

BR-125310

CLAIMANT APPELLANT:
Hearings Docket #618292

EMPLOYING UNIT:

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Kathleen Della Penna, 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 was separated from her position with the employer on June 8, 2012. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 8, 2012. 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 December 13, 2012. 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 remanded the case to the review examiner to afford the claimant an opportunity to testify. Both parties 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. This case required an additional hearing for further evidence.

The issue on appeal is whether the claimant, a temp worker, quit her job without good cause, or was discharged after her temp employer advised her that her temporary assignment had ended, and after she was removed from the agency's roster and thusly become ineligible for further assignments.

Findings of Fact

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

1. The claimant worked as a customer service representative and she was most recently employed from 4/29/12 through 6/8/12.
2. The claimant was called in to work a shift but was instructed to leave by the supervisor on duty when she told him that she had no training on out-bound calls.
3. The instant employer is a temporary agency.
4. The assignment that the claimant was working was a long term assignment. The claimant had been working for this client doing only in-bound calls. The claimant was aware that some of her co-workers were given training to do out-bound calls in addition to in-bound calls. The claimant never had training for out-bound calls.
5. When an individual works on either in-bound or out-bound calls they work from a script. The script is different for in-bound and out-bound calls and therefore it requires some training.
6. The claimant generally worked Monday through Thursday.
7. Prior to being called in on 6/8/12 the claimant last worked on 5/31/12 and she was next scheduled to work on 6/11/12.
8. On 6/7/12 the office manager on the temporary assignment called the claimant, and asked if she would come in on 6/8/12 to do in-bound calls. The claimant told the manager, "As a favor to you I will."
9. The manager works on site and on 6/8/12 she was in her office.
10. On 6/8/12 the supervisor on duty informed the claimant that she would be doing out-bound calls. The claimant told the supervisor that she was never trained for out-bound calls and he told the claimant that she could leave.
11. There was no scene when the supervisor told the claimant she could leave. She was happy to leave because she didn't have the training needed to do the out-bound calls.

12. The claimant received a telephone call from the temporary agency while she was on the way home indicating that the job had ended so that she did not have to report back to the client company.
13. The manager made several attempts to contact the claimant and left voice mail messages. The claimant called the manager back but never got through to her and she finally left a message with another office staff person.
14. When the manager did contact the claimant she indicated that she had walked off the job. The claimant denied walking off the job.
15. The temporary agency will no longer consider the claimant as a candidate for other jobs due to the way the last assignment ended.
16. The claimant would not have accepted the final assignment had she been told that the work would be doing out-bound calls.

The claimant's testimony as to what happened in the work place is credible as she was the only witness with firsthand testimony on that matter.

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 benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1), which provides, in pertinent part as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

After the initial hearing, solely on the basis of the employer's testimony, the review examiner concluded that the claimant left work voluntarily, without good cause attributable to the employer. After remand, the facts appear differently.

From the remand findings, we conclude that claimant's separation was a discharge that occurred when the temporary employer ended her assignment after telling the claimant that she could leave, and then when the employer did not offer her further placements and would no longer consider her a candidate for other jobs. As such, the claimant's separation is controlled by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter 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 . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to prove it discharged the claimant for a knowing violation of a reasonable and uniformly enforced policy, or for deliberate misconduct in willful disregard of the employer's interest. We conclude that the employer has not met its burden.

Following remand, the review examiner found that the temporary client of the temporary agency asked the claimant if she would come in on her day off to do inbound calls, and the claimant agreed to do so. However, when she arrived at work, expecting to do inbound calls, the claimant was told she had to do outbound calls, for which she had never received training. The claimant would not have accepted the final assignment had she been told she would be handling outbound calls. When the claimant told the supervisor that she had not been trained to do outbound calls, he responded that she could leave. However, before the claimant reached home, she received a telephone call from the temporary agency indicating that her assignment had ended and that she should not report back to the temporary job. The review examiner found that the claimant called the temporary agency to speak to the manager and when the claimant never got through to the manager, left a message for her. The temporary agency no longer considered the claimant for other jobs, due to the way in which her assignment ended.

The review examiner made a credibility assessment that the claimant's testimony as to what happened in the workplace was credible. 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. MCAD*, 423 Mass. 7, 15 (1996).

These facts support our conclusion that the employer initiated the claimant's separation. Because the employer has characterized the claimant's separation as a resignation, it has established no relevant policy or expectation that was violated by the claimant, nor has it provided any evidence of intentional wrong doing by the claimant.

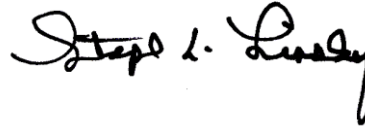
We, therefore, conclude as a matter of law that the claimant was discharged and that there is no evidence in the record of either a knowing violation or deliberate misconduct, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 2, 2012, and for subsequent weeks, if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING -



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- July 1, 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.

SPE/jv