

**Where the claimant had not worked for the employer temporary staffing agency for over two years, and was not provided with a new written notice or reminded of the requirement to request re-assignment during his latter period of employment with the employer, the claimant had good cause for his failure to request re-assignment at the conclusion of his temporary assignment.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> 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: 0025 3033 83**

## **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 April 2, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 23, 2018. 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 July 17, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left his employment by failing without good cause to request re-assignment from this temporary staffing agency employer and, thus, was disqualified under G.L. c. 151A, G.L. c. 151A, § 25(e). 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 allow the claimant an opportunity to provide testimony and other evidence. Both parties attended the remand hearing. 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 decision, which concluded that the claimant voluntarily left his employment by failing without good cause to request re-assignment from this temporary staffing agency 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 employer is a temporary staffing agency.
2. The Technical Recruiter is the claimant's contact person at the employer's establishment.
3. The Technical Recruiter and the claimant both speak Spanish. The claimant's primary language is Spanish.
4. On September 21, 2015, the claimant went to the employer's establishment and brought in an interpreter with him as the claimant does not speak English.
5. The employer informed the claimant in writing of an obligation to request another assignment upon completion of an assignment.
6. On September 21, 2015, the claimant signed the employer's form, written in Spanish, title "Acknowledgment of Responsibility to Request An Additional Assignment (Exhibits 11-11A)."
7. On the employer's form, the following information is listed:

"I [claimant's name omitted] hereby acknowledge and understand it is my obligation to request an additional assignment from [employer's name omitted] upon the completion of each and every assignment.  
I understand my failure to do so will be considered a voluntary quitting of employment and could effect me collecting Unemployment Insurance Benefits. To Request an additional assignment, I understand and agree to contact my recruiter [name omitted] Monday through Friday between 8:30AM and 5PM at 978-663-2013 (Exhibit 11A)."
8. The claimant did not read the form he signed written in Spanish on September 21, 2015.
9. In 2015, the claimant worked one day for the employer's client. Due to an issue with the claimant's immigration status, the claimant could not work for the employer at that time.
10. The next time the claimant started working for the employer again was in October 2017 for the same client he had worked for 1 day in the past in 2015.
11. The employer did not have the claimant sign another form, titled Acknowledgment of Responsibility to Request An Additional Assignment, when the claimant started working for the client/employer again in October 2017.
12. On October 30, 2017, the claimant started working for the employer/employer's client again. The claimant was paid \$11.00 per hour by the employer to work

- for the client company. The claimant was scheduled to work Monday through Friday from 7:30AM until 4PM for the client company.
13. The claimant was aware that he was working for the client as a temporary worker through the employer's establishment. The employer was paying the claimant his wages.
  14. The claimant's last date of work for the employer's client was on March 30, 2018. On March 30, 2018, the employer's client laid the claimant off for lack of work.
  15. On April 2, 2018, the claimant's supervisor, at the client company, notified the claimant and the other temporary workers that the company was closing due to conducting an inventory and that the client company will call the temporary workers to come back to work.
  16. The client company never contacted the claimant to return to work.
  17. The claimant did not contact the employer to request an additional assignment before or after filing for unemployment insurance benefits.
  18. On April 9, 2018, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 1). The claim is effective the week beginning April 8, 2018.
  19. The claimant listed lack of work as the reason for separation from the employer's establishment when initially filing for unemployment insurance benefits (Exhibit 3).
  20. The employer returned a Lack of Work Notification form to the Department of Unemployment Insurance Benefits selecting 'quit' as the claimant's reason for separation from work (Exhibit 3).
  21. After the claimant filed for unemployment insurance benefits, the claimant received some documentation from the Department of Unemployment Assistance listing that the claimant had quit his job.
  22. The claimant did not quit his job.
  23. After the filing for unemployment insurance benefits, the claimant initiated a telephone call to the employer's Technical Recruiter. During this conversation, the claimant informed the Technical Recruiter that the client company had not called the claimant back to work after the inventory was completed. The Technical Recruiter was surprised by this information. The Technical Recruiter was expecting for the client company to call the claimant to return to work after the inventory was completed.

24. During the telephone conversation, the claimant asked the Technical Recruiter if the claimant can file for unemployment insurance benefits. In response to this inquiry, the Technical Recruiter informed the claimant he had a right to file for unemployment insurance benefits.
25. During the telephone conversation, the Technical Recruiter did not offer the claimant another assignment, and the claimant did not ask the Technical Recruiter for another assignment.
26. During the telephone conversation, the Technical Recruiter did not remind the claimant about the Acknowledgment of Responsibility to Request An Additional Assignment form that the claimant had signed in 2015.
27. The claimant did not realize he was supposed to request an additional assignment from the employer prior to filing for unemployment insurance benefits. The claimant did not read the Acknowledgment of Responsibility to Request An Additional Assignment form that the claimant had signed in 2015. The claimant believes if he read the form in 2015 that he would have realized he should have called the employer to request another assignment.
28. The claimant believed that the employer would call the claimant to offer him more work
29. The employer has additional assignments available for the claimant.

[Credibility] Assessment:

During the hearing sessions, the employer contended that the claimant quit his job. However, the claimant's contention to the contrary is assigned more weight. It is concluded that the claimant did not quit his job by failing to request another assignment even though, on September 21, 2015, the claimant signed the employer's Acknowledgment of Responsibility to Request An Additional Assignment form, where the claimant only worked for the employer 1 day in 2015 with the client then did not return to work for the employer/client again until October 30, 2017, to which the employer did not have the claimant sign another Acknowledgment of Responsibility to Request form. It is concluded that the claimant did not quit his job considering such an extended time period had passed since the claimant initially signing the Acknowledgment of Responsibility to Request An Additional Assignment form in 2015, working 1 day for the employer in 2015 and the claimant returning to work for the employer/client in October 2017.

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 except

Finding of Fact # 22, which constitutes a finding of law and not of fact. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The findings of fact state that the claimant, a temporary employee of a temporary staffing agency, separated from his employment upon the conclusion of his assignment. G.L. c. 151A, § 25(e), 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 (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 . . .

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.

In addition, the regulations found at 430 CMR 4.04(8) provide, in pertinent part, as follows:

(b) Unless the claimant satisfies the provisions of 430 CMR 4.04(8)(c), the commissioner shall determine that the claimant has voluntary quit employment if:

1. the claimant was employed by a temporary help firm; and
2. the temporary help firm advised the claimant in writing as provided in 430 CMR 4.04(8)(e) of the need to contact the temporary help firm for reassignment upon completion of an assignment; and
3. the temporary help firm submits information, supported by contemporaneous documentation prepared in the ordinary course of business, that the claimant did not request another work assignment upon completion of the most recent assignment.

(c) The claimant may avoid the commissioner's determination in 430 CMR 4.04(8)(b) above if the claimant shows that he/she:

1. did request another assignment; or

2. did not receive written notice from the temporary help firm of the obligation to request another assignment; or
3. had good cause, as determined by the commissioner, for failing to request another assignment.

(d) The request for a new assignment must be made by the claimant upon completion of the current assignment and before filing an initial (new or additional) claim for benefits.

(e) Any notice given by the temporary help firm to its temporary employees of the need to request a new assignment upon completion of their current assignment must be in writing and inform the employees of the method and manner for requesting a new assignment, such method and manner to be consistent with the normal method and manner of communication between the temporary employee and the temporary employment firm for which he/she works, and that a failure to request a new assignment may affect their eligibility for unemployment compensation.

We note that the review examiner's findings of facts and credibility assessment explicitly state that the claimant did not quit his employment. However, the record contains no suggestion that the claimant affirmatively quit his position in the traditional sense. Rather, whether or not the claimant 'quit' his position within the meaning of the above provisions of G.L. c. 151A, § 25(e) is a question of law, not of fact. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979).

In this case, the claimant was notified of the obligation to request a re-assignment but failed to do so before filing his unemployment claim. The review examiner credited the claimant's testimony that he failed to do so because he was unaware of such a requirement. Notably, the employer presented the written notice in question to the claimant in September, 2015. At that time, the claimant only worked for the employer for one day before becoming separated from his employment and later working for other employers. Just over two years later, in October, 2017, the claimant was re-hired by the instant employer. At that time, the claimant was not again provided the notice regarding requesting re-assignment. Nothing in the record indicates that the employer reminded the claimant about the policy during this later period of employment<sup>1</sup>.

Neither the statute nor the regulations specify whether or not the employer is required to provide new notice to a temporary employee each time the same individual is re-hired. In the present case, the claimant initially only worked for the employer for one day, had a break of over two years between periods of employment, was not reminded of the requirement upon being re-hired, and only ever worked for one of the employer's clients. In such circumstances, even the most reasonable and careful employee would not assume that such an important policy was still in place. While we decline to adopt a blanket rule requiring temporary staffing employers to again notify returning employees of the requirement during each period of employment, in the present circumstances, we conclude that the original 2015 document signed by the claimant did not provide

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

the claimant with reasonable notice that such a policy applied to his later 2017–2018 period of employment with the employer.

We, therefore, conclude as a matter of law that the claimant had good cause for his failure to request reassignment at the conclusion of his temporary assignment within the meaning of 430 CMR 4.04(8)(c).

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending April 7, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 21, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, 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](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.

JRK/rh