

**Claimant was told on a Friday about a lay off from her temporary assignment, and she was told to contact the employer's offices on Monday, because a new assignment was available for her. She called early on Monday, did not speak with her recruiter, and did not leave a message that she had called inquiring about the assignment. Held the claimant did not satisfy the statutory requirement that she contact the temporary help firm for reassignment before filing for benefits. Therefore, she is denied benefits under G.L. c. 151A, § 25(e)(1).**

**Board of Review  
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**Issue ID: 0031 1199 07**

## **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 affirm.

The claimant separated from her position with the employer on or about May 20, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 18, 2019. 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 August 20, 2019.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer 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 regarding her separation. Only the claimant 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 to deny benefits 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 claimant finished her temporary work assignment, she was told to contact the employer's office for a new assignment, and she called the employer early in the morning and did not leave a message stating that she was looking for reassignment.

## 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 claimant's contact person at the employer's establishment is the Recruiting Manager.
3. On May 14, 2018, the claimant signed the employer's Notification of Unemployment Eligibility form (Exhibit 3). In this form, the employer listed a phone number, an address, and an e-mail address for the claimant to contact the employer upon completing an assignment. On the form the employer wrote in part:

"Upon completion of an assignment, you must contact [employer's name omitted] within 3 working days. You may contact any [employer's name omitted] in person, by phone or by e-mail between the hours of 8:00 a.m. and 5:00 p.m. (Exhibit 3)."

"Failure to contact [employer's name omitted] for reassignment before filing a claim for Unemployment Insurance benefits may also result in the denial of those benefits as you may still be considered an employee of [employer's name omitted] even though you are currently not on assignment (Exhibit 3)."

4. The employer notified the claimant in writing of the responsibility to contact the employer for reassignment prior to filing a claim for unemployment benefits.
5. On May 21, 2018, the claimant started to work for the employer's client, a pharmaceutical manufacturer, as a fulltime inspector. The claimant was paid \$17.00 per hour. The claimant was scheduled to work Monday through Friday from 7 a.m. – 3:30 p.m.
6. The claimant's last date of work with the client was on May 17, 2019. The client laid the claimant off from work.
7. On May 17, 2019, the recruiter from the employer's establishment notified the claimant that the client laid the claimant off from work from the assignment. This conversation occurred after the claimant's shift had ended. This conversation occurred at approximately 4 p.m. or 4:30 p.m. During this conversation, the recruiter notified the claimant to contact the Recruiting Manager the following Monday for reassignment. The recruiter informed the claimant that the Recruiting Manager had another assignment for the claimant.
8. The Recruiting Manager was not in the office on May 17, 2019.

9. The claimant contacted the employer for reassignment prior to filing a claim for unemployment benefits.
10. The claimant contacted the Recruiting Manager for reassignment on May 20, 2019 by initiating a telephone call at 8:30 a.m. The Recruiting Manager did not answer the claimant's telephone call, and the claimant hung up. The claimant did not leave a voice mail message for the Recruiting Manager as the claimant was feeling rushed.
11. If the claimant had called the employer/recruiting manager on May 20, 2019, there was an assignment available for the claimant. The claimant was informed by the recruiter on May 17, 2019 that the Recruiting Manager had another assignment for the claimant.
12. On May 20, 2019, the claimant subsequently filed an initial claim for unemployment benefits (Exhibit 1).
13. The claimant did not specifically inform the employer verbally or in writing that she was quitting her job with the employer.
14. The claimant did not quit her job.
15. The claimant was discharged from her assignment with the employer's client due to a lack of work.
16. The employer did not contact the claimant on May 20, 2019 or May 21, 2019.
17. On May 22, 2019, the claimant and Recruiting Manager had a telephone conversation. During this conversation, the Recruiting Manager informed the claimant that the job was closed and not available. The Recruiting Manager informed the claimant that the Recruiting Manager will look for something else for the claimant.
18. On June 3, 2019, the Recruiting Manager initiated contact with the claimant inquiring into if the claimant was looking for work. The Recruiting Manager mentioned an assignment to the claimant in [City A], Massachusetts. The claimant informed the Recruiting Manager that the claimant did not have a car at that time and asked for a closer assignment.
19. The claimant lives in [City B], Massachusetts. [City A], Massachusetts is 20 miles away from the claimant in [City B], Massachusetts.

Credibility Assessment:

The overall testimony of the claimant is assigned more weight than the overall testimony of the employer where the claimant's testimony was more specific compared to the testimony of the employer.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except, except for Consolidated Findings of Fact ## 9, 14, and 15. We reject these findings, because, as we discuss below, we conclude that the claimant did separate voluntarily from her employment.<sup>1</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude that the claimant is not eligible to receive unemployment benefits following her separation from the employer.

This case presents a threshold question of whether the claimant quit or whether she was laid off due to a lack of work. This question requires the application of G. L. c. 151A, § 25(e), which provides in pertinent part:

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.

The DUA has also promulgated regulations pertaining to this requirement. They are found at 430 CMR 4.04(8), and state, in relevant part, as follows:

#### (8) Temporary Help Firm Former Employees.

(b) Unless the claimant satisfies the provisions of 430 CMR 4.04(8)(c), the commissioner shall determine that the claimant has voluntarily 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 9.04(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

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<sup>1</sup> These findings constitute mixed questions of fact and law. "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).

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.

The above-quoted portion of G. L. c. 151A, § 25(e), requires a conclusion that the claimant voluntarily quit her job with this temporary help employer, if the claimant failed to contact her employer for a new assignment prior to applying for unemployment benefits. However, that provision by its own terms does not come into play unless the employer has provided the claimant with written instructions of her duty in that regard. In this case, there was no dispute that the claimant was provided written instructions on what to do after the completion of her assignment. Consolidated Finding of Fact ## 3 and 4. Thus, the claimant's eligibility for benefits turns on whether she contacted the employer for the new assignment prior to filing for unemployment benefits on May 20, 2019.

The Board has interpreted this contact provision of the statute 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 (Apr. 25, 2011).<sup>2</sup>

Here, the claimant and a representative from the employer's offices spoke on May 17, 2019. During that conversation, the representative told the claimant there was another assignment available for her. Consolidated Finding of Fact # 11. The claimant was told to call on May 20, 2019 to speak with her recruiter to get the assignment. On May 20, the claimant called at 8:30 a.m., but did not speak with her recruiter. Consolidated Finding of Fact # 10. She left no message to say that she had called. We think that these actions by the claimant did not give the employer an opportunity to offer the claimant the new assignment. Especially where the claimant knew that there was work available for her, her failure to call back or leave a message for the recruiter was unreasonable.

The review examiner made a finding about some of the content of the employer's Notification of Unemployment Eligibility form in Finding of Fact # 3. The form says, in part, that the worker can contact the employer "in person, by phone or by e-mail between the hours of 8:00 a.m. and 5:00 p.m." However, the review examiner did not also note that the form states the following:

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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.

[Employer] can be reached 24 hours a day, 7 days a week. If no one answers the phone, you must leave a message on the answering machine. Your call will be returned during normal business hours (Monday through Friday 8:00 a.m. – 5:00 p.m.).

Calling early in the morning and not leaving a message was, in practical terms, equivalent to not calling at all.<sup>3</sup>

Because the claimant did not undertake reasonable measures to obtain reassignment on May 20, 2019, prior to filing her claim for unemployment benefits, we reject Consolidated Finding of Fact # 9. Moreover, we do not think that there was good cause for the claimant's failure to request the assignment. *See* 430 CMR 4.04(8)(c)(3). The review examiner found that the claimant did not leave a message, because she was "rushed." However, the claimant was already on the phone, leaving a message would have taken seconds, and she immediately filed her unemployment claim thereafter. If she had the wherewithal to make the call and file for benefits, she certainly could have left a message to show that she made contact with the employer on May 20, 2019. It follows that the claimant separation was not due to a lack of work, as indicated in Consolidated Finding of Fact # 15.

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and free from error of law, where the claimant knew a new assignment was available for her, but her attempt to obtain reassignment were insufficient when she called the employer early in the morning and left no message indicating that she had called to request reassignment.

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<sup>3</sup> The claimant testified that she called her recruiter at "8 [or] 8:30." When asked by the review examiner if the voicemail came on, presumably so that she could leave a message, the claimant responded in the affirmative, but she left no message. The claimant offered that she was in a rush, and that she was going to call back. She then filed her unemployment claim. While not explicitly incorporated into the review examiner's findings, this testimony 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).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning May 19, 2019, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 30, 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](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