

Claimant, whose temporary placement service employer had no new work for her at the time of her exit interview when her placement with the client company ended, became separated due to lack of work and qualified for benefits under § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member**

Issue ID: 0020 0544 77

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by P. Sliker, 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 affirm.

The claimant was separated from her position with the employer on September 30, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 23, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on December 24, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was entitled to benefits, 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 remanded the case to the review examiner to allow the employer an opportunity to present testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 became separated due to a lack of work and, thus, neither for deliberate misconduct in wilful disregard of the employer's interest nor for a knowing violation of a reasonable and uniformly enforced rule or policy of 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 scientific editor for the employer, a staffing agency. She began work for the employer on December 15, 2014.
2. The claimant has a master's degree in pharmacology. She worked for 15 years as a scientist for a pharmaceutical manufacturer until approximately 2012. She then worked as a technical writer for a biomedical company for approximately three years. She then began her job for the employer.
3. The [sic] prior to beginning her assignment for the employer, on December 4, 2014, the claimant electronically signed the employer's policies and procedures. They state in part: "I understand that...when my assignment ends, I must call my (employer) office immediately and then on a weekly basis to notify the Company that I am available for other assignments...Failure to do so may result in the termination of my employment with (employer) and my jeopardize my eligibility for unemployment benefits."
4. The claimant was placed at a pharmaceutical company. At the time of the claimant's employment, the pharmaceutical company had work for 250 of the employer's employees. The claimant's contact at the employer was an on-site account manager (account manager 1). The employer had two on-site account managers at the work site.
5. When the claimant began work, she was given many written policies and procedures as a part of the orientation process. Some of them remind employees [they] are required to contact the employer to request a new assignment after their assignment ends. (See Remand Exhibit 9)
6. The claimant's job duty was technical writing.
7. The claimant's contract was scheduled [to] expire on September 30, 2016.
8. On August 29, 2016, account manager 1 met with the claimant. She told the claimant her assignment was ending on September 30, 2016. She told the claimant the pharmaceutical company did not have enough work. The claimant told the account manager she had a few jobs in her "pipeline."
9. On September 19, 2016, the claimant spoke with the other account manager (account manager 2) about other assignments. Account [manager] 2 told the claimant about a medical writer position and a laboratory position. The claimant told account manager 2 she was interested in the writer position. She did not express interest in the laboratory position because it had been five years since she worked in a laboratory.

10. Account manager 2 sent the claimant an e-mail with a job description for the medical writer position. In the e-mail she told the claimant she would “market” her for the assignment.

11. On September 30, 2016, the claimant met with account manager 1 for her exit interview. There was no discussion about additional work.

Credibility assessment: At the [remand] hearing, account manager 1 testified she reminded the claimant to call the employer for new work. However, her testimony regarding this point was hesitant and she did not recall specifically what she said. When asked by the examiner, she stated she “would have” told the claimant to contact the employer because she always said this to employees. The claimant testified at the hearing that account manager 1 did not suggest she contact the employer for new work. Her direct testimony is more credible.

12. After her exit interview, the claimant stopped by the office of account manager 2 to discuss the job she was interested in. Account manager 2 told the claimant that the pharmaceutical company manager would contact her directly.

13. On September 30, 2016, the claimant did not remember the employer’s policies regarding contacting the employer after her assignment ended.

14. In early October 2016, account manager 2 sent a LinkedIn invitation to the claimant. The claimant accepted.

15. The claimant had no further contact with the employer. She filed a new claim for unemployment benefits on October 21, 2016. She was determined to be monetarily eligible with a benefit year beginning October 16, 2016.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s consolidated findings of fact and deems them to be supported by substantial and credible evidence.

The review examiner initially awarded benefits after analyzing the claimant’s separation under G.L. c. 151A, § 25(e)(2), which provides, in pertinent 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit’s interest, or to a knowing

violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for disqualifying misconduct. Based solely on the claimant's testimony at the initial hearing, the review examiner concluded that the claimant was separated due to lack of work, and the employer had not met its burden. We remanded the case to take the employer's testimony. Following remand, we also conclude that the employer has not met its burden.

After remand, our analysis also considers another portion of G.L. c. 151A, § 25(e), which states, 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.

The review examiner found that the claimant's placement with a client company of the employer ended when her contract with the client and employer expired on September 30, 2016.

The claimant had previously met with one of the employer's two account managers assigned to the client company on August 29, 2016, when the manager told her that the client did not have enough work and the claimant indicated she had a few prospects in her "pipeline." The claimant met next with the employer's other on-site account manager on September 19, expressed interest in one of the two positions that the manager proposed to her, and exchanged email correspondence about that position on the same day. *See* Hearings Exhibit # 9. The second account manager indicated she would "market" the claimant to the client.

The review examiner found that, on September 30, 2016, the first account manager conducted an exit interview with the claimant, with no discussion of additional work. After the exit interview, the claimant met with the second account manager about the job they had discussed earlier that month. The second manager told the claimant that the client company manager would contact her directly. Thereafter, the claimant had no further contact with the employer.

The review examiner made a credibility assessment that the first account manager, who appeared on behalf of the employer at the remand hearing, did not remind the claimant to call the employer for new work. Such assessments are within the scope of the fact finder's role, and,

unless they 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).

Ultimately, however, the outcome of this case does not hinge on whether or not the account manager reminded the claimant at their exit interview that the employer expected her to call in for work weekly, as its policies required (*see* Hearings Exhibit # 3 and Remand Exhibit # 9); or whether or not the claimant remembered the employer had such policies regarding calling in for work.

The scenario presented by this case is straightforward. The claimant worked at an assignment until September 30, 2016. On that day, the employer conducted an exit interview to formally notify the claimant that the assignment was over. The employer did not offer the claimant a new assignment, because none was available for her. Since the employer did not have ongoing work available for the claimant, she separated due to a lack of work and is not disqualified, pursuant to G.L. c. 151A, § 25(e)(2).

Our prior decisions regarding claimants who work for temporary placement services have noted that the purpose of the temporary employment contact provisions of the statute is to ensure that a temporary employment agency, who may lack frequent contact with its employees, has an opportunity to offer its employees additional work before said employees apply for unemployment benefits. *See, e.g.*, Board of Review Decision 0002 2757 85 (September 20, 2013) (“The record in this case establishes that, well before the claimant applied for benefits, communication occurred between the parties that afforded the employer with actual notice of the claimant’s availability, [which] effectuated the relevant statutory purpose”); BR-122974 (October 26, 2012) (where the claimant had communicated with his employer on the day his prior assignment ended, the claimant met the statutory requirement, even though the conversation focused on the status of the claimant’s employment with the prior client).¹ In this case, the employer had such an opportunity on September 30, 2016. Indeed, the second account manager discussed the claimant’s potential opportunity for another prospective client, but offered the claimant no additional work. The fact that the claimant had no further contact with the employer after September 30, or the fact that she did not specifically ask for more work on September 30, does not affect her eligibility for benefits.

We, therefore, conclude as a matter of law that the claimant fulfilled her obligation as a temporary employee to contact the employer for reassignment prior to filing for benefits, pursuant to G.L. c. 151A, § 25(e), and became separated due to lack of work, pursuant to G.L. c. 151A, § 25(e)(2).

¹ Board of Review Decision BR-122974 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending September 30, 2016, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 26, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

JPC/rh