**Board of Review**
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**Issue ID: 0010 6162 10**
**Claimant ID: 682574**

# BOARD OF REVIEW DECISION

0010 6162 10 (Sept. 29, 2014) – Where the claimant resigned to accept full-time employment with a temporary staffing agency, the Board held that the claimant left his former job in good faith to accept new employment on a permanent full-time basis. Although the nature of his assignments were temporary, the claimant's relationship with the staffing agency was permanent within the meaning of G.L. c. 151A, § 25(e).

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 June 1, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 24, 2013. 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 October 31, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment to accept new full-time employment that was not permanent and, thus, was disqualified, under G.L. c. 151A, § 25(e), as to his separation from the instant employer. 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 ineligible for benefits, under G.L. c. 151A, § 25(e), is supported by substantial and credible evidence and is free from error of law, where the claimant left full time, indefinite employment with a temporary staffing agency in order to accept new full-time, indefinite employment with another temporary staffing agency.

Findings of Fact

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

1. The claimant worked full-time as a mechanical inspector for the instant employer's client, from 1/14/13 to 6/1/13. The instant employer is a temporary staffing agency.

2. The claimant believed that if he continued to perform work for this client for an additional 4 to 6 weeks beyond the date he separated from employment, he would have been offered a permanent, full-time position.

3. A different temporary staffing agency contacted the claimant in May 2013 and offered him a temporary assignment with a client company that paid the claimant $1 more per hour than he was paid with the instant employer, and that required him to travel from Framingham to Ashland each day, rather than traveling from Framingham to Malden, as he did with the instant employer.

4. On 5/20/13, the claimant notified the client company he worked with through the instant employer that he was resigning from his position. On 5/31/13, the claimant e-mailed the instant employer a letter of resignation.

5. The claimant started working for the other temporary staffing agency starting on 6/3/13. He believed this assignment might lead to permanent employment. He was not guaranteed a timeframe within which he might expect to hear whether he would be offered a permanent position with this other client. He was not offered a permanent, fulltime position with the agency's client before his assignment ended.

6. The claimant's assignment at the second temporary agency ended on 6/24/13, when he was informed that there was no more work available for him. He asked for a new assignment from this agency but no additional assignments were available.

7. The claimant started working for a third temporary agency on 6/27/13. His assignment ended on 7/26/13.

8. The claimant re-opened his claim for unemployment insurance benefits on 7/18/13, effective the week ending 7/6/13.

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. 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

conclude, contrary to the examiner, that the claimant left his employment in good faith to accept new employment on a permanent full-time basis, within the meaning of G.L. c. 151A, § 25(e).

G.L. c. 151A, § 25(e) (hereinafter "subsection 25(e)") provides, in pertinent part, as follows:

> No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit.

The review examiner found that the claimant resigned from the instant employer in good faith for a new job with higher pay and a shorter commute. The examiner nonetheless disqualified the claimant on the ground that the new employment was not "permanent," because the new employer was a temporary help agency. Because the new job for which the claimant left his previous job was a temporary help agency, the review examiner took the view that the new job was not "permanent," within the meaning of the portion of G.L. c. 151A, § 25(e), cited above.

The findings of fact show that the claimant resigned from one temporary help agency to become employed with another such agency on a full time basis. After reporting to his first assignment from the new employer for three weeks, that first assignment ended and the employer had no other assignments available. The claimant thus became unemployed.

This case requires us to interpret the term "permanent" as it applies to employment by an employer whose business is to assign its employees to work for the employer's clients on a temporary, indefinite, or contingent basis. For the reasons discussed below, we conclude that the examiner erred by confusing the temporary nature of the claimant's *assignments* by his new employer with the indefinite nature of the employment relationship which existed between the claimant and the new employer.

For purposes of our analysis, we will assume that the claimant's initial assignment to the client company (the one that ended after three weeks) was a temporary assignment. Although the claimant hoped the assignment would lead to direct employment by the client company, the review examiner found that there was no guaranty to that effect. However, the nature or duration of any particular assignment should not be dispositive of the question here, which is whether the relationship between the claimant *and the staffing agency* is "permanent," within the meaning of G.L. c. 151A, § 25(e).

Employment on a "permanent basis" is not defined in the Massachusetts Unemployment Insurance statute, as set forth in G.L. c. 151A, but it certainly does not literally mean "permanent." No one has a "permanent" job in the sense of guaranteed lifetime employment. Instead, the phrase is most reasonably interpreted to mean "indefinite," i.e., "lacking precise limits; uncertain, undecided." American Heritage College Dictionary, 4th Ed., 2004. Black's Law Dictionary defines "permanent employment" as "Work that, under a contract, is to continue

*indefinitely* until either party wishes to terminate it for some legitimate reason." Black's Law Dictionary 545 (7th ed. 1990) (emphasis added).[1]

In the present case, the claimant's new employment relationship was with a staffing agency, not with the agency's clients. The staffing agency recruited the claimant, offered him a dollar more per hour than he was earning from the previous (instant) employer, and further offered him the opportunity to work in an assignment with some potential for direct hire. The claimant's employment relationship with the staffing agency, however, was neither governed by nor limited to the duration of the claimant's initial assignment. Nothing in the findings or the record suggests that the new staffing agency was hiring the claimant for a finite or pre-defined period of time or for only one assignment. Thus, the relationship was open-ended and indefinite. In this sense, the new job was as "permanent" as a typical job with any typical employer, even though the work (the employer's business) potentially (though not necessarily) involved a series of short-term assignments to clients.

We are aware that G.L. c. 151A, § 25(e), refers to an employee of a temporary help firm as a "temporary employee." This is because this section imposes certain requirements upon employees of temporary help firms that are not imposed upon employees generally (in particular, an obligation to request a new assignment before filing a claim for unemployment compensation). The term "temporary employee" is, therefore, used to designate the set of employees who are subject to those special requirements. In this specific context, the statute defines "temporary employee" as "an employee assigned to work for the clients of a temporary help firm." The definition is necessary because otherwise the term "temporary employee" might be construed to include at least two categories of employees who were not intended to be covered by the special requirements: (a) employees who work on a temporary basis for companies other than temporary help firms, and (b) employees of temporary help firms who are not assigned to work for client companies, but instead work directly for the firm (e.g., account managers, recruiters, bookkeepers, etc.). Thus "temporary employee" is not used in contradistinction to "permanent employee," but rather to precisely label those employees who are subject to the special statutory provisions governing "temporary employees." Nothing in that label precludes the analysis we follow here.

We also note that a temporary help firm is defined in G.L. c. 151A, § 25(e), to mean companies that are in the business of supplying temporary services to their customers; again, nothing in that definition implies that employment by a temporary help firm (as opposed to an assignment) is inherently non-permanent. By analogy, a business that offers landscaping services to its customers and assigns its workers to perform work on different client jobs is a landscaping company. One who works for a landscaping company is a landscaping employee; a worker who works for a temporary staffing firm is called a "temporary employee."

[1] Although the Black's Law Dictionary definition contemplates "permanent" employment under a contract specifying its terms, a very small proportion of contemporary employment relationships are covered by individual employment contracts, and those are largely for high-level professional and managerial positions. A greater proportion of such relationships are governed by collective bargaining agreements, but even those are an increasingly small minority. Thus, if we were to interpret "permanent" to require an employment contract, we would be narrowing its application substantially. We see no reason in policy or statutory language that would justify such a narrow construction.

The DUA's regulations governing temporary staffing agencies support our conclusion. Those regulations provide that employees of temporary staffing agencies are not eligible for unemployment benefits unless they first seek a new assignment and none is available. 430 CMR 4.04(8)(b). Otherwise, the worker is viewed as quitting his job *with the staffing agency*. Id. Implicit in this requirement is that the end of an assignment does not mean a separation from the job with the staffing agency; such a separation occurs only if the staffing agency has no work for the claimant and, in effect, lays him off.

Our holding is also in harmony with the policy underlying the unemployment compensation statute as a whole, as well as the provision at issue. Generally speaking, G.L. c. 151A, § 25(e), disqualifies claimants who are separated from employment through their own fault, such as employees who quit voluntarily without good cause attributable to their employers. The specific provision at issue here deals with a situation where an employee resigns in good faith to take another job that thereafter fails to materialize or is cut short. The provision recognizes that the employee in this situation should not be viewed as "at fault" for his unemployment. By the same token, the provision requires that the new employment be both full time and "permanent," thus seeking to ensure that, at the time the employee quits his previous job, he does not knowingly place himself into a situation that is could lead to unemployment in the foreseeable future. For example, if an employee leaves a job in order to accept a finite or limited term position (say, six weeks), it is foreseeable that such employee may be unemployed six weeks hence. Similarly, if she leaves a full time job for a part-time job, she may be intentionally placing herself in partial unemployment, within the meaning of G.L. c. 151A, § 1(r)(1). Both of these scenarios are contrary to the purposes of the statute, which is to award benefits to those who are unemployed through no fault of their own. The specific provision at issue discourages these scenarios by requiring that the new employment be both full time and "permanent."

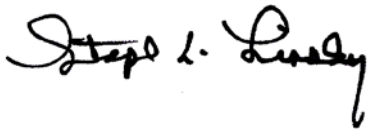
Absent evidence that the arrangement is intended by both parties to be of finite, short-term duration, employees who accept employment by a staffing agency can reasonably expect their jobs to be just as "permanent" as any other job. That is to say, they can expect the employer to continue to offer them work, even if it is in the form of a succession of assignments. In the instant case, the claimant's new job carried higher wages and a much better commute. He had no reason to anticipate that the employment would end after only a few weeks. We can think of no reason to exclude him from unemployment benefits simply because his employer was in the business of supplying contingent services to client companies.

For the foregoing reasons, we conclude that the claimant left his employment "in good faith to accept new employment on a permanent full-time basis," within the meaning of G.L. c. 151A, § 25(e). The findings also show that the reason that the claimant separated from the new employment agency was that he was told there was no more work available. Since the new employer effectively laid him off for lack of work, the claimant separated for good cause attributable to that employing unit, thus satisfying all of the elements in the applicable provision of law.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 1, 2013, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION – September 29, 2014**

Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
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**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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