THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-123778-TRA (Jan. 17, 2013) – A claimant whose termination from a trade-certified employer was determined to be non-disqualifying for purposes of receiving regular unemployment benefits under G.L. c. 151A, § 25(e)(2), was not eligible to participate in the Trade Program, because she did not separate due to "lack of work" within the meaning of the Trade Act.

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 federal Trade Adjustment Assistance ("TAA") benefits under the Trade Act of 1974, as amended, 19 U.S.C. § 2101 et seq. (2011) ("Trade Act")[1]. We assume jurisdiction to review, pursuant to our authority under 19 U.S.C. § 2311(e), 20 C.F.R. § 617.51(a), and G.L. c. 151A, § 41. We affirm.

The claimant had been assigned to work at a company that became trade certified by the U.S. Department of Labor (DOL). Following her separation, she applied for TAA benefits, and on May 3, 2012, the DUA TRA Unit denied the claimant's application. The claimant appealed that determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the determination, holding that the claimant was not entitled to TAA benefits in a decision rendered on June 25, 2012. We accepted the claimant's application for review.

Participation in the TAA program was denied after the review examiner concluded that the claimant was not an adversely affected worker under the Trade Act, as required by 20 C.F.R. § 617.3(b) and (c), and, therefore, was not entitled to TAA benefits under 20 C.F.R. § 617.11(a)(2)(i). 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

[1] The Trade Adjustment Assistance Extension Act of 2011 (Pub. L. 112-40).

examiner to obtain more evidence about where the claimant was assigned to work and the identity of the trade-certified group of workers. Both the claimant and a representative from the DUA TRA Unit 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 on appeal is whether the claimant, who was arguably a member of the group of workers certified to become eligible to participate in the TAA program, and whose separation was ultimately found to be non-disqualifying under G.L. c. 151A, § 25(e)(2), was nonetheless not eligible for TAA benefits because she was not separated from her employment due to lack of work attributable to foreign trade competition.

Findings of Fact

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

1. The claimant had been employed as a credentialing associate for the instant employer, [Employer]. Her employment began on 6/27/10 until her separation took effect on 6/25/11. The claimant worked for the VSP and Enterprise unit of the organization.

2. The claimant was terminated by the employer while she was on FMLA. The claimant filed an unemployment claim on 7/1/11 after her separation took effect. The claim was initially approved, but the employer appealed which resulted in an overturned decision.

3. The claimant appealed the decision to the Board of Review, which ultimately found in her favor. The Board of Review ruled that the claimant did not knowingly violate the employer's policy or engage in deliberate misconduct in wilful disregard of the employer's interest within the meaning of M.G.L. c. 151A, Section 25(e)(2).

4. The claimant applied to participate in the Trade Program. The claimant met with a TRA counselor at the Haverhill Career Center.

5. Form 8555A [sic], Request for Employment Information, was sent to [Employer], which was returned by the SR HR Payroll Representative on 4/9/12 who had indicated that the claimant was let go for reasons other than lack of work.

6. The form 8555A [sic] also stated that the claimant "did not work in Creditialing [sic] CNO [sic] and CPC Division, a group of workers certified by the Secretary of Labor as eligible to apply for adjustment assistance under the Trade Act of 1974, amended 1981." (Exhibit 1)

7. There is no CPD division at [Employer].

8. The Trade unit offered into evidence a copy of the Secretary of Labor's Petition Number 81137 (DOL Petition). The claimant submitted a MCAD letter of complaint into the record which established that the claimant worked for the CDO team at [Employer]. (Remand Exhibit 7)

9. The claimant worked for the CDO team at [Employer] located in Andover. The claimant's job duties required her to enter physicians' data into the computer ensuring that their licenses were intact and whether any malpractice suits were filed against them. The claimant entered data for both [Employer] and [X] group. The claimant's work did not differ from that performed by the group of adversely affected workers certified in the DOL petition.

10. On May 3, 2012, the Trade Unit issued a determined [sic] to the claimant which cited The Code of Federal Regulations [20 CFR] Section 617.11 as the basis for their determination.

11. The claimant did not qualify for TRA because it was determined that the claimant did not work in the Trade-certified unit of the company.

12. The determination also cited that the claimant did not meet The Code of Federal Regulations [20 CFR] Section 617.3 because the employer did not confirm that she was laid off.

13. The claimant appealed the determination in a timely manner.

Ruling of the Board

The Board adopts the review examiner's consolidated 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 review examiner denied TAA benefits based upon her conclusion that the claimant failed to qualify as an adversely affected worker under 20 C.F.R. § 617.11, which provides, in relevant part, as follows:

> (a) Basic qualifying requirements for entitlement—
>
> (2) To qualify for TRA for any week of unemployment an individual must meet each of the following requirements of paragraphs (a)(2)(i) through (vii) of this section:
>
> (i) Certification. The individual must be *an adversely affected worker covered under a certification.* (Emphasis added.)

The first issue in this case is whether the claimant worked in the part of the employer's organization that the DOL certified as an adversely affected group. At the remand hearing, the DUA TRA Unit entered a copy of the DOL certification into evidence. The document identifies those workers who are eligible to apply for TAA benefits as: "All workers of [Employer], Credentialing: CDO and CPC Division, including on-site leased workers from [names of leasing firms], Andover, Massachusetts, . . ."[2]

At the hearing, the claimant could not identify which entity she worked for—she did not know—she simply knew that she did the same work of credentialing physicians as those workers described in the certification[3]. The review examiner found that the claimant's work "*did not differ"* from that performed by the group of adversely affected workers certified in the DOL petition. In light of the evidence, this finding is reasonable. However, it falls short of concluding that the claimant *was in* the certified group.

Nonetheless, we need not reach a decision as to whether the claimant was covered under a certification, because the claimant's reason for separation from employment does not meet the Trade Act's definition of an adversely affected worker.

The term "adversely affected worker" is defined under 19 U.S.C. § 2319(2), as follows:

> The term "adversely affected worker" means an individual who, *because of lack of work in adversely affected employment*, has been totally or partially separated from such employment. (Emphasis added.)

Thus, we must consider whether the reason for the claimant's separation from work had to do with adverse affects of trade competition. In this case, the employer reported to DUA on Form 855A that the claimant separated because of violating work rules[4]. As the review examiner found, the Board of Review ultimately ruled in a separate decision that although the claimant was discharged for violating the employer's rules, the discharge was not disqualifying for the purpose of regular unemployment benefits under G.L. c. 151A, § 25(e)(2). This was because the employer did not meet its burden of showing that the claimant knowingly violated the employer's work rules or intentionally engaged in deliberate misconduct. *See* BR-121233 (R. Exhibit 3). However, a claimant may be eligible for regular unemployment benefits and not meet the eligibility criteria for participation in the Trade Program.

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[2] This description of the certified group of adversely affected workers at [Employer] appears in R. Exhibit 6, DOL Certification TA-W-81,137. R. Exhibit 6, 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).

[3] This portion of the claimant's testimony is also part of the unchallenged evidence introduced at the hearing. Id.

[4] Exhibit 1 is the completed DUA Form 855A which the TRA Unit received from the employer.

Here, the review examiner found that the claimant was discharged while she was on FMLA. Upon being terminated, she was no longer on leave; her employment ended. As a result of the Board's decision under G.L. c. 151A, § 25(e)(2), the claimant collected unemployment benefits. She had been terminated, and the reasons had nothing to do with foreign trade competition. *See* 19 U.S.C. § 2102(4); Dougherty v. Unemployment Insurance Appeal Board, CIV. A. 80A-OC-11, 1981 WL 384360, at *2 (Del. Super. Ct. Aug. 10, 1981) (even though the state agency concluded that the claimant was not discharged for cause and paid him unemployment benefits, he was not laid off for lack of work due to adverse import competition, and he, therefore, does not meet the threshold requirement for Trade Act benefits).

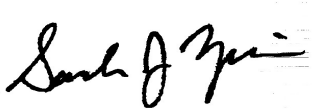
To qualify for Trade Act benefits under 19 U.S.C. § 2319(2), a worker must separate for non-disqualifying reasons *and* because of lack of work in adversely affected employment. Sinykin v. Commissioner of Economic Security, 594 N.W.2d 227, 231-232 (Minn. Ct. App. 1999). Here, the claimant separated for non-disqualifying reasons under G.L. c. 151A, but she did not separate due to lack of work in adversely affected employment within the meaning of the Trade Act.

We, therefore, conclude as a matter of law that the claimant did not separate from her employment due to lack of work. Therefore, she is not an adversely affected worker within the meaning of 19 U.S.C. § 2319(2) and 20 C.F.R. § 617.11.

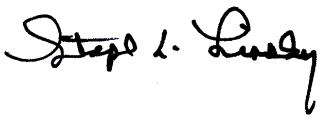
The review examiner's decision is affirmed. The claimant is not eligible for TAA benefits.

BOSTON, MASSACHUSETTS
DATE OF MAILING - January 17, 2013

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
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- February 19, 2013

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/ jv