Temporary help firm's representative notified the claimant to stop reporting for work with its client, and the claimant and the representative communicated several times via email over the next several days. Although neither party discussed the possibility of a new assignment, the employer had an opportunity to offer one before the claimant filed for benefits. Her employment ended involuntarily and she may not be disqualified under G.L. c. 151A, § 25(e).

Board of Review
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Issue ID: 0025 5579 40

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 April 25, 2018. She filed a claim for unemployment benefits with the DUA, effective May 6, 2018, which was approved in a determination issued on August 4, 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 September 26, 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, 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 obtain additional evidence about communications between the claimant and the employer at the time her temporary assignment ended. 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's failure to affirmatively request a new assignment before filing her unemployment claim renders her ineligible for benefits under G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the consolidated findings show that the employer told the claimant her assignment ended and it offered her no additional work.

Findings of Fact

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

1. The claimant worked for a temporary agency as a full time Project Coordinator for the client employer from 11/13/17 until 04/25/18. The claimant's rate of pay was $24 per hour.

2. On 11/01/17, the claimant electronically signed off on receipt of the Talent Agreement.

3. The Talent Agreement states:

   "Obligation to Report Availability/Unemployment Benefits. Unless otherwise required by the state in which you are employed, you hereby acknowledge that within twenty-four (24) hours of the End Date of any Contract Assignment, and each week during any period when you are not on an active assignment, you will communicate at least one time with your assigning [employer] branch office concerning your availability for additional work with [employer]. You acknowledge having received and read the Notification of Unemployment – Failure to Maintain Contact form, and shall abide by its terms. Furthermore, failure to call your assigning branch office regarding your availability, or refusal to accept a job assignment, may result in your termination from [employer] or cause you to be disqualified for unemployment benefits (if you are otherwise eligible)."

4. On 04/25/18, the temporary agency representative sent the claimant an email at 7:15 PM that read:

   "Hi [Claimant],

   I tried calling you a couple of times this evening. [Client employer] needs to end your assignment effective immediately!

   I will call you tomorrow morning to go over the details. Please feel free to call me as well on my direct line at XXX-XXX-XXXX.

   I did not like leaving you a message with this information, but I needed to reach out to you immediately. DO not report to [client employer] tomorrow.

   Thank you.

   [Temporary Agency Representative]"

5. The temporary agency representative did not offer the claimant any additional assignments when she notified the claimant that her job with the client employer had ended.

6. The temporary agency representative did not remind the claimant of her obligation to contact the temporary agency for additional assignments when she notified the claimant that her job with the client employer had ended.

7. The claimant was not expecting her assignment to end and was caught off guard by the news; the claimant had hoped to be hired by the client employer as a permanent employee.

8. Between their [sic] 04/25/18 and 05/09/18, the claimant did not indicate to the temporary agency that she was unwilling to continue working for the employer or any of its clients.

9. On 05/08/18, the claimant filed her claim for unemployment benefits with an effective date of 05/08/18.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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 reject the review examiner's legal conclusion that the claimant is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner rendered her decision based upon G.L. c. 151A, § 25(e)(1), which states, 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 . . . .

However, Consolidated Finding # 4 shows that the claimant stopped working for the employer because the employer's representative notified her not to report for further work with its client. Generally, when a claimant stops working because the employer tells her to, this is treated as an involuntary termination of employment and she is eligible under G.L. c. 151A, § 25(e)(2), unless the employer shows that the separation is due to deliberate misconduct or a knowing policy violation. In this case, there is no indication of any misconduct. The client simply decided to end her assignment.[1]

[1] There is a vague reference to the employer having told the claimant it had to do with attendance and performance, *see* Exhibit 4, p. 2, but nothing else to indicate that claimant knowingly or deliberately did anything wrong.

Because the claimant worked for a temporary help firm, the Legislature has imposed an additional requirement that she contact the employer for a new assignment before filing her unemployment claim. Specifically, a separate provision under G.L. c. 151A, § 25(e), states 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.

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); and Board of Review Decision BR-113873 (April 25, 2011).[2]

In this case, the employer temporary help agency was well aware that the claimant's job assignment had ended on April 25, 2018, because it was the employer's representative who notified the claimant to stop reporting for work. *See* Consolidated Finding of Fact # 4. Remand Exhibit 6 includes a number of email communications over the next several days between the employer's representative and the claimant concerning this separation.[3] 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. *See* Consolidated Finding of Fact # 5. As in our earlier cases, 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.

We, therefore, conclude as a matter of law that the claimant's employment ended involuntarily, and she is not disqualified under G.L. c. 151A, § 25(e).

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[2] Board of Review Decisions 0016 0869 84 and 0002 2757 85 are published on the Board's website, 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.

[3] 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 review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 6, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 2019

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

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