THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW
DECISION

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MEMBER

BR-108951 (July 29, 2009) -- Awarded benefits to claimant who left work voluntarily to accept a full-time "temp-to-perm" position, where the new position had all the characteristics of a permanent job, notwithstanding its label.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny benefits following her separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated on October 13, 2008. She filed a claim for unemployment benefits with the DUA and was disqualified in a determination issued by the agency on December 6, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which only the claimant attended, the review examiner affirmed the agency's initial determination. In a decision rendered on January 7, 2009, the review examiner concluded that employment as a temporary worker for a temporary service agency was not permanent employment and, thus, subjected the claimant to disqualification under G.L. c. 151A, § 25(e).

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we accepted the case for review. Both parties were invited to present their reasons for agreeing or disagreeing with the review examiner's decision. Neither party responded within the time allowed. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who quit one job in order to take another from which she was later laid off, can be said to have left her first job to accept permanent employment, when that new employment was a "temp-to-perm" position with a temporary service agency.

Findings of Fact

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

1. The claimant applied for benefits on October 15, 2008. The Division disqualified the claimant on December 6, 2008. The claimant appealed on December 8, 2008.

2. The claimant worked for the employer from May 2008 to October 13, 2008. The claimant worked as a sales associate for a retail department store. When hired the claimant worked between 36 and 40 hours. Over the last two months of her employment, the claimant worked about 20 hours per week. The claimant earned $9.00 per hour.

3. The claimant quit her employment in order to take a temporary service agency position.

4. On October 13, 2008, the claimant informed the employer that she would quit work. The claimant informed the employer that she had taken a temporary service agency position.

5. The claimant took the temporary service agency position, because it promised to lead to a permanent, full time position after three months. The temporary service agency position consisted of medical assisting, the claimant's work prior to her sales associate position. If hired full time the claimant would have had entitlement to benefits.

6. Prior to accepting the temporary service agency position, the claimant had interviewed twice for the position.

7. The claimant began work for the secondary employer. The claimant did not possess the necessary computer skills for the position. The claimant separated from employment shortly after beginning work.

8. Had the claimant known about the need for the computer skills, she would not have accepted the position.

9. The claimant did not attempt to preserve her work with the instant employer in any way.

10. After separating from the secondary employer, the claimant did not attempt to return to work with the instant employer.

Ruling of the Board

The Board adopts the DUA review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The findings indicate that the claimant left a part-time job in order to accept a full-time position with a temporary help firm in a "temp-to-perm" capacity. Accordingly, her eligibility for benefits will be determined in accordance with G.L. c. 151A, § 25(e), which states, in relevant part, as follows:

> No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became separated from such new employment for good cause attributable to the new employing unit.

The review examiner found that the claimant had a firm offer of new work at the time she quit her job. The new work was full-time, and the claimant became separated from the new work under non-disqualifying circumstances. At issue is the meaning of "permanent" under the statute.

We start with the observation that few jobs indeed in today's labor market are "permanent" in the sense that they come with long-term guarantees of employment. Rather, the watchwords of the modern world of work are risk, contingency, and impermanence.[1]

The risk that the claimant would not be continuing in her new job "permanently" was certainly elevated during the period of her initial employment with the temporary help firm. However, many new hires experience substantially the same increased risk of job loss during the first few months of their employment, as the traditional probationary period to which new hires are subjected often includes an understanding that the standards for discharging them during this period are relatively low.

Moreover, under the at-will employment status that most workers have today, their employment cannot be characterized as being truly "permanent", because at-will employees can be discharged at any time, without notice, for virtually any reason, or no reason at all, so long as the reason is not an impermissible one. *See* e.g., Jackson v. ABCD, Inc., 403 Mass. 8, 9 (1988); Folmsbee v. Tech Tool Grinding Supply, Inc., 417 Mass. 388, 394 (1994).

[1] For an analysis of the generalized trend toward declining job tenure and increasing employment instability in the U.S. labor market, see Jay Stewart, "Recent Trends in Job Stability and Job Security", Bureau of Labor Statistics Working Paper 356, March, 2002.

Also, employers are increasingly making it a practice to recruit their "permanent" personnel through "temp-to-perm" arrangements. If we were to categorically exclude all such "temp-to-perm" jobs from our understanding of what kinds of jobs are "permanent", we would be excluding a growing share of the workforce, for whom the best route to a "permanent" job may be through the "temp-to-perm" vehicle.

In this claimant's case, the new work in the "temp-to-perm" position she took offered a substantially better opportunity than her previous employment. She would be working full-time hours rather than her prior 20 hours per week, and her salary would be $12.00 per hour versus $9.00 per hour in her prior job[2]. She would have a number of fringe benefits available to her and the work involved the use of higher skills, holding out the hope of a more professionally satisfying work life. Finally, the job appeared, at least, to have the makings of a "permanent" job and the claimant reasonably believed that it was such a job.

We think that to exclude on a *per se* basis all jobs that have been labeled "temp-to-perm" or "temporary" from the definition of "permanent," as it is used in G.L.c 151A, §25(e), simply because of the way they are labelled is too rigid a formulation.[3] The better approach, in our view, is to look to determine based on the actual facts and circumstances of each case whether the new job, irrespective of the label attached to it, has a reasonable probability of continuing for a significant or indefinite period of time. In the case now before us, the claimant had prior work experience in the field of medical assisting. She went through two interviews before being hired, which suggests that the temporary help firm exercised considerable care to ensure that their hire was a person who would be able to succeed over the long run in the new position. Most importantly, the position had not been characterized as a short-term or purely temporary job, but rather as one that would, within a three month period likely lead to long-term employment. We conclude on the facts of this case that there was sufficient reason for the claimant to believe that the job would continue for a significant or indefinite period of time for us to deem it to be "permanent."

We, therefore, conclude as a matter of law that the claimant is not subject to disqualification since she left her job in good faith to accept new employment on a permanent, full-time basis, within the meaning of G.L. c. 151A, §25(e).

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[2] The claimant's compensation rate, 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 Director, Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

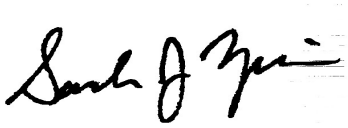
[3]The danger of relying solely on labels such as "temporary" or "permanent" to define the duration of jobs is illustrated by the Microsoft Ninth Circuit cases, in which thousands of long-term employees, some of whom had more than a decade's tenure with the employer, were labelled "temporary". *See* Vizcaino v. Microsoft Corp, 173 F.3d 713 (9th cir. 1999)("Microsoft III") and prior decisions.

The DUA review examiner's decision is reversed. The claimant is entitled to benefits for the week ending October 18, 2008 and subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 29, 2009

John A. King, Esq.
Chairman

Donna A. Freni
Member



Sandor J. Zapolin
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – August 28, 2009

JAK/ jv