The review examiner's legal conclusion that the claimant voluntarily quit her position with a temporary help firm was incorrect, where it is undisputed that the claimant separated due to a lack of work when the client cancelled her assignment after learning of her changed availability due to her childcare responsibilities. The employer was aware her assignment ended and did not offer her another. Effectively, she was discharged due to lack of work and may not be disqualified pursuant to G.L. c. 151A, § 25(e).

Board of Review
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Issue ID: 0077 0401 16

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 May 19, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 23, 2022. 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 September 23, 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, 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 the claimant voluntarily quit her employment, is supported by substantial and credible evidence and is free from error of law, even though her employer notified her that her temporary assignment was over, and it failed to show that she turned down another assignment.

Findings of Fact

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

1. The claimant worked full-time for the instant employer, a temporary employment agency, as an accountant from March 30, 2022, to May 19, 2022.

2. The agency assigned the claimant contract work with regular work hours of Monday through Friday 8:30 a.m. to 5:00 p.m. at a pay rate of $25.00 per hour.

3. On May 19, 2022, the claimant informed the instant employer that she would be out of work for five days due to being exposed to her grandson who tested positive for COVID-19. The claimant would be available to work as of May 25, 2022.

4. On May 19, 2022, the claimant also informed the instant employer that as of June 17, 2022, her available hours to work would be changing to 11:00 a.m. to 7:00 p.m. due to childcare requirements for her grandson because of school ending.

5. The contract assigned to the claimant could not accommodate her newly requested hours and terminated the employer's services.

6. The instant employer did not have employment available for the claimant that would fit into the claimant's specific hourly requirements. The employer did have work available for the claimant for her original work hours between 8:00 a.m. and 5:00 p.m.

7. The employer expects to re-employ the claimant when she is available to work.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. As written, Finding of Fact # 5 is confusing. In light of the record, we believe that the review examiner meant to write that the employer's client terminated the employer's services, because it could not accommodate the claimant's newly requested hours. In adopting the remaining findings, we deem 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 was disqualified from receiving benefits.

The claimant's last assignment with the employer ended because the employer's client company informed the employer that the client no longer wanted the claimant's services. *See* Finding of Fact # 5. Since the claimant was employed by a temporary help firm, we must consider whether the circumstances of her separation implicate the provision of G.L. c. 151A, § 25(e), concerning employees of temporary help firms. The provision at issue states, in pertinent part, 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 the assignment.

In this case, the review examiner failed to inquire whether the claimant had been advised in writing of her obligation to contact the employer temporary help firm upon completion of an assignment. Even if the employer had, we do not believe the claimant's separation must be deemed a voluntary quit.

Under the above provision, and the regulations at 430 CMR 4.04(8), a temporary worker who fails to request a new assignment prior to filing for unemployment compensation is deemed to have quit her employment and will be disqualified from benefits. 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).

In this present case, the claimant separated from the employer temporary help firm on May 19, 2022. Finding of Fact # 1. We note that the DUA's electronic record-keeping system, UI Online, shows that, after separating from the employer, the claimant did not re-open her 2019-01 claim for benefits until the week beginning May 29, 2022. The review examiner did not render a finding as to whether there was contact between the parties prior to doing so. However, the record shows that the employer was well aware that the claimant's job assignment ended on May 19, 2022. The claimant testified that she was notified the assignment was cancelled via email on May 19, 2022. Additionally, the employer's witness testified that the employer was looking for other assignments for the claimant after her assignment ended.[1]

We also note that the claimant never suggested in her testimony that she needed to quit, nor was she unavailable to work her normally scheduled hours between May 25, 2022, and June 16, 2022. *See* Findings of Fact ## 3 and 4. Although there is no indication that either party discussed the possibility of a new assignment, the employer clearly had an opportunity to offer the claimant work and did not do so.[2] As in our earlier cases, we decline to interpret the statute to require a claimant to initiate redundant contact with the employer in order to comply with an unduly formulaic interpretation of the statute, when the apparent purpose of the statute has been served.

Given the facts in this case, we view the claimant's separation as involuntary, and, therefore, we must analyze her eligibility pursuant to G.L. c. 151A, § 25(e)(2), which provides:

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[1] This portion of the claimant's and employer's testimony, while not explicitly incorporated into the review examiner's findings, 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).

[2] The findings show that the employer had work available for the claimant during the hours 8:00 a.m. – 5:00 p.m., which the claimant was available to perform until June 17, 2022. *See* Findings of Fact ## 4 and 6. It may be that the employer did not want to place her on another assignment, knowing that she needed to change her hours in June, but this is pure speculation.

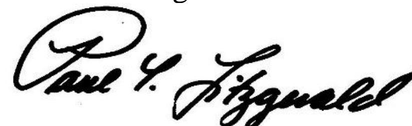
> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence 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, . . .

"[T]he 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).

The employer has not met its burden. The findings show that the employer's client terminated the claimant's assignment, and that nothing else was offered to the claimant. *See* Findings of Fact ## 5 and 6. In effect, she was discharged from employment. It is unclear whether the driving factor was her absence for a week due to COVID-19 exposure or the need to change her hours in a few weeks due to childcare responsibilities. *See* Findings of Fact ## 3 and 4. Regardless, neither circumstance constitutes misconduct, and there is nothing to indicate that the claimant violated an employer policy. As such, the employer has not met its burden to establish deliberate misconduct in wilful disregard of the employer's interest or a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that that the claimant did not quit her employment, but instead was discharged due to changes in her availability because of childcare. Because of the change in her availability, the client terminated her assignment, and the employer did not find her another assignment. The claimant was effectively discharged due to a lack of work by the employer, and her discharge was not shown to be the result of a policy violation or deliberate misconduct. The claimant is not disqualified from receiving unemployment benefits, pursuant to G.L. c. 151A, § 25(e), under these circumstances.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 22, 2022, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 2023

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.

MR/rh