(e)(1) for leaving work voluntarily without good cause attributable to the employing unit or its agent 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 …
> >
> > 2. For purposes of determining a claimant's eligibility for benefits under 430 CMR 4.04([5])(c)1a., an employer is deemed to have knowledge of sexual, racial or other unreasonable harassment committed by its agents and supervisory employees in connection with the employment relationship regardless of whether the employer had actual knowledge of these acts.[2]
>
> (d) In determining whether a claimant's reasons for leaving work is due to harassment, the Division will look at the totality of the factual circumstances

[2] Although the official version of 430 CMR 4.04(5)(b)(2) refers to "430 CMR 4.04(7)(c)1.a," this appears to be a scrivener's error, as there is no subsection (7)(c)1a under 430 CMR 4.04.

> 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.

In her decision, the review examiner found that the human resources department's investigation showed that the claimant's instances of sexual harassment were unsubstantiated. *See* Finding of Fact # 16. The record does not support this.

Upon receipt of the claimant's resignation letter, the employer's human resources department investigated the alleged inappropriate conduct. *See* Finding of Fact # 16. The employer's Assistant General Manager of Operations (AGMO) testified, "The investigation showed that there were no witnesses to substantiate the remarks that [the claimant] had shared. So, if someone said something, no one else had witnessed it."[3] Having no witnesses to corroborate the remarks does not mean that the remarks did not happen.

During her testimony, the AGMO further stated that she had interviewed the manager who had allegedly participated in an instance involving a sexual innuendo about a water bottle (discussed more fully below), and the manager did not remember the interaction. Again, the inability to remember if the interaction occurred is not proof that it did not happen.

In fact, the review examiner found that at least one inappropriate comment had occurred. When the claimant asked where a work meeting would be held, the manager texted the response, "Office or nearest bar lol." Finding of Fact # 6. A manager requesting that a meeting take place out of the workplace, at an intimate location such as a bar, alludes to the fact that the interaction may have romantic or sexually charged undertones. We can also infer that the comment made the claimant uncomfortable in his working environment, as he informed the manager of his discomfort. The manager stated that an incident like this should not happen again. *See* Finding of Fact # 7.

Further, the claimant's resignation letter (admitted onto the record as Exhibit 1) refers to two other instances of sexual harassment, which the employer was not able to disprove.

One such instance was when a coworker walked in while the claimant was spending his break with his manager in the manager's office. The coworker made a "sexually insinuate comment about the 'size of [the manager's] water bottle,' to which [the manager] replied, 'I'm a size Queen.'" The claimant's resignation letter explains that this interaction involving the slang term of "size queen" was a "direct penis size comment to [the claimant] in front of other employees" and it made him feel uncomfortable. Exhibit 1. Commenting on penis size preference is self-evidently conduct of a sexual nature within the meaning of 430 CMR 4.04(5)(a)(2).

Another incident occurred when the claimant was working to prepare for the company's annual fashion show. The letter explains that he was tasked with assisting the male models, and his coworker stated, "'You got to see the models un-dress,' in a disgusting and creepy way. [The

[3] While not explicitly incorporated into the review examiner's findings, the employer's testimony in this regard, as well as the portions of her testimony referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record. As such, they are 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).

coworker] then commented, 'Did you see that one model with all the cash?' [Another coworker] replied 'He must be a stripper.'" The claimant wrote that, after this conversation, he left the office feeling "uneasy and further isolated because [he] did not want to engage in this type of behavior." Exhibit 1. He was so disturbed that he texted his manager informing him that he no longer wanted to work the fashion show due to the sexually offensive conservations that had taken place.

In our view, this record shows that the claimant's resignation was due to a sexually offensive work environment. Inasmuch as two of the instances involved managers, and the claimant provided evidence that he reported another event to the manager, it is apparent that the employer knew of the harassment.

Nonetheless, because the claimant quit before reporting the sexual harassment to the human resources department, the review examiner disqualified the claimant pursuant to G.L. c. 151A, § 25(e)(1), on the grounds that he did not make reasonable attempts to resolve the problem before resigning. *See* Finding of Fact # 11. Ordinarily, to meet the burden of showing good cause attributable to the employer, a claimant must also show that he made a reasonable effort to correct the situation before leaving. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93–94 (1984). However, the Massachusetts Appeals Court has held that, in cases involving allegations of sexual harassment, a claimant need not show that he took all, or even reasonable, steps to preserve his employment. Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of Division of Employment and Training, 54 Mass. App. Ct. 405, 410–411 (2002). Therefore, he may not be disqualified for failing to report the behavior to human resources or for failing to wait for the results of the human resources investigation before resigning.

We, therefore, conclude as a matter of law that the claimant has met his burden to show that he left his job for good cause attributable to the employer due to sexual harassment pursuant to G.L. c. 151A § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 30, 2023, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 2024

Paul T. Fitzgerald, Esq.
Chairman

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.

MM/rh