

The review examiner's legal conclusion that the claimant voluntarily quit his position with a temporary help firm was incorrect, where the client terminated his assignment due to poor performance. The employer notified the claimant that his assignment ended and did not offer him another. Effectively, the claimant was discharged due to lack of work and may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0082 2439 77

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 on February 5, 2024. He filed a claim for unemployment benefits with the DUA, effective February 4, 2024, which was approved in a determination issued on March 20, 2024. 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 May 1, 2024. 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 voluntarily quit his employment, is supported by substantial and credible evidence and is free from error of law, where the employer notified the claimant that his temporary assignment was over and did not offer him a new assignment at that time.

Findings of Fact

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

1. The claimant worked full-time as a temporary employee for the employer, a temporary employment agency, from May 28, 2023, until February 5, 2024.

2. The claimant had a recruiter assigned to him by the employer.
3. The employer has a written policy provided to all employees during the onboarding process that they agree to remain in contact with the employer on a weekly basis following the end of an assignment. Employees cannot move past the onboarding process without signing an acknowledgement to the policy.
4. The claimant was assigned to work at a client employer (Company A).
5. The claimant's job performance at Company A was not up to Company A's standards. Company A notified the employer it was terminating the claimant's assignment due to performance issues.
6. On February 5, 2024, the employer called the claimant on the telephone and notified the claimant their assignment ended with Company A. The employer also sent a follow up e-mail to the claimant.
7. The claimant did not contact the employer after February 5, 2024.
8. The claimant did not request a leave of absence from the employer.
9. On April 17, 2024, the claimant was sent a request to provide additional information regarding their claim. A question on a questionnaire asked, "The employer states that you 'failed to contact [Employer] for additional employment.' Did you contact [Employer] to let them know that you had been let go? If yes, on what date, who did you contact and how did you contact them? I.e, phone email text. What phone number, email or text number did you contact them to? If you did not contact them, why not?", to which the claimant responded, "Yes I did 02/06/2024 [Recruiter] I did contact him by email."
10. The next question on the questionnaire asked the claimant, "Were you aware that you were required to contact the employer for other work if the assignment you were on ended? If yes, did you contact them when you were discharged? Please explain.", to which the claimant responded, "Yes I did contact them, and let them know about my situation and I asked if there anything else for me to apply for medical field, but they said there is nothing else open."

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 reject the review examiner's legal conclusion that the claimant is 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 due to performance issues. *See* Finding of Fact # 5. 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. 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 found that the claimant had been advised in writing of his obligation to contact the employer temporary help firm upon completion of an assignment. Finding of Fact # 3. Even so, we do not believe that 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 his employment and may 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 February 5, 2024. 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 filed his 2024-01 claim for benefits two days later, on February 7, 2024. The review examiner found that the employer called the claimant on February 5th to notify him that his assignment with the client had been terminated and followed up with an email. Finding of Fact # 6.

The employer has made no assertions that it offered the claimant a new assignment either during the phone call or the follow-up email on February 5th. It appears that, per the employer's policy, the claimant was expected to remain in contact with the employer on a weekly basis after the end of an assignment, presumably until the employer could find a new assignment for him. Finding of Fact # 3. 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 at the initial contact, which in this case took place on February 5th.

Given the facts in this case, we view the claimant's separation as involuntary, and, therefore, we must analyze his eligibility 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 wilful 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, he was discharged from employment. The client terminated the claimant's position because it believed that the claimant's job performance was not up to its standards. *See* Finding of Fact # 5. “When a worker is ill equipped for his job . . . any resulting conduct contrary to the employer's interest is unintentional; a related discharge is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits.” Since no allegation was made that the claimant was intentionally failing to perform his duties to the client's expectation, it appears that the claimant was simply “ill equipped for his job.”

In light of the above, the employer has not shown that the circumstances of the claimant's separation constitute 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 his employment, but instead was discharged due to performance issues. Further, we conclude 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 policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 4, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 30, 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

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.

SVL/rh