

Board of Review
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Issue ID: 0012 1407 14
Claimant ID: 1191197

BOARD OF REVIEW DECISION

0012 1407 14 (Sept. 15, 2014) – A landscape driver, who had routinely been laid off for the winter and re-hired in the spring, was deemed to have voluntarily quit when he was recalled to work and failed to return.

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 November 22, 2013. He filed a claim for unemployment benefits with the DUA, which was approved. After the claimant did not return to work in April 2014, the DUA issued a Notice of Disqualification on June 4, 2014, which indicated that the claimant was disqualified from receiving benefits as of April 20, 2014. The claimant 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 awarded benefits in a decision rendered on August 6, 2014. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was laid off by the employer on November 22, 2013 and, thus, he was not disqualified under G.L. c. 151A, § 25(e)(2). 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. Only the employer responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2) is supported by substantial and credible evidence and is free from error of law, where the claimant was laid off on November 22, 2013, as is customary with this employer, and the claimant did not return to work in April 2014 when he was recalled.

Findings of Fact

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

1. The claimant worked as a seasonal Truck and Delivery person, for the employer, a Landscaping Company, from April 15, 2010 until November 22, 2013, when he was separated.
2. The claimant worked a full-time schedule.
3. During the claimant's tenure with the employer, the claimant worked seasonally for the employer. The claimant would start working each year in either March or April and be laid off due to lack of work in November.
4. Each year the claimant worked for the employer, the claimant was laid off and then re-called back to work in the spring. Prior to 2014, the claimant always accepted the recall and returned back to work in the spring.
5. The claimant worked on November 22, 2013.
6. On November 22, 2013, the claimant was informed that he was being laid off because it was the end of the season. The employer told the claimant that she would see him in spring. No exact re-call date was given to the claimant at the time.
7. The claimant did not quit his job. Continuing work was not available to the claimant at that time.
8. The claimant then filed for unemployment benefits, effective the week beginning November 24, 2013.
9. The claimant decided that he wanted to move to Florida.
10. The claimant moved to Florida in February 2014.
11. In April 2014, the claimant received a call from the employer informing him that he could return to work that month. The claimant informed the employer that he would not be returning to work because he now lived in Florida and wanted to start a new life there.
12. A new issue on the claimant's claim was created, effective the week beginning April 20, 2014.
13. On June 4, 2014, the claimant received a Notice of Disqualification under 25(e)(1), stating that he was not entitled to benefits for the week beginning April 20, 2014 because he left work for personal reasons.

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 reject the review examiner's legal conclusion that the claimant was discharged for purposes of G.L. c. 151A, § 25(e)(2). We conclude instead that the claimant's failure to return to the employer in the spring of 2014 constituted a voluntary, and disqualifying, resignation governed by G.L. c. 151A, § 25(e)(1).

Initially, we note the period of time at issue in this case. It was undisputed by the parties that the claimant was laid off on November 22, 2013.¹ There is no question that the claimant was entitled to benefits during the winter months in late 2013 and early 2014. Although the review examiner's focus in Part III of her decision was exclusively on the November 2013 layoff, this was not the relevant time period for her to consider. The original determination in this case had an effective date of April 20, 2014. The question before the review examiner, and now this Board, is whether the claimant or the employer caused his separation as of April 20, 2014.

The findings of fact regarding the circumstances of the claimant's employment are straightforward. He worked seasonally for a landscaping company. Each year in the spring, he began work. In the fall, he would be laid off due to a lack of work. The review examiner found that, each year the claimant had worked for the employer, he had been laid off and recalled to work according to this schedule. Accordingly, the claimant was laid off in November 2013 and recalled to work in April 2014. However, the claimant did not return to work in April 2014. As found by the review examiner, the claimant decided that he wanted to move to Florida and did so in February 2014.

The DUA has specific guidelines to apply in circumstances such as this. Section 1208(K) of the DUA's Service Representatives' Handbook, with which we agree, provides that, where "[a] non-union claimant who has been laid off fails to return to work when recalled" the following applies:

If you establish that: (1) at the time of the layoff, a definite or approximate date of recall had been given; *or* (2) the layoff was a seasonal or customary one and the claimant had returned to work following a similar layoff in the past, then the claimant is disqualified, effective on the date of the recall.

The review examiner did not consider this provision in her decision. Although either circumstance could lead to a disqualification for the claimant, the findings of fact indicate that both situations are met in this case. First, the review examiner found that, in November 2013, the employer told the claimant that it would see him in the spring. Although the review examiner found that "[n]o exact re-call date was given to the claimant," under Section 1208(K), an exact date need not be given. As had been true in the past, the employer would see the claimant in the spring, usually March or April, and the claimant knew to expect a recall at that time. Second, as the findings of fact make clear, the winter layoff was both seasonal and customary for the employer, and the claimant had returned to work following the seasonal layoff before.

¹ The review examiner found that the claimant did not quit in November 2013 and that there was no more work for him at that time. *See* Finding of Fact #7.

In short, the time period to be addressed here is the time at which the claimant was recalled to work. Since he failed to return to work at that time, he quit and was not discharged.

Since claimant quit his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(1), which provides, in pertinent part:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he 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

Under this section of law, the claimant has the burden to show that he is entitled to benefits. As noted above, the claimant decided to move to Florida during the winter layoff period. By moving to Florida, and not returning to work following the recall, the claimant put himself in unemployment as of April 20, 2014. Consequently, he is not entitled to benefits.

We, therefore, conclude as a matter of law that the review examiner's decision to apply G.L. c. 151A, § 25(e)(2) and award benefits was based on an error of law, because the claimant's failure to return to work in April 2014 following a recall was a voluntary resignation, and the claimant is disqualified under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning April 20, 2014, and for subsequent weeks until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

DATE OF DECISION: September 15, 2014



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

**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.

SF/jv