When the claimant complained about her coworkers' harassment, the employer set up meetings to address those complaints, but it removed her from the schedule until the issues could be resolved. The employer's act of taking away the claimant's work hours effectively penalized her for raising concerns and was unreasonable, providing good cause attributable to the employer to resign. However, because the claimant failed to show up for or call the employer to say why she could not attend a meeting to finish addressing the concerns, held she abandoned her job without making reasonable efforts to preserve it. She is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0082 1978 40

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 affirm.

The claimant separated from her position with the employer and filed a claim for unemployment benefits with the DUA, effective February 4, 2024, which was denied in a determination issued on April 11, 2024. 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 23, 2024. 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 obtain additional evidence regarding the claimant's removal from the work schedule and efforts to address her concerns. Only the claimant 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 had abandoned her job when she failed to attend a continued meeting with the employer, 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 as a server for the employer, a restaurant, from October 23, 2023, through February 17, 2024, when she separated.

2. The claimant was hired to work full-time hours, but rarely worked [sic] hours. The claimant averaged twenty (20) hours per week.

3. The claimant's direct supervisor was the manager (supervisor). The claimant's upper-level managers were the owner/president (owner) and the manager/chef (manager).

4. During the claimant's employment, she had informed the supervisor she was being harassed by several different coworkers.

5. On one occasion, a bartender asked the claimant who had worked the prior night and left the bar messy and unstocked. The bartender stated, "It better not have been you," to the claimant. The claimant understood the statement to be a threat of bodily harm.

6. On another occasion, the claimant had put in an order with modification requests for the food. The kitchen manager cursed at her, threw food in the air, and berated her.

7. On several occasions, the claimant would place empty trays on a counter, fill cups with water to place on the tray, and come back to find her tray was taken away.

8. The claimant would often receive drink orders from the bar that were not full to the top of the glass, which the claimant was made to deliver to her customers.

9. On several occasions, the claimant would arrive to start her work but would find tables messy and would have to clean the tables prior to beginning her work.

10. The claimant brought each concern and incident to the attention of the supervisor, but the claimant was not aware if the supervisor was addressing her concerns.

11. In early January 2024, the claimant sent a text message to the manager asking to have a meeting regarding her concerns.

12. The president was first informed of the claimant's concerns about her treatment at work when she was out of the country on vacation.

13. Upon returning, on or around February 10, 2024, the president began attempting to set up a meeting with the claimant to obtain further information regarding her concerns.

14. The president and the claimant had an appointment to speak on February 10, 2024, which the claimant did not attend because she was sick.

15. The president took the claimant off the schedule until they were able to meet because the president took the claimant's concerns seriously. The president wanted to ensure she was able to address her concerns appropriately before she returned to work.

16. The president attempted to schedule a meeting with the claimant on several dates, including on February 12, 2024, and February 14, 2024, but the claimant [sic] was unable to meet with the claimant until February 15, 2024.

17. The claimant was scheduled to work February 11, 2024; February 12, 2024; February 15, 2024; and one (1) other shift on either February 18, 2024, or February 19, 2024. The claimant believes she was scheduled to work from 3:00 p.m. until 9:00 p.m. for each of these shifts.

18. The claimant did not work any of those shifts due to being taken off the schedule.

19. The president offered to pay the claimant the number of wages she would have earned had she worked her shift on February 12, 2024.

20. Had the claimant worked her shift on February 12, 2024, the claimant would have earned a total of approximately $200 based on her hourly rate plus tips.

21. The claimant did not receive any wages from the employer for the February 12, 2024, shift she was removed from.

22. The claimant felt comfortable returning to work prior to discussing her concerns with the president.

23. On February 15, 2024, at 6:00 p.m., the claimant met with the owner and the manager for approximately one (1) hour.

24. The meeting occurred in the basement of the restaurant because it was the only place within the restaurant where the owner could ensure privacy for the meeting.

25. After approximately one (1) hour, the claimant requested to end the meeting because she was cold because of the basement being cold.

26. The president and the manager had additional questions for the claimant and did not feel they had concluded the conversation regarding the claimant's concerns.

27. Both the president and the owner [sic] agreed they were unsure what to do about the claimant's concerns at that point.

28. The president informed the claimant that they would continue their conversation at another meeting on February 17, 2024, at 2:00 p.m. to obtain additional information as to how to properly move forward regarding the claimant's concerns.

29. The manager was present and heard the president inform the claimant regarding the February 17, 2024, meeting.

30. At the end of the meeting, the president gave the claimant her check from that week because she was not there to get it prior to the meeting.

31. The employer issued paper checks to all employees for that week because there was an error with the employer's payroll company.

32. The owner sent the claimant an email reminding her of the scheduled meeting on February 17, 2024.

33. The claimant does not have a copy of the email to provide to the DUA.

34. The claimant did not attend the scheduled meeting on February 17, 2024.

35. The owner did not place the claimant back on the schedule because they had not concluded their meeting regarding the claimant's concerns and the owner wanted to make sure they proceeded with the claimant's employment appropriately.

36. The claimant did not contact the owner or the manager again.

Credibility Assessment:

The claimant's testimony regarding the incidents and her concerns are deemed to be credible. There is nothing in the record that would suggest the incidents did not occur or that the claimant's concerns were not credible.

The employer's testimony regarding the claimant's separation from employment is deemed to be more credible than that of the claimant's.

The claimant provided testimony that she was discharged from employment when she was taken off the schedule, not scheduled for any further shifts, both prior to their meeting on February 15, 2024, or after, and that the claimant received her last paycheck from the president at the February 15, 2024, meeting. The owner and the manager provided consistent sequestered testimony that the claimant initiated her separation from employment when she did not report to the scheduled meeting on February 17, 2024, regarding her concerns surrounding her employment. The

claimant denied the scheduling of the February 17, 2024, meeting and provided testimony that she did not receive a follow up reminder email from the owner regarding the scheduled February 17, 2024, meeting. The president and the manager also provided consistent sequestered testimony that the claimant was not given her final check at the February 15, 2024, meeting, but that the claimant was provided with her check she would have received that week had she been at the restaurant to get the check, which was for previous hours worked. The employer distributed paper checks to all employees that week because there was an error with their payroll company. It is reasonable for the employer to distribute paper checks when there is an error with their payroll company that would not allow direct deposit of wages.

Given the owner and the manager both provided consistent sequestered testimony that at the end of the meeting on February 15, 2024, the owner informed the claimant they had to continue the meeting prior to the claimant returning to the schedule and informed her of the February 17, 2024 meeting, the employer's testimony regarding the scheduling of the February 17, 2024, meeting is deemed to be more credible than that of the claimant's.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Portions of Consolidated Finding # 16 are unsupported by the record, as the parties agreed that it was the employer who was unable to meet on February 12 and 14, 2024.[1] In adopting the remaining findings, we deem 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. As discussed more fully below, we agree that the record after remand supports the review examiner's original legal conclusion that the claimant is ineligible for benefits.

The first question is whether the claimant resigned or was fired. The employer alleges that the claimant abandoned her job when she failed to attend a scheduled February 17, 2024, meeting. There is no dispute that the claimant did not attend a meeting on February 17th. *See* Consolidated Finding # 34. However, the claimant maintains that she was unaware of a February 17th meeting, and that the employer effectively discharged her because it stopped scheduling her for work.

Consolidated Findings ## 28, 29, and 32 reflect the review examiner's assessment that, in fact, the claimant was told about the meeting, both verbally and in an email. In rendering these findings, the review examiner found the employer's testimony to be more credible than the claimant's. "The review examiner bears '[t]he responsibility for determining the credibility and weight of

[1] Both parties testified that the employer was unable to meet on these dates. While not explicitly incorporated into the review examiner's findings, the parties' testimony in this regard 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).

[conflicting oral] testimony . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Unless such assessments 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). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we see no reason to disturb these findings.

Inasmuch as the review examiner found that the claimant failed to either report for the meeting, as directed or contact the employer about her failure to attend, we also view this as job abandonment, and this case is properly analyzed as a voluntary separation pursuant to G.L. c. 151A, § 25(e)(1). *See* Consolidated Findings ## 34 and 36; and 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)).

G.L. c. 151A, § 25(e)(1), provides, in relevant 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. . . .

The express language of these provisions assigns the burden of proof to the claimant.

"[A] 'wide variety of personal circumstances' have been recognized as constituting 'urgent, compelling and necessitous' reasons under G.L. c. 151A, § 25(e)(1), which may render involuntary a claimant's departure from work." Norfolk County Retirement System v. Dir. of Department of Labor and Workforce Development, 66 Mass. App. Ct. 759, 765 (2009), *quoting* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 847 (1992). Here, the claimant has not presented any personal circumstances as the reason she did not appear at the February 17, 2024, meeting or contact the employer.

Alternatively, we consider whether she has shown good cause attributable to the employer to leave her job. 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).

In this case, the claimant offered numerous instances of alleged harassment by different coworkers. *See* Consolidated Findings ## 4–9. However, the employer was meeting with her to address these concerns, and the claimant was still willing to work despite these issues. *See* Consolidated Findings ## 13–14, 16, 22–26, 28, and 32. Thus, she did not stop working because of the alleged harassment or the employer's failure to address it. Rather, she stopped working because the employer took her off the schedule. *See* Consolidated Finding # 18.

Specifically, the employer removed her from four scheduled shifts between February 11 to February 18 or 19, 2024. *See* Consolidated Findings ## 17 and 18. As the owner explained, it did so until they were able to meet with the claimant, because it took the claimant's concerns seriously and wanted to address them appropriately before she returned to work. *See* Consolidated Findings ## 15 and 35. Despite its stated good intention, taking away the claimant's hours effectively penalized her for raising workplace complaints. In our view, this was not a reasonable response and may be considered good cause attributable to the employer to resign.

However, our analysis does not stop 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 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). In this case, the record shows that the employer wanted to address her concerns. It met with her for an hour on February 15, 2024, and set up a second meeting to try to reach some resolution for February 17, 2024. *See* Consolidated Findings ## 23–28. This willingness to listen and find a way to work through the claimant's issues shows that further efforts to preserve at that point were not futile. In short, the claimant failed to make a reasonable effort to preserve her job before abandoning it.

We, therefore, conclude as a matter of law that the claimant voluntarily left her employment. We further conclude that she failed to sustain her burden to show a reasonable effort to preserve her job, as required pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 4, 2024, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2024

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 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