

When the temporary help firm employer called the claimant to say that his assignment had ended and it did not offer him more work, the claimant's obligation to contact the employer for reassignment before filing his claim was satisfied. The separation is not deemed to have been a voluntary quit. Held he was laid off due to lack of work and eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0070 0632 67

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 and filed a claim for unemployment benefits with the DUA, effective May 23, 2021, which was approved in a determination issued on January 27, 2022. 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 January 27, 2023. 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, was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that claimant separated voluntarily from his job at a temporary placement agency when he turned down suitable work, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. From 2014 until 2019, the claimant worked for a software company. His duties at the software company included shipping and receiving.
2. The claimant began work for the employer, a staffing agency, in October 2020. He accepted a position as a shipper/receiver at a manufacturer. He worked from 8 a.m. to 5 p.m. Monday through Friday and earned \$20 per hour.

3. The employer maintains an Attendance Policy and Notification of Unemployment Insurance Eligibility policy which states in part: As a temporary employee of (employer), it is expected that you will be assigned to work for one or more of our client companies. Upon completion of an assignment, you must contact [Employer] to request reassignment... Failure to contact [Employer] 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] even though you are not currently on assignment.
4. The claimant was provided with the employer's policies in writing when he began his employment.
5. The claimant last performed work for the employer on Friday, May 21, 2021.
6. On Saturday, May 22, 2021, the employer's account manager for the manufacturer called and informed him that his assignment had ended.
7. The claimant believed the assignment might have led to permanent work, and he was surprised.
8. On Sunday, May 23, 2021, the claimant filed a new claim for unemployment benefits. He was determined to have a benefit year beginning May 23, 2021.
9. On Tuesday, May 25, 2021, a recruiter from the employer called the claimant. She left a voice mail message for him with an offer of work. The work offer was as a full-time lead receiver earning \$20 per hour.
10. The claimant called the recruiter. He asked if it was a permanent assignment. She told him it was not. The claimant asked the recruiter if there were any assignments available in facilities. She told him there were not. He told her he was only looking for work in facilities.
11. The claimant did not accept the assignment or any additional assignments with 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's 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 legal conclusion that the claimant is ineligible for benefits.

In this case, the claimant worked for the employer, a temporary staffing agency, until May 22, 2021. *See Findings of Fact ## 2 and 6.* Because of this employment relationship, we must first

consider his eligibility under the specific statutory provision that applies to temporary help firm employees. G.L. c. 151A, § 25(e), states, in relevant 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 the assignment.

Findings of Fact ## 3 and 4 show that the employer had advised the claimant in writing of his obligation to contact the employer prior to filing for benefits. His last physical day of work was Friday, May 21, 2021, and he filed his claim for unemployment benefits on Sunday, May 23, 2021. Findings of Fact ## 5 and 8. Pursuant to the above provision, the separation will be deemed to be a voluntary quit only if the claimant had failed to contact the employer for reassignment in between.

The findings further show that, on Saturday, May 22nd, the employer spoke with the claimant, advising him that his assignment had ended. Finding of Fact # 6. In our view, this satisfied the claimant's statutory requirement. 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 (March 24, 2016). During the parties' communication on May 22, 2021, the employer had an opportunity to offer the claimant new work prior to the claimant filing for benefits. Given this contact, he may not be deemed to have quit under the above section of G.L. c. 151A, § 25(e).

Moreover, nothing in the record indicates that, during that May 22, 2021, conversation in which the employer's account manager spoke to the claimant, she had offered him another assignment. Simply put, at that time he was laid off due to lack of work. For purposes of unemployment eligibility, this is deemed to be an involuntary separation, and we must analyze his separation pursuant to G.L. c. 151A, § 25(e)(2), which provides:

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 willful 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, . . .

“[The] grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

Since there is no evidence to indicate that the layoff was due in any way to the claimant's behavior, the employer has not met its burden to demonstrate either misconduct or a violation of policy. Therefore, he may not be disqualified under G.L. c. 151A, § 25(e)(2).

We note that whether the claimant turned down suitable assignments the following week is a separate legal question, which is not before us. *See* Findings of Fact ## 9–11. These offers were made *after* the employer had laid him off. They did not cause his unemployment.

We, therefore, conclude as a matter of law that the claimant's separation from the employer was involuntary, and the employer has failed to meet its burden under G.L. c. 151A, § 25(e)(2), to show that it was due to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced policy.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 23, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 9, 2024



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
(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