Where the actual practices of the temporary help firm employer and clients misled the claimant to believe that she was employed by the client companies and that the employer was simply the payroll company, and where the claimant contacted the client for more work when an assignment ended, held the claimant took sufficient action to satisfy G.L. c. 151A, § 25(e).

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0024 4369 85

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 her position with the employer on December 24, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 10, 2018. The employer 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 denied benefits in a decision rendered on May 5, 2018. We accepted the claimant's application for review.

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, she 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 make further subsidiary findings from the record pertaining to whether the claimant knew she was in an employment relationship with the employer. Thereafter, the review examiner issued her 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 original decision, which concluded that the claimant is ineligible for benefits due to her failure to request a new assignment from her temporary help firm employer, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that she did not know that she was employed by a temporary help firm.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits effective January 7, 2018. The claimant worked for four employers, one of which was the instant employer, during the base period of the claim, which extended from January 1, 2017 through December 31, 2017. The Department of Unemployment Assistance determined the claimant was monetarily eligible to receive weekly benefits in the amount of $485.00, with an earnings exclusion of $161.67.

2. The claimant began employment with the employer, a temporary staffing agency, on May 3, 2017.

3. On May 3, 2017, the claimant electronically signed the employer's At-Will Agreement, Employment Policies and Procedures and Talent Agreement. The documents notified the claimant she was required to contact the employer within 24 hours of termination of her assignment to provide her availability for future assignments and each week thereafter. The documents also notified the claimant failure to contact the employer may affect her eligibility for unemployment benefits.

4. The claimant did not thoroughly read the employer's documents she electronically signed.

5. From May 3, 2017 until the date the claimant filed her unemployment claimant, the claimant never spoke with an employee of the employer staffing agency. The claimant didn't call the employer staffing agency and the employer staffing agency didn't contact the claimant.

6. The claimant worked for one of the employer's client companies (Client A), a cosmetic company, from November 24, 2017 until December 24, 2017, when she was laid off due to a lack of work. The claimant worked 96 hours during said period of time and was paid $18.00 per hour. The work assignments were offered to the claimant by Client A and not the employer staffing agency.

7. The claimant worked directly for Client A prior to working for the company through the employer staffing agency.

8. On a date on or before May 3, 2017, the claimant's supervisor at Client A advised her going forward she would be paid by the employer staffing agency and not Client A. The supervisor instructed the claimant to report her hours with Client A online to the employer staffing agency.

9. The claimant followed her supervisor's instructions.

10. While working for the employer with Client A, the claimant continued to receive her work assignments from Client A's representative.

11. The claimant contacted Client A for work.

12. The claimant did not contact the employer staffing agency for work with Client A because she believed the employer staffing agency was the payroll company for Client A.

13. The claimant worked for another employer's client company (Client B), a cosmetic company, from December 11, 2017 through December 21, 2017. The claimant worked 49 hours during said period of time and was paid $18.00 per hour. The work assignments were offered to the claimant by Client B and not the employer staffing agency.

14. The claimant did not work for Client B prior to working for the employer staffing agency.

15. After the claimant's assignment with Client A ended December 24, 2017, she did not contact the employer staffing agency to report her availability for work. She contacted Client A for work because she believed she was employed by Client A and not the employer staffing agency.

16. After the claimant's assignment with Client B ended, she did not contact the employer staffing agency to report her availability for work because she believed she was employed by Client B and not the employer staffing agency.

17. After the claimant's assignments ended with Client A and Client B, the employer staffing agency had work to offer the claimant with other cosmetic companies.

18. The employer staffing agency did not contact the claimant to offer her work after her assignments ended with Client A and Client B in December 2017.

19. After an issue was raised with the claimant's unemployment claim due to failure to maintain contact with the employer staffing agency, the claimant's supervisor at Client A provided the claimant with a contact telephone number for the employer staffing agency to report Client A did not have work available to the claimant.

20. On February 9, 2018, the claimant called the employer staffing agency and was instructed by an employee to report her availability for work each week. The claimant reported her availability for work each week to the employer staffing agency for that week forward.

21. The claimant has worked for another employer, a retail store, for approximately 40 years. The claimant works part time 8-15 hours each week and is paid $15.62 per hour.

22. The claimant has worked full time for a third employer, a golf club, for 5 years. The claimant works as a function waitress. She is paid $9.00 per hour, plus tips, which averages to $20.00 per hour. The club is a seasonal business and is open from approximately April or May through November.

23. On March 10, 2018, the DUA issued the employer a Notice of Approval under Section 25(e)(1) of the Law beginning January 7, 2018.

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. However, as discussed more fully below, we disagree with the review examiner's original decision to disqualify the claimant from receiving benefits.

Ordinarily, when a person separates from employment due to lack of work, she is involuntarily unemployed and eligible for benefits under G.L. c. 151A, § 25(e)(2). However, the Legislature has imposed an additional burden upon workers who are employed by temporary help firms. A separate provision under G.L. c. 151A, § 25(e) provides 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. (Emphasis added).

In her original decision, the review examiner relied upon exhibits presented by the employer, a temporary help firm, which showed that it had complied with its statutory obligation to advise the claimant in writing of her obligation to contact the firm upon completion of an assignment. *See* Consolidated Finding # 3. Although the employer technically complied with the statute, the consolidated findings after remand show that the employer's written directive to contact it for new assignments was subverted by the actual practices of the employer and its clients, which misled the claimant to believe that she was employed by the client companies.

In Board of Review Decision 0002 3154 36 (Nov. 8, 2013), we held that a claimant complied with the requirement of G.L. c. 151A, § 25(e), to contact her employer for work prior to filing for benefits, where she reasonably believed she was employed by the client company and not by

the temporary help firm.[1] In that case, the claimant did not have any direct communication with the employer before receiving DUA's Notice of Redetermination and Overpayment. She had been hired and assigned hours by client representatives and had contacted the client directly for additional hours after her assignment ended. The claimant had been told that the employer handled payroll. Id.

The case before us is strikingly similar. Here, the claimant never spoke to anyone at the employer staffing firm until well after her separation date, when DUA raised an issue about failing to contact the employer staffing agency and her Client A supervisor finally gave her the contact information. *See* Consolidated Findings ## 5 and 19. Work assignments were offered directly from Clients A and B, not from the employer. Consolidated Findings ## 6, 10, and 13. When her assignments ended with Client A, she reached out to Client A's representative for more work. Consolidated Findings ## 11 and 15. The review examiner has found that the claimant believed she was employed by Clients A and B directly, and that she believed the employer was the payroll company for Client A. *See* Consolidated Findings ## 12, 15, and 16. We think this belief was perfectly reasonable in light of how she received her assignments, and where, having been employed directly by Client A before May 3, 2017, the claimant was simply instructed to begin reporting her hours to the employer online so that she could get paid by the employer. *See* Consolidated Finding # 8.

As noted in Board of Review Decision 0002 3154 36, the above language of G.L. c. 151A, § 25(e) states "unemployment benefits *may* be denied" if a claimant working for a temporary placement agency fails to contact the employer prior to filing for benefits. In this case, the claimant contacted the client company for a new assignment because she reasonably believed that was her employer. Under these circumstances, we conclude that the claimant took sufficient action to satisfy the requirements of this statutory provision.

We, therefore, conclude as a matter of law that the claimant is eligible for benefits under G.L. c. 151A, § 25(e).

[1] Board of Review Decision 0002 3154 36 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 31, 2017, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 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

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