

0013 8756 65 (Mar. 26, 2015) – A temporary help firm employee complied with the notice requirement of G.L. c. 151A, § 25(e) and 430 CMR 9.04(8), when he asked for a new assignment two business days before his layoff from his current assignment and before filing his claim for benefits. He need not make the request *between* the layoff and filing a claim.

Board of Review
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Issue ID: 0013 8756 65
Claimant ID: 1154168

BOARD OF REVIEW DECISION

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 separated from his position with the employer on June 16, 2014. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 1, 2014. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on September 17, 2014. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to contact his temporary help firm employer for reassignment before filing for benefits and, thus, was disqualified, under G.L. c. 151A, § 25(e). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant'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, 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 conclusion that the claimant is disqualified, pursuant to G.L. c. 151A, § 25(e), because he failed to request a new assignment in the period between the end of his prior assignment and his filing for benefits, 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 assessments are set forth below in their entirety:

1. The claimant worked for the employer on a full-time temporary assignment as a CNC Operator for approximately a year and a half until his separation on 6/16/2014.
2. At the time of hire, the claimant signed a document titled *Acknowledgement of Responsibility to Request an Additional Assignment* which states that the claimant has the obligation to request an additional assignment upon the completion of each and every assignment. Failure to do so will be considered a voluntary quitting of employment and could affect collecting of Unemployment Insurance Benefits.
3. The claimant signed the *Acknowledgement of Responsibility to Request an Additional Assignment* on 11/9/2012.
4. The claimant was informed to contact a recruiter Monday through Friday from 8:30am to 5:00pm. A phone number to call was provided.
5. The week prior to his separation, the claimant heard that layoffs would be occurring and on Thursday 6/12/2014 while picking up his paycheck, he asked a recruiter from the employer if there was any other work available. The recruiter informed the claimant that no additional work was available.
6. On Monday 6/16/2014, the claimant reported to work and was notified by the client company that he was laid off and he could possibly be recalled in 6 to 8 weeks. On 6/17/2014, the claimant contacted the DUA and filed a new claim for unemployment benefits.
7. The claimant did not contact the employer for an additional assignment prior to filing his unemployment claim.
8. On 6/19/2014, the claimant went to the employer's location to pick up his paycheck and asked a recruiter for an additional assignment. The claimant was informed that no additional assignment was available.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. We reject finding of fact # 8, as it is inconsistent with finding of fact # 5. In adopting the remaining findings, we deem 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 failed to comply with the statute's requirement that he contact his employer for additional work before filing a claim.

There is no dispute that the claimant's last temporary assignment came to an end and that he was out of work. At issue is whether the claimant complied with the specific provision contained in the unemployment statute which pertains to workers who are employed by temporary help firms. The provision at issue is G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

A temporary employee of a temporary help firm shall be deemed to have voluntarily quit employment if the employee does not contact the temporary help firm for reassignment before filing for benefits and the unemployment benefits may be denied for failure to do so. Failure to contact the temporary help firm shall not be deemed a voluntary quitting unless the claimant has been advised of the obligation in writing to contact the firm *upon completion of an assignment*.

For the purposes of this paragraph, "temporary help firm" shall mean a firm that hires its own employees and assigns them to clients to support or supplement the client's workforce in work situations such as employee absences, temporary skill shortages, seasonal workloads and special assignments and projects. "Temporary employee" shall mean an employee assigned to work for the clients of a temporary help firm. (Emphasis added.)

The DUA has also promulgated regulations pertaining to this requirement. They are found at 430 CMR 4.04(8), and state, in relevant part, as follows:

(8) Temporary Help Firm Former Employees.

(b) Unless the claimant satisfies the provisions of 430 CMR 4.04(8)(c), the commissioner shall determine that the claimant has voluntarily quit employment if:

1. the claimant was employed by a temporary help firm; and
2. the temporary help firm advised the claimant in writing as provided in 430 CMR 9.04(8)(e) of the need to contact the temporary help firm for reassignment *upon completion of an assignment*; and
3. the temporary help firm submits information, supported by contemporaneous documentation prepared in the ordinary course of business, that the claimant did not request another work assignment *upon completion of the most recent assignment*.

(c) The claimant may avoid the commissioner's determination in 430 CMR 4.04(8)(b) above if the claimant shows that he/she:

1. did request another assignment; or
2. did not receive written notice from the temporary help firm of the obligation to request another assignment; or
3. had good cause, as determined by the commissioner, for failing to request another assignment.

(d) The request for a new assignment must be made by the claimant *upon completion of the current assignment* and before filing an initial (new or additional) claim for benefits.

(e) Any notice given by the temporary help firm to its temporary employees of the need to request a new assignment *upon completion of their current assignment* must be in writing and inform the employees of the method and manner for requesting a new assignment, such method and manner to be consistent with the normal method and manner of communication between the temporary employee and the temporary employment firm for which he/she works, and that a failure to request a new assignment may affect their eligibility for unemployment compensation. (Emphasis added.)

The review examiner disqualified the claimant because the claimant did not ask his employer for a new assignment in the period of time between the end of his shift on June 16, 2014, the date on which he was laid off from his temporary assignment, and whatever time that he filed his unemployment claim on the next day, June 17, 2014. In doing so, the examiner misinterpreted the above provisions of G.L. c. 151A, § 25(e), and 430 CMR 4.04(8), to require that the request be made between the layoff and filing. Both the statute and the regulations use the phrase “*upon completion of the current assignment.*” We believe the statutory purpose underlying the requirement that a temporary help firm employee contact the employer for a reassignment prior to filing for benefits is to provide the employer with actual notice of an employee’s availability for reassignment and the opportunity to offer a suitable reassignment, in order to avoid the claimant becoming unemployed. In several prior decisions, we have stated, “[W]hen a temporary agency employee is in discussion with the agency as an assignment is winding down, and the employee is told that the current assignment is about to end, but that nothing in the way of new assignments will soon be forthcoming, we deem that transaction to have met the ‘call-in’ requirements.” See, e.g., Board of Review Decision BR-124418 (Mar. 22, 2013), Board of Review Decision 0002 2757 65 (Sept. 20, 2013).¹

Here, the claimant knew a layoff was coming. On June 12, 2014, when he asked the employer’s recruiter for a new assignment, his existing assignment was winding down. It was, in fact, just two business days before the layoff. Prior to filing his claim on June 17, 2014, he provided the employer with actual notice that he was available for reassignment and was told that no additional assignment was available. The claimant has satisfied the statutory requirement and is entitled to benefits, pursuant to 430 CMR 4.04(8)(c)(1), as he did request another assignment prior to filing his claim.

We, therefore, conclude as a matter of law that the claimant is not disqualified, pursuant to G.L. c. 151A, § 25(e).

¹ Board of Review Decisions BR-124418 and 0002 2757 65 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 15, 2014, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 26, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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