Because the temporary help firm employer failed to show that it notified the claimant in writing that failure to request a new assignment may affect his eligibility for unemployment benefits, the claimant is not deemed to have voluntarily quit his job pursuant to the temporary help firm provisions under G.L. c. 151A, § 25(e) and 430 CMR 4.04(8). However, the Board disqualified the claimant pursuant to G.L. c. 151A, § 25(e)(1), because he stopped working simply because he did not like the assignment. This is neither good cause attributable to the employer nor an urgent, compelling, and necessitous reason for leaving.

Board of Review
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Issue ID: 0076 9507 76

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 his position with the employer on June 11, 2022. He sought unemployment benefits under a previously filed claim, effective March 30, 2022. However, in a determination issued on June 16, 2022, the DUA disqualified him from receiving benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on October 1, 2022. 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, he 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 further evidence about any written instructions that the employer provided to the claimant as required under 430 CMR 4.04. 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, a temporary help firm employee, is ineligible for benefits because he stopped working at his temporary assignment without demonstrating that he did so for good cause attributable to the employer or urgent, compelling, and necessitous reasons, 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 claimant worked full-time and part-time for the instant employer, a temporary employment agency, as a laborer from October 11, 2011 to June 10, 2022. The claimant was paid based on the type of placement from $16.00 to $58.00 per hour.

2. The claimant's last job with the employer was full-time as a maintenance worker at a hospital from June 8, 2022 to June 10, 2022, at a pay rate of $18.00 per hour.

3. The employer lists available jobs through a computer Application that can be viewed and accepted and rejected by the employees directly.

4. On June 11, 2022, the claimant used the employer's electronic Application to "call-off" from the hospital job he had been working because he did not like the work. The Application instructed the claimant to contact the employer. The claimant called the office on that date and left a voicemail informing the employer that he was not returning to the assignment.

5. The claimant was informed in writing on his employment application of the requirement to contact the employer to request new work upon completion of an assignment. The date of the application is unknown to the employer.

6. The employer believes that the claimant's most recent reminder of his obligation to contact the employer is every time he ends an assignment because the Application prompted the claimant to call the office.

7. The employer did not have a record of a written reminder given to the claimant of his obligation of the requirement to contact the employer to request new work upon completion of an assignment.

8. The claimant was not notified in writing of an obligation to view the computer Application at the completion of an assignment.

9. The most recent contact the employer had with the claimant was on November 23, 2022. The claimant resumed work with the employer on November 21, 2022, in Connecticut and stopped-in to the office to pick up a pay card.

Credibility Assessment:

The differences between the claimant's and the employer's testimony were not significant or relevant to issue in dispute. The employer agreed to provide documentary evidence by 6 p.m. on December 13, 2022: Claimant's Employment Application; Claimant's Corrective Action Form; Claimant's Log-In Activity

Database; Computer Application Job Ticket Information. No documents were submitted by 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 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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The first question is which provisions under G.L. c. 151A, § 25(e) dictate the claimant's eligibility for benefits. Because the claimant worked for a temporary help firm, we must first direct our attention to the following paragraphs under G.L. c. 151A, § 25(e), which state:

> 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.

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 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.

In our view, the Legislature enacted the statutory provision with the mindset that a claimant would be deemed to have quit rather than have been laid off, if the employer or client ended the assignment and the claimant did not request a new one. In the present case, we need not even reach the question of whether the claimant's contact with the employer satisfied his obligation to seek a new assignment. This is because we do not have evidence that he was properly notified of the possible consequence for failure to do so.

The review examiner found that the claimant's employment application informed him in writing of the requirement to contact the employer to request new work upon completion of an assignment. Consolidated Finding # 5. However, nothing in the record shows that this written notice informed the claimant that his failure to request a new assignment may affect his eligibility for unemployment benefits, as required by 430 CMR 4.04(8)(e). As noted in the credibility assessment, the review examiner asked to see the written instructions, and the employer agreed to submit it but then failed to produce it. Absent such evidence, the employer has not met its burden under 430 CMR 4.04(8)(b)(2), and the separation may not be deemed a voluntary quit pursuant to the above paragraphs under G.L. c. 151A.

However, this does not automatically render the claimant eligible for benefits. Since there is no suggestion that he was on a leave of absence of any sort, it is reasonable to infer that he was out of work because he separated from employment on June 11, 2022, when he notified the employer that he would not return to the hospital assignment. *See* Consolidated Finding # 4. We reach this conclusion even though he returned to work for the employer the following November. *See* Consolidated Finding # 9.

In his appeal to the Board, the claimant argues that, since the separation may not be deemed a voluntary quit pursuant to the temporary help firm provisions cited above, his separation must be viewed as a discharge. He further argues that, inasmuch as there is no evidence of misconduct, this must be deemed to be a layoff and the claimant may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2). We disagree.

We do not believe that the Legislature intended the temporary help firm provisions to be applied so narrowly. Where, as here, a claimant is not deemed to have voluntarily quit pursuant to the temporary help firm provisions, we must consider whether the circumstances of his separation render him ineligible under any other provision. In this case, the next question is whether this was a resignation or discharge and, accordingly, we analyze his eligibility under G.L. c. 151A, § 25(e)(1) or (2).

The consolidated findings show that the claimant's assignment for the employer did not end because the client hospital laid him off or the employer directed him to stop working. Thus, he was not discharged, and he may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2). Rather, the claimant initiated his own separation on June 11, 2022, when he notified the employer that he would not return to the assignment. Consolidated Finding # 4.

Where a claimant initiates his separation from employment, we consider his eligibility under G.L. c. 151A, § 25(e)(1), which provides, in relevant 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

These statutory provisions expressly assign the burden of proof to the claimant.

As nothing in the record indicates that there were any pressing circumstances that caused the claimant to end his assignment, the separation was not for urgent, compelling, and necessitous reasons. *See* Reep v. Comm'r of Department of Employment and Training, 412 Mass. 845, 848, 851 (1992).

In order to determine whether the separation was for good cause attributable to the employer, the focus is on the employer's conduct and not on the employee's personal reasons for leaving. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 23 (1980). Nothing in the record suggests that the employer did anything to trigger the claimant's resignation.

Nor is there any evidence that the work he performed at the hospital was unsuitable. *See* Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2013), *summary decision pursuant to rule 1:28* ("Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.'"), *quoting* Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 767 (1981); *see also*

Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 349-–350 (1948) (in determining the suitability of a job, many factors are to be considered, including whether the employment was detrimental to the health and safety of the employee).

The claimant ended his assignment simply because did not like the work. Consolidated Finding # 4. While that may have been the correct personal decision, it does not rise to good cause attributable to the employer, and it does not warrant an award of unemployment benefits under G.L. c. 151A, § 25(e)(1).

We, therefore, conclude as a matter of law that although the claimant's separation is not deemed to be a voluntary quit pursuant to the temporary help firm provision under G.L. c. 151A, § 25(e), and 430 CMR 4.04(8), the claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), as he voluntarily left his job without demonstrating good cause attributable to the employer or urgent, compelling, and necessitous reasons.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 11, 2022, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 22, 2023

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
(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