

**Claimant employee of a temporary placement firm eligible for benefits where he went to the employer's office after his assignment ended, and the employer failed to offer him a new position.**

**Board of Review  
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**Issue ID: 0021 4994 85**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by Danielle Etienne, 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 was separated from his position with a client company of the employer job placement agency on March 23, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 20, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on June 16, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had failed to contact the employer to ask for a new placement after completing his assignment and before filing for unemployment benefits, and, thus, 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 take testimony and evidence from the claimant. Both parties attended the two-day remand hearing. Thereafter, the review examiner issued her 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 failed to contact the employer for a new placement after his assignment ended, but before filing for unemployment benefits, 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 assessments are set forth below in their entirety:

1. The claimant worked for the employer from April 5, 2016 until the claimant separated on March 23, 2017.
2. The employer is a job placement agency.
3. On March 23, 2017, the claimant completed his last full time temporary assignment for the employer's client. The claimant's supervisor at the client's location notified the claimant that he was laid off from the assignment and gave the claimant a letter to file for unemployment benefits.
4. On or about March 23, 2017, the claimant did not request reassignment from the employer.
5. As of March 23, 2017, the employer had multiple positions available in [City A], Massachusetts. The employer did not offer any work to the claimant because the claimant did not request reassignment.
6. The employer maintains a policy that requires employees to contact the employer for work within 3 business days of their last assignment and before filing for unemployment benefits.
7. The claimant was aware of the employer's requirement given that he received the employer's policies on April 4, 2016.
8. On March 27, 2017, the claimant reported to the employer's location and notified the employer that he was laid off from the assignment on March 23, 2017. At that time, the claimant requested a letter from the employer indicating that he is no longer employed with the employer. The employer replied that they would look into it (the separation) and get him the letter once they confirm his separation from the client.
9. On March 27, 2017, the claimant did not request reassignment from the employer.
10. On March 28, 2017, the claimant notified the employer that he was coming to the office to pick up his paystubs.
11. On March 31, 2017 the claimant filed a claim for unemployment benefits with an effective date of March 26, 2017.
12. On April 5, 2017, the employer sent a text message and an email to the claimant indicating that the employer had work available and requesting that the claimant contact the employer.
13. The text message and email did [not] offer any details regarding the work that was available.

14. The claimant did not respond to the text message and email from the employer about available work.
15. On April 12, 2017, the employer offered the claimant an assignment located in [City B], Massachusetts. The claimant refused the assignment due to lack of transportation.
16. On May 5, 2017, the claimant called and notified the employer that he was leaving Massachusetts for vacation to visit his mother until June 8, 2017.
17. Prior to March 23, 2017, the claimant purchased a plane ticket to travel to Portugal to visit his mother because he believed during that period he would be eligible for vacation from the client.
18. The claimant travelled from Massachusetts to Portugal on May 25, 2017.
19. The claimant returned to Massachusetts from Portugal on June 8, 2017.
20. On June 30, 2017, the claimant notified the employer that he returned to Massachusetts and wanted to return to work for the employer's client. The employer replied that they would contact the client about the claimant's request.
21. On July 11, 2017, the claimant returned to work for the employer's client.
22. The employer does keep information regarding contacts with its employees during its regular course of business.
23. The claimant left his phone in Portugal during his vacation.
24. The claimant obtained a new phone when he returned from Portugal.
25. The claimant is unable to provide a copy of his cell phone bills since March 23, 2017 showing his communication with the employer because the phone company was no [sic] able to provide them to him.

#### Credibility Assessment:

The claimant offered that the supervisor at the client's location notified him that he was laid off. The claimant also contends that the employer's Owner told him that there was no work available. The claimant offered contradictory testimony indicating that on March 23, 2017, he did contact the employer for work, then he also offered that he did not request work from the employer because he was notified that there was no work available.

The employer's Recruiter offered that the supervisor at the client's location did notify the claimant that he was laid off but she is unaware of what was said to the claimant specifically. She denies that the claimant requested work on March 23, 2017. The

Recruiter offered that the employer's Owner does not come to the office. The Recruiter further offered testimony corroborated by documentary evidence that the first contact from the claimant after his lay off was on March 27, 2017, when the claimant reported to the employer's location and notified the employer that he was laid off from the assignment on March 23, 2017. At that time, the claimant asked the employer for a letter indicating that he is no longer employed, but he did not request reassignment.

The documentary evidence further corroborates the Recruiter's testimony that on May 5, 2017, the claimant called and notified the employer that he was leaving Massachusetts for vacation to visit his mother until June 8, 2017.

Given the claimant's contradictory testimony and the documentary evidence corroborating the employer's testimony, it is concluded that the employer's testimony is more credible.

### 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 of fact 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 consolidated findings of fact and credibility assessment except for Consolidated Finding of Fact # 7.

Consolidated Finding # 7 states the claimant was aware of the employer's requirement that he contact the employer to request reassignment when his current assignment ends and before filing for unemployment benefits, as set forth in the policy that he signed. *See* Hearings Exhibit # 2. But the claimant testified on remand that he does not read English, and that he did not understand that he was obligated to call the employer within three working days of his assignment ending.<sup>1</sup> The employer testified on remand that its policy is only written in English, it did not provide a copy of its policies in the claimant's language, and it did not offer the claimant an interpreter to review the policy. The employer also admitted on remand that the claimant's English proficiency is "1" on a scale of "1" to "10," the lowest on a ten-point scale, which it went so far as to indicate in its computer "Employee Notes" that it kept on its communications with the claimant. *See* Remand Exhibit # 8. This testimony eviscerates Finding # 7. There is no substantial and credible evidence to support a finding that the claimant was aware of the employer's requirement. Because we conclude that the claimant is eligible for unemployment on other grounds, we need not address today whether the employer's practice of providing its policy only in English, with no interpretation available for employees who do not speak or read English, satisfies the requirements of G.L. c. 151A, § 25(e).

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<sup>1</sup>The parties' testimony regarding the claimant's English proficiency, and the lack of interpretation for the employer's policy, while not explicitly incorporated into the review examiner's findings, 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).

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 meet his burden under the applicable law.

There is no question in this case that the claimant's last assignment with the employer ended when the employer's client company informed the claimant that he was laid off from his temporary assignment. Since the claimant was employed by a temporary help firm we must consider whether the circumstances of his separation implicate the provision of G.L. c. 151A, § 25(e), concerning employees of temporary help firms. The provision at issue 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 the assignment.

Under the above provision, a temporary worker who fails to request a new assignment prior to filing for unemployment compensation is deemed to have quit his employment and will be disqualified from benefits. In several prior decisions, the Board has interpreted this provision to require communication between the employer and the claimant at or near the end of an assignment, so that the employer has an opportunity to tender a timely offer of a new assignment to the claimant and thus avoid the claimant's unemployment. *See, e.g.*, Board of Review Decision 0016 0869 84 (Mar. 24, 2016); Board of Review Decision 0012 9652 36 (Feb. 27, 2015); Board of Review Decision 0002 2757 65 (Sept. 20, 2013); Board of Review Decision BR-113873 (April 25, 2011).<sup>2</sup>

In this case, the employer temporary help agency was well aware that the claimant's job assignment had ended on March 23, 2017, because the claimant reported to the employer's location to inform the employer he had been laid off. *See* Consolidated Finding of Fact # 8. Although neither party discussed the possibility of a new assignment, the employer clearly had an opportunity to offer the claimant work and did not do so, despite it having "multiple positions available" as of March 23, 2017. *See* Consolidated Finding of Fact # 5. As in our earlier cases, we decline to interpret the statute to require a claimant to initiate redundant contact with the employer in order to comply with an unduly formulaic interpretation of the statute, when the apparent purpose of the statute has been served.

Furthermore, we decline to endorse an interpretation of the statute that requires the claimant to formally request reassignment when there is contact with the employer upon the completion of an assignment. Where the employer knows the claimant's assignment has ended at the time it is communicating with the claimant, it cannot stand on ceremony and wait for the claimant to formally ask for a new placement, as the employer apparently did here.

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<sup>2</sup> Board of Review Decisions 0016 0869 84 and 0002 2757 85 are published on the Board's website, [www.mass.gov/dua/bor](http://www.mass.gov/dua/bor). Board of Review Decisions BR-113873 and 0012 9652 36 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

We, therefore, conclude as a matter of law that the claimant did not quit his employment, but instead, was separated because his assignment ended and the employer failed to offer him suitable work to continue his employment. The claimant is not disqualified from receiving unemployment benefits pursuant to G.L. c. 151A, § 25(e), under these circumstances.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending March 19, 2017, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 30, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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](http://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/jv