

**A claimant who worked all shifts as assigned to him by a temporary employment agency and who was in contact with the agency after his final assignment ended was separated due to lack of work. Lacking substantial evidence of any misconduct, he is not disqualified under G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0023 0233 09**

## **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 or about September 6, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on December 15, 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 March 1, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons 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 accepted the claimant's application for review and remanded the case to the review examiner to allow the claimant an opportunity to provide evidence, as well as to clarify what happened during the claimant's final period of employment. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant quit his position and is subject to disqualification pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant completed his final shift of work for the employer on September 6, 2017 and then was offered no work after that date.

### **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, a temporary employment agency, on and off from September 14, 2016 to September 6, 2017 as a General Laborer.
2. The claimant's last two assignment were from April 10, 2017 to May 19, 2017 for a distribution company and from August 30, 2017 for more than one company with intermittent need for temporary help (day-to-day).
3. On August 30, 2017, the claimant worked a one-day assignment for a client in [City B] ([City B] client).
4. On September 1, 2017, the employer's Consultant offered the claimant a one-day assignment on September 5, 2017 for a second client in [City A] ([City A] client).
5. On September 5, 2017, the claimant worked the one-day assignment for the [City A] client from 7:00 a.m. to 3:30 p.m.
6. At 5:05 p.m., the Consultant called the claimant and asked if he would work one more day (September 6, 2017) for the [City A] client. The claimant initially stated that he would not because he was on his feet all day and it was difficult for him, but the employer asked him as a favor and the claimant agreed. The Consultant told the claimant that she would look for something else for him.
7. On September 6, 2017, the claimant reported to the [City A] client assignment at 6:55 a.m. and spoke with the client's General Manager. The claimant explained that he agreed to work one more day, but the employer will look for something else for him. The General Manager thanked the claimant. The claimant completed his shift at 3:30 p.m.
8. On September 7, 2017, the claimant visited the employer's office at approximately 11:30 a.m. to deliver a cactus pad to the Consultant. The Receptionist said that she was in a meeting. The claimant asked the Receptionist to have the Consultant give the claimant a call.
9. The Consultant did not give the claimant a call.
10. On September 12, 2017 at approximately 10:00 a.m., the claimant called the employer regarding another assignment. The Consultant stated that she could not give the claimant any more work because the claimant allegedly told an employee with [the] [City A] client, who reported to the client's General Manager, that the [City A] client "sucks and treats employees like animals." The claimant denied the allegation. The Consultant also alleged that the claimant never showed up for work on September 7, 2017 for the [City B]

client. The claimant responded that no one told him about an assignment on September 7, 2017 and if someone did, he would have made transportation arrangements. The Consultant informed the claimant that she will have the Manager contact him.

11. After a couple of hours, the claimant visited the employer's office to speak with the Consultant and the Manager. The Receptionist informed the claimant that they were in a meeting and unavailable. The claimant asked the Receptionist to have someone call him.
12. On September 13, 2017, the claimant called and no one returned his call.
13. On September 14, 2017, the claimant called and no one returned his call.
14. On September 15, 2017, the claimant called and spoke with the Manager. The Manager mentioned that the claimant did not finish his shift on September 6, 2017, to which the claimant responded that he did. The Manager said that she will look into the situation and get back to him.
15. Also on September 15, 2017, the claimant was paid for sixteen hours of work for the pay period of September 3-9, 2017 (eight hours each on September 5 and 6, 2017).
16. No one contacted the claimant after September 15, 2017.

[Credibility Assessment:]

At the initial hearing, the employer gave often inconsistent and conflicting testimony without the claimant's participation. And at the remand hearing, the claimant gave very consistent and precise testimony without the employer's participation. Given that the claimant's testimony is now given greater weight for those reasons, the facts as found have changed substantially and most of the Board's questions are inapplicable as a result.

### 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 original 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the claimant's separation resulted from the employer's decision not to offer the claimant any work after September 6, 2017. Consequently, he is not subject to disqualification from the receipt of benefits.

As an initial matter, we must decide what section of law applies to the claimant's separation. The review examiner applied G.L. c. 151A, § 25(e)(1) in his decision. That section relates to quit situations or voluntary resignations. The DUA originally applied G.L. c. 151A, § 25(e)(2), the statute covering discharges. *See* Exhibit # 4. Following our review of the full record and the consolidated findings of fact, we conclude that the employer caused the separation in this case. The claimant worked as scheduled on August 30, September 5, and September 6, 2017. After that date, the employer did not offer him any further work. The findings do not support a legal conclusion that the claimant quit, abandoned his job, or otherwise caused his own separation. Therefore, G.L. c. 151A, § 25(e)(1) is not applicable here.

Because the employer initiated this separation, the claimant's eligibility for benefits is governed by 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 this section of law, the employer has the burden to show that the claimant is not eligible to receive benefits following his separation from employment. We conclude that the employer has not carried its burden.

As noted above, the claimant worked for the employer's temporary employment agency on August 30, September 5, and September 6, 2017. He had been informed on September 5 that he should report to his job assignment one more time on September 6, and then his contact person, the Consultant, would find him another assignment. The claimant did exactly as he was told. Later, on September 12, 2017, the employer informed the claimant that he did not report to a job assignment on September 7 and that he had indicated to another worker at a different job assignment that client "sucks and treats employees like animals." Following this, the employer did not get back to the claimant about offering him work. Because the claimant was in contact with the employer the entire time, and the employer did not offer the claimant a new assignment, we conclude that the claimant's separation is ultimately due to a lack of work.

The employer's allegations as to what the claimant told the worker about the client were unsubstantiated during the hearings. We note that the evidence as to what was told to the employer about what the claimant said was hearsay, without any corroboration or other indicia of reliability. We further note that the review examiner made no findings that the claimant actually said what he was accused of saying. Based on the findings, we cannot conclude that he engaged in any misconduct. Consequently, he is not disqualified pursuant to G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny unemployment benefits pursuant to G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence or free from error of law, because the review examiner's consolidated findings

of fact indicate that the claimant's separation is attributable to a lack of work and not due to any misconduct on the claimant's part.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning September 3, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 31, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](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.

SF/rh