

After being told that his assignment with the employer's client had ended, the claimant contacted the employer seeking a new assignment. The employer did not respond to the claimant and did not offer him any work. Held the claimant was discharged for a lack of work and is entitled to benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review**  
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**Issue ID: 0080 9208 85**

### Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 May 5, 2023. He filed a claim for unemployment benefits with the DUA, effective May 21, 2023, which was denied in a determination issued on August 26, 2023. The claimant 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 awarded benefits in a decision rendered on December 13, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to review the record and issue a credibility assessment based upon conflicting evidence. 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 employer laid off the claimant due to a lack of work after his previous assignment had ended, 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 for the employer, a temporary job placement agency, from January 11, 2023, through May 5, 2023, when the employer discharged the claimant.

2. The claimant was assigned to a temporary assignment with the employer.
3. On May 5, 2023, the employer's recruiter informed the claimant that the last assignment ended. The recruiter asked the claimant to contact her on Monday, the next business day.
4. On May 5, 2023, the employer did not assign other work to the claimant.
5. On Monday May 8, 2023, the claimant contacted the employer via telephone. The claimant was notified by the staff person who answered the call that the recruiter was not in the office. The staff person informed the claimant that his message would be relayed to the recruiter.
6. The recruiter did not receive a message that the claimant called her on May 8, 2023.
7. The claimant contacted the employer via phone for work about twice a week after May 5, 2023. During each call, the claimant was unable to reach the recruiter.
8. On June 12, 2023, the claimant contacted the employer for work and left a voicemail for the recruiter. The recruiter received the message and contacted the claimant. The recruiter offered a new assignment to the claimant. The claimant informed the recruiter that he would accept the position. However, the position was closed, preventing the employer from assigning the claimant to that client.
9. The employer discharged the claimant due to lack of work.

#### Credibility Assessment:

It is not disputed that when the claimant's assignment ended on May 5, 2023, the recruiter reminded the claimant to call the office for additional work on the following business day. The claimant's testimony was direct and consistent about his own efforts to contact the employer, leaving messages with the staff person. The recruiter denies receiving any message from the claimant until June 12, 2023. It is believable that the claimant left messages for the recruiter during his calls and that the recruiter did not receive the messages from the staff. The staff person was not presented as a witness and did not offer direct testimony to rebut that of the claimant. Given this, the claimant's testimony that he contacted the employer the Monday after his previous assignment had ended is credible.

#### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is eligible for benefits.

Since the claimant was employed by a temporary help firm, we must consider whether the circumstances of his separation implicate the provision of G.L. c. 151A, § 25(e), concerning employees of temporary help firms. *See Consolidated Findings ## 1 and 3.* 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.

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 his employment. 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).*

Following remand, the review examiner accepted as credible the claimant's testimony that he contacted the employer, attempting to contact the recruiter to request a new assignment repeatedly after being told his previous assignment had ended. Consolidated Findings ## 5, 6, and 7. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Upon review, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

As the claimant made several efforts to contact the employer following the end of his previous assignment but was not offered any work, we view the claimant's separation as involuntary. Consolidated Finding ## 5, 7, and 8. Therefore, we must analyze his eligibility pursuant to G.L. c. 151A, § 25(e)(2), 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 . . . (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).

As a threshold matter, the employer must show that the claimant engaged in some sort of misconduct or rule violation that caused the separation. Here, there was no evidence indicating that the claimant engaged in any misconduct or violated any rule or policy. Rather, the employer initiated the separation because it did not offer the claimant any work after May 5, 2023. Consolidated Findings ## 3, 4, 7, and 9. Thus, the claimant was eligible for benefits upon his separation.

We, therefore, conclude as a matter of law that the claimant was discharged from employment. We further conclude that the employer failed to show that his discharge was due to deliberate misconduct in wilful disregard of the employer's interest or due to a knowing violation of a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending May 21, 2023, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 10, 2024**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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](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.

LSW/rh