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Issue ID: 0002 2960 41

BOARD OF REVIEW DECISION

0002 2960 41 (Jan. 17, 2014) – Claimant's resignation in the middle of a disciplinary investigation was not involuntary in anticipation of discharge within the meaning of the Supreme Judicial Court's decision in Malone-Campagna. The employer's investigatory process was incomplete and any discharge for alleged misconduct was not imminent. The claimant had to burden to prove that her resignation was for good cause attributable to the employer.

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 reverse.

The claimant resigned from her position with the employer on February 19, 2013. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 22, 2013. 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 June 7, 2013.

Benefits were awarded after the review examiner determined that the claimant left employment because she reasonably believed the employer was about to discharge her, and the record did not establish that such discharge would have been for disqualifying misconduct. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer'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 on appeal is whether the review examiner's conclusion that the claimant is entitled to benefits is supported by substantial and credible evidence and free from any error of law, where he found that the employer was conducting an investigation into the possible theft of baggage fees, the claimant was questioned by the employer about it, the claimant was advised by her union to quit, and the claimant quit in the middle of the investigation.

Findings of Fact

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

1. The employer is an airline. The claimant worked as a customer service agent for the employer. The claimant worked for the employer from 5/17/09 until 2/19/13.

2. The employer allows customers to carry one bag onto its planes free of charge. The employer charges baggage fees for most items that passengers check in for transport. The employer does not charge for medical items, personal assistance items, and some sports equipment.

3. The claimant belonged to a labor union while she worked for the employer.

4. The claimant processed many customers each day. She checked many bags each day. She entered bag information into the employer's computer.

5. The employer suspected that the claimant stole money from it. Specifically, the employer suspected that the claimant entered into its system that she waived baggage fees for some items yet collected fees for these items.

6. The employer compiled several print-outs from its computer system. The print-outs showed that the claimant waived baggage fees for customers. The employer contacted four of these customers. These customers told the employer that they indeed paid baggage fees.

7. The employer's supervisor and its investigator met with the claimant on 2/19/13. The claimant's union steward and the union president also attended the meeting. The employer showed the print-outs to the claimant and inquired about them. The union representatives told the employer that the claimant possibly made mistakes when she entered information into the computer. The investigators told the representatives to "shut up." He also told the claimant that he is a "former cop."

8. After the employer showed a number of print-outs to the claimant in the 2/19/13 meeting, the union officials met with the claimant outside of the meeting room. The steward said that they must "go into job saving mode." The union president said, "We can't because she hasn't been here long enough." The claimant challenged this. The union president said "we cannot argue for her job, she has to resign. The union president directed the claimant to write a resignation note. He tore paper from his notepad and the claimant wrote the note. The union president read it and said that she must give indication that the union did not coerce her to resign. The claimant then wrote, "I take full responsibility for my actions which have led me to this decision." The claimant then left. The union then submitted the note to the employer.

9. The employer never told the claimant that it discharged her or that it planned to discharge her. The employer never told the claimant that she could not leave the 2/19/12 meeting.

Ruling of the Board

In accordance with our statutory obligation, the Board has reviewed the examiner's findings of fact to determine whether they are supported by substantial and credible evidence, as well as whether the examiner's conclusion that claimant should not be disqualified under G. L. c. 151A, § 25(e)(1) for quitting her employment is free from error of law. After such review, we adopt the examiner's findings, as we deem them to be supported by substantial and credible evidence. We hold, however, that the review examiner's conclusion – that the claimant left work with good cause attributable to the employer – is erroneous based on the facts and evidence in the record.

G.L. c. 151A, § 25 (e)(1), 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, . . .

Under this section of the law, the claimant has the burden to show that she is eligible for benefits despite having quit her employment. Following the hearing, the review examiner concluded that the claimant had carried her burden. He decided that the claimant was eligible for benefits because she quit her job in anticipation of being discharged by the employer for conduct which the employer had not proved to be disqualifying under G.L. c. 151A, § 25(e)(2). After reviewing the entire record, we conclude that the claimant has not shown that she was in imminent danger of being discharged for non-disqualifying reasons. Therefore, she should be denied benefits.

It is well-settled that an employee who resigns under reasonable belief that they are facing imminent discharge is not disqualified from receiving unemployment benefits merely because the separation was technically a resignation and not a firing. *See* Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399 (1984). In such a case, the separation is treated as involuntary and the inquiry focuses on whether, if the impending discharge had occurred, it would have been for a disqualifying reason under G. L. c. 151A, §25(e)(2). For example, impending separations based on imminent layoff or poor job performance would not be for disqualifying reasons, and an employee who quits in reasonable anticipation of such would be eligible for benefits. *See* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-599 (1981), Scannevin v. Dir. of Division of Employment Security, 396 Mass. 1010, 1011 (1986) (rescript opinion).

In this case, however, the basis for the potential discharge (stealing baggage fees), if established, could have been disqualifying, depending upon the circumstances of the theft and the claimant's state of mind. The claimant quit in the middle of an investigatory meeting conducted by the employer. The claimant was told by her union, but not by any representative of the employer, that she should quit her position based upon what had transpired thus far in the investigation.

While the comments of the union president persuaded the claimant that her job could not be saved if the investigation progressed any further, the employer itself gave no indication that the claimant's job was necessarily in jeopardy. The question, therefore, is whether the claimant, having interrupted the employer's investigation of her alleged misconduct by quitting, may still claim both that discharge was imminent and that the employer should have to prove that she engaged in disqualifying misconduct. The review examiner ruled in favor of the claimant, because he placed the burden on the employer to establish misconduct and then concluded that the employer did not meet that burden. We think under these circumstances that was error.

The Board has previously considered whether a claimant is qualified for benefits if she or he quits before an investigation into misconduct has been conducted. In that case, BR-119386-A (November 2, 2011), the Board wrote:

> [The Malone-Campagna] principle does not mean, however, that a claimant may avoid disqualification simply by resigning before the employer has even completed an investigation that might have supplied the basis for disqualifying discharge. The review examiner appears to have awarded benefits premised on her implicit conclusion that, at the time that the claimant resigned the employer could not have proved misconduct. This may – or may not – have been true, but it is not important to the outcome of this case, because at the time the claimant resigned the employer had not decided whether to discharge the claimant, and indeed had not even held an investigatory interview with him.
>
> In this circumstance, the employer is not obligated to show that a hypothetical firing, which never occurred, based on an investigation that was not completed, would have been a disqualifying separation under G. L. c. 151A, §25(e)(2), because the employee has not shown that he had a reasonable basis for his belief that he faced imminent termination.
>
> That being the case, we must conclude that the claimant's resignation was not involuntary within the meaning of Malone-Campagna, but rather merely a voluntary quit under G. L. c. 151A, §25(e)(1). As such, the claimant bears the burden of showing good cause or urgent, compelling, and necessitous circumstances…."

Id. at 3.

In the case at hand, the employer's investigation had proceeded further than it had in the above-quoted case. Here, the employer had begun, but not completed, an investigatory interview. Here, further, the claimant had been advised by her union, if not her employer, that her job was in jeopardy, which creates a stronger inference that her quit was involuntary than was true in our earlier case. However, we view the most significant circumstances to be the same in both cases: the employer had not completed its investigation or as yet identified the grounds it believed it could substantiate for discharge, and it was the claimant's resignation that interrupted the investigatory process. While the claimant's preemptive action (and the union's advice) may have been entirely rational at that point, the quit cannot be viewed as so involuntary (or, put another way, the discharge as so imminent) that the burden of proving disqualifying misconduct should shift to the employer. In accord with our earlier holding, therefore, we conclude that the

claimant voluntarily quit and retained the burden to prove that such quit was without good cause attributable to the employer.

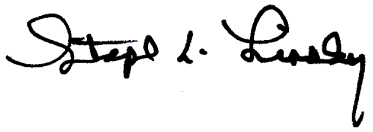
The findings of fact do not satisfy the claimant's burden. The review examiner made no findings indicating that the claimant did not steal. He also made no determination that she made a mistake with the baggage fees. The findings do indicate, however, that the claimant collected certain bag fees from customers and then entered in the computer system that the bag fees had been waived. Neither these findings nor the evidence in the record establish that the employer's suspicion of baggage fee theft was so groundless as to constitute such good cause.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is not supported by substantial and credible evidence and is based on an error of law. The claimant quit her job voluntarily and without good cause attributable to the employer.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending February 23, 2013, and for subsequent weeks, until such time as she has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 17, 2014

Paul T. Fitzgerald, Esq.
Chairman



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ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh