THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-118094 (Jul. 29, 2011) – Claimant did not have good cause to quit his job at a bus company over his employer's intent to set off his wages to pay for the claimant's accrued unpaid municipal parking tickets. These set-offs were permissible under G.L. c. 149, § 148, as most recently construed by the Supreme Judicial Court in Camara v. Attorney General, 458 Mass. 756 (2011). *[Note: The District Court affirmed the Board of Review's decision.]*

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 the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant resigned from his position with the employer on November 24, 2010. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on January 25, 2011. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 22, 2011.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer 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 back to the review examiner to take additional testimony regarding the employer's parking ticket policy and whether there was a process though which the claimant could appeal tickets he received while in possession of the employer's van. 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.

The issue on appeal is whether the claimant, who had received numerous parking tickets while in possession of the employer's van, but failed to pursue appeals of those tickets, had good cause for leaving employment attributable to the employer when he resigned after his employer informed him that it would be deducting the past due, unpaid parking ticket fees and fines from his wages.

Findings of Fact

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

1. From September 16, 2010 through November 24, 2010, the claimant worked as a driver for the employer's transportation company. The claimant was hired to work part-time.

2. The claimant's schedule varied. He generally worked between 15 and 30 hours per week.

3. The claimant has a commercial driver's license and was qualified to drive a school bus. A large portion of the employer's business is transporting students either on buses or smaller vans/vehicles.

4. When hired, the claimant was given a school route driving a van, with the understanding that as bus routes became available, the claimant would be able to bid for them.

5. Driving a van only required a 7D license. The claimant's bus driver license allowed him to drive any vehicle that was covered by the 7D license.

6. The bus runs were normally longer and paid better and were, therefore, more desirable than 7D runs.

7. The employer initially gave the claimant a 7D route that required him to work from 6:30 am to 8:00 am; and from 2 pm to 3:15 or 3:30 pm. The claimant was paid $27.50 for each morning run and $27.50 for each afternoon run that he drove.

8. Since the claimant could also drive a bus, the employer would sometimes pull the claimant from his assigned 7D run to fill in on bus runs when needed.

9. The employer also, at times, assigned the claimant to drive students on field trips or to sporting events. To allow the claimant to arrive on time, the employer covered the claimant's 7D run with a different driver if there was a scheduling conflict.

10. The claimant was late three times picking up students for after school events, causing the students to miss two track events and a symphony performance. The three school systems for which this happened were very unhappy with the employer and asked that the claimant not drive their events in the future.

11. These three school systems accounted for approximately 80% of the employer's school transportation business.

12. On November 9, 2010, the employer issued the claimant a written warning for being late for scheduled trips.

13. During the meeting on November 9th, the claimant complained that he was not earning enough money. The claimant told the employer that if he were given a permanent bus route and more money then he would perform better.

14. The employer responded that a disciplinary meeting was not the proper forum to ask for more money. The employer suggested that the claimant improve his performance and then initiate a conversation about salary.

15. After the November 9th meeting, the claimant called out sick numerous times.

16. The employer did not give paid sick time. Neither did the employer offer paid holidays. If the claimant did not work, he was not paid.

17. The employer has an Off-Site Vehicle Policy which applies to "drivers keeping vehicles off-site overnight." The policy states, in part: "Drivers will be responsible for the cost of all tolls, parking tickets and the like for vehicles in their possession."

18. The Off-Site Vehicle Policy also states: "Drivers are to provide [the employer] with the location (address) where vehicle is parked when not used for [employer] business. Drivers acknowledge that [the employer] may conduct spot checks at designated site, at any time without notice, to ensure compliance with this agreement."

19. In August or September 2010, the employer gave the claimant the Off-Site Vehicle Policy. The claimant signed an Off-Site Vehicle Request Form through which the claimant acknowledged that he had "read and understood the off-site vehicles policy and procedure and agree to abide by their terms."

20. The employer also posted the Off-Site Vehicle Policy in the drivers' reception area along with other notices.

21. Because he had received a copy of the Off-Site Vehicle Request Form and due to his experience and training as a professional driver, the claimant knew that he was personally responsible for any parking tickets he got while in the employer's van.

22. The claimant told the employer he had a driveway at his house in which he could park the van at night. The employer assigned the claimant a specific van to drive.

23. The employer allowed the claimant to take the van home at night and to leave directly from his house on his daily school run. Because the claimant took the van home at night, the claimant had no commuting time or costs since his school "runs" were configured from his house to the school and back to his house.

24. The claimant did not always park the van in his driveway at night. The claimant had another car and both did not fit in the driveway at the same time.

25. The claimant acquired numerous parking tickets from parking the employer's van after work in either restricted spaces or at expired meters.

26. The claimant neither informed the employer of the tickets nor paid the tickets.

27. The claimant was issued the following parking tickets: a $30 ticket on September 20, 2010 for violating the resident permit only restriction; a $30 ticket on October 6, 2010 for violating the resident permit only restriction; a $25 ticket on October 26, 2010 for parking at an expired meter; a $30 ticket on November 3, 2010 for violating the resident permit only restriction; a $25 ticket on November 10, 2010 for parking at an expired meter; a $30 ticket on November 12, 2010 for violating the resident permit only restriction; a $25 ticket on November 17, 2010 for parking at an expired meter; and a $25 ticket on November 22, 2010 for parking at an expired meter. By the time the employer learned of these tickets, a $10 late payment had been added to each ticket.

28. Other than informing the claimant that he was responsible for any parking tickets he received, the employer did not tell the claimant anything else about his responsibility for paying for the parking tickets until the employer met with the claimant in November 2010 to discuss tickets the claimant had received.

29. The employer learned of the tickets when the employer, as the registered owner of the van, started receiving past due notices from the towns/cities issuing tickets.

30. The employer called the claimant to a meeting on November 22, 2010 to discuss the matter of the unpaid parking tickets. The claimant acknowledged that he had received the parking tickets from parking the van overnight on the street rather than in his driveway.

31. On November 22nd, the employer told the claimant it was giving him a final warning due to his acquiring numerous parking tickets. The employer also told the claimant that it would be deducting the cost of the unpaid tickets from the claimant's check.

32. At the time of the claimant's separation from employment, the employer was aware of 8 parking tickets the claimant had incurred on the employer's van. By the time the employer learned of the tickets, all were past due.

33. Parking tickets were left on the windshield of the van. There was a section on the ticket that the claimant could complete to request a hearing on the validity of the ticket. The claimant had 21 days of the ticket being issued to appeal the ticket.

34. The [City] assessed a $10 late penalty schedule for ticket payments received after 21 days. A second penalty of up to $20 could be assessed. The non-renewal penalty was $40.00.

35. The claimant requested hearings on at least two of the tickets and may have requested hearings on all of them.

36. The claimant did not attend any of the hearings. The claimant was unable to locate the hearing office for the first hearing. It is not known whether the claimant had been scheduled for multiple hearings at the same time. If other hearings were scheduled for later dates, it is not known why the claimant did not ask for additional directions in order to find the hearing office for the later hearings.

37. When the claimant's tickets were not paid within 21 days, the city sent overdue parking violation notices to the employer, the van's owner of record. The employer had 15 days after the date of the overdue notice to appeal the ticket.

38. The employer did not appeal the overdue tickets since the tickets had in fact been issued for violations of parking ordinances.

39. The employer believed that an appeal from a hearing determination (had there been one) could have been made by either the employer, as the owner of the vehicle, or the claimant. A review by a magistrate cost $50 per ticket. Judicial

review of the magistrate's decision could be obtained at a cost of $100 per ticket.

40. Other than the claimant's ability to appeal the original ticket and the employer's ability to appeal the ticket once the overdue notice was received, neither party knew of any other process by which the city could be asked to re-examine the tickets.

41. During the meeting of November 22nd, the claimant resigned because he was upset that the employer would be deducting the parking tickets from his pay checks. The claimant indicated that November 24th would be his last day.

42. By the time the claimant left this job he had accumulated approximately $450 in parking tickets on the employer's van.

43. The claimant grossed the following amounts: $624 for the week ending September 25, 2010; $311 for the week ending October 30, 3010; $195 for the week ending November 13, 2010; and $242.50 for the week ending November 20th. The claimant's gross earnings during the two weeks in November were less than normal due to the claimant's absences and the Veterans' Day holiday. The amount of the claimant's earnings for the other weeks he worked is unknown.

44. The claimant filed for unemployment benefits on December 29, 2010; the effective date of the claim was December 19, 2010.

Credibility Assessment

The claimant testified that he quit this job because the work he was assigned and the pay he received was not what the employer had promised at hire. The claimant testified that he was told at hire that he would *only* be driving a bus. The claimant's testimony that he was hired to *only* drive a bus was not credible in light of the employer's testimony that it did not have bus routes available at the time the claimant was hired and, therefore, had no reason to tell the claimant he would only be driving a bus; and because the claimant did not contest the employer's assigning him to a van route when he began working.

The claimant testified that the employer told him he could expect to make approximately $300 per week initially and sometimes more if he was called to fill-in for bus routes. The claimant submitted pay stubs for four weeks to suggest that he was not earning the amounts the employer promised. For two of the weeks, the pay stubs show the claimant earned more than $300. The other two weeks were in November, after the

claimant had been given the written warning on November 9th. For one of the weeks, the Veteran's Day holiday would have resulted in a smaller than usual pay check. The claimant had also called out sick for some of the days covered by the November pay checks. The two earlier weeks' pay which, presumably, reflected full work weeks show that the claimant was, indeed, earning the amounts that the employer told him he could expect. I also note that the employer's ability to assign the claimant additional jobs driving for field trips was limited after the claimant alienated the employer's three biggest clients by delivering students late to scheduled outings.

The claimant further testified that he quit as a matter of conscience because the employer assigned him to drive a van for which he was not licensed. It is not credible that a professional bus driver would not know that his school bus license also allowed him to drive a school van. Indeed, at a later point in the hearing, the claimant testified that his bus driver license allowed him to drive school vans. In contrast, the testimony of the employer witness regarding the reason for the claimant's resignation was consistent and logical. The employer witness testified that the claimant quit because he was upset that the employer would be deducting amounts from the claimant's checks to pay for the hundreds of dollars in parking tickets the claimant had accumulated in the few months he worked for the employer.

The Board asked when the claimant was informed of the employer's policy that the claimant was responsible for any parking tickets received. The claimant acknowledged, in writing, that he was given the employer's Off-Site Vehicle Policy before he began work for the employer. The acknowledgement form is dated 8-8-10. The claimant testified that he did not meet with the employer in August and that he did not write that date on the form. Since the claimant confirmed that he signed the form, I conclude that the employer gave the policy to the claimant. However, there may have been an error in writing the date. For example, the form may have been signed by the claimant on September 8th rather than on August 8th. The findings, therefore, state that the policy was given to the claimant sometime in August or September 2010.

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.

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 he is entitled to benefits. Following the first hearing, the review examiner concluded that the claimant had not carried his burden. After our review of the record from the remand hearing, we agree that the claimant resigned his position without good cause attributable to the employer.

The review examiner found that the claimant resigned his position after the employer told him during a meeting on November 22, 2010 that it would be deducting the cost of unpaid parking tickets the claimant had incurred from his paycheck. All of the tickets were past due and had incurred late fees. In her decision, written after the initial hearing, the review examiner concluded that the claimant knew he was responsible for paying the parking tickets, and that the employer's insistence that the claimant pay them was reasonable. Therefore, she concluded, the claimant's resignation was not for good cause. She also rejected the claimant's contention that he quit his job because the work assigned to him by the employer and his gross pay were not what the employer had promised at hire. The claimant's appeal addresses both issues and we will consider them both.

Assigned Work and Pay

We first consider the claimant's argument that the employer failed to comply with the terms of the claimant's employment. The review examiner found that the claimant had a commercial driver's license which qualified him to drive both a school bus and a smaller van. She also found that, at hire, the employer told the claimant that he would be driving a van route, but could be eligible for a bus route if one became available. In the credibility assessment, the review examiner explicitly rejected the claimant's contention that he was hired only to drive a bus. According to the employer, a permanent bus route was not available when the claimant was hired. Therefore, he only filled in on bus runs when specifically asked by the employer. We discern nothing in the record which would compel us to disturb the review examiner's findings and conclusions on this issue. She found the employer to be credible, and that conclusion was not unreasonable given the weight of the testimony. *See* School Committee of Brockton v. MCAD, 423 Mass. 7.15 (1996)(G. L. c. 30A hearing officer's findings of fact and credibility assessments will not be overturned on appeal unless they are unreasonable in relation to the evidence before her).

We also believe that there is substantial and credible evidence in the record to support the review examiner's conclusion that the claimant was paid what he was promised by the employer. The claimant testified that the employer informed him that he would be paid at least approximately $300 per week, with the possibility that he could earn more if he was given a bus route. The claimant's pay stubs, introduced into evidence at the initial hearing, show that the claimant was, in fact, paid more than $300 per week for two weeks in November 2010. As noted by the review examiner in her credibility assessment, the other two weeks were not complete working weeks and so do not accurately reflect what the claimant could have earned. Based on this evidence, the review examiner was within her power to conclude that the claimant was being paid as promised.

In his appeal to the Board, the claimant argues that one of the employer's dispatchers said that he would earn approximately $600 per week, a figure which included van driving, school bus routes, and field trips. We do not interpret the review examiner's findings to suggest that this one comment by the dispatcher was a binding promise on the part of the employer that the claimant would be earning $600 each week. First, it is unclear whether the dispatcher had any authority to make such a promise to the claimant. Second, the $600 figure is derived from a combination of $300 for the van driving and $300 for bus routes and field trips. As noted above, the claimant was never promised a bus route or field trips. He was hired to drive a van, with occasional additional earnings from other work. There was no agreement that he would consistently earn around $600 weekly.

G.L. c. 149, §148

We next address the claimant's argument, made to the Board in his appeal, that the employer violated G.L. c. 149, §148, the Massachusetts Wage Act, and the claimant, thus, had good cause attributable to the employer for resigning his job. The claimant bases this contention on the Supreme Judicial Court's recent decision in Camara v. Attorney General, 458 Mass. 756 (2011).

G.L. c. 149, §148 requires prompt and full payment of an employee's wages. It provides, in pertinent part, as follows:

> Every person having employees in his service shall pay weekly or biweekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week. . . . No person shall by special contract with an employee or by another means exempt himself from this section or from section one hundred and fifty. . . ."

In response to an alleged violation of this section, the Attorney General may file a complaint against an offending employer. G.L. c. 149, §150. In such a case, the employer's defenses are limited by the statute as follows:

> On the trial no defence [sic] for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof *or a valid set-off* against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid.

G.L. c. 149, § 150.

In Camara, an employer, as a way "to promote safety and to decrease careless driving . . . established a policy whereby drivers determined to be at fault [were] given an option of either accepting disciplinary action or entering into an agreement to set off the damages against their

wages." 458 Mass. at 757. The fault determination was made after an internal investigation by the employer, and a safety manager eventually determined whether an incident was a "preventable accident." Id. at 758. "The findings of the safety manager . . . [were] final and not subject to any appeal process." Id. After investigation by the Attorney General's office, the employer was issued a civil citation for violating the Wage Act. Id.

The SJC concluded that the employer had, indeed, violated the Wage Act by unilaterally determining whether its employees were "at fault" for accidents involving company vehicles and deducting money from earned wages in order to pay for damages resulting from the accidents. Id. at 763-765. The Court first determined that the scheme adopted by the employer constituted a "special contract" under §148. The Court then found that the deductions made by the employer were not valid set-offs within the meaning of § 150. It observed that a valid set-off may found in "'circumstances where there exists a clear and established debt owed to the employer by the employee.'" Id. at 763, *quoting* Somers v. Converged Access, Inc., 454 Mass. 582, 593 (2009). Under the facts of the case before it, the Camara Court concluded that "[a]n arrangement whereby [an employer] serves as the sole arbiter, making a unilateral assessment of liability as well as amount of damages with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company, does not amount to 'a clear and established debt owed to the employer by the employee.'" Camara, 458 Mass. at 763, *quoting* Somers, 454 Mass. at 593. Thus, the court concluded that since the employer had not shown that there was a valid set-off, it had violated the Wage Act.

In this case, no special contract existed between the claimant and the employer to deduct any monies from the claimant's wages. The claimant quit before such an agreement could be reached. Nevertheless, the employer admitted at the hearing that it told the claimant that it was going to begin deducting the cost of the tickets from the claimant's wages. If this had happened, the employer would have been "deducting, or withholding payment of, earned wages." Camara, 458 Mass. at 760. Therefore, the employer's actions could have constituted a violation of § 148.

However, we believe that unlike Camara, there was a valid set-off in this case. The facts here are markedly different from those before the Court in Camara.[1] First, the employer is not making a determination as to the liability of the claimant. The [City] determined that the claimant was in violation of the law and subject to a fine. Second, the claimant had an opportunity to appeal the issuance of the tickets, something foreclosed completely by the employer's policy in Camara. The review examiner found that the claimant had, in fact, requested hearings on two of the tickets. However, he did not attend those hearings or pursue an appeal of his default for non-attendance. Finally, the claimant found himself in the position he was in because he did not pay the tickets, moreover, he did not ever tell the employer that he had received them. In Camara, the employer was involved from the beginning to the end and controlled the entire process, including the investigation and determination of fault, until an employee had to choose between accepting discipline or paying for the damages. Here, the

[1] The Camara Court did not limit the types of setoffs permissible under § 150 to those listed by the Attorney General in that case. *See* Camara v. Attorney General, 458 Mass. 756, 763 n.13 (2011).

employer's role was limited to dealing with the aftermath of the claimant's own failure to take responsibility for the tickets he had himself incurred, follow through with an appeal or even tell the employer about them.

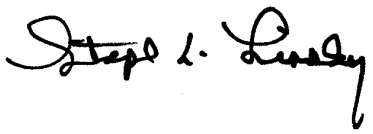
In short, prior to the employer's decision to begin deducting from the claimant's wages, the due process protections set forth in Camara were available to the claimant in that he had the right to pay and/or appeal his parking tickets. *See* Camara, 458 Mass. at 761-762. Here, we believe that the employer has shown that the employee's interests would be adequately protected, as to "both the existence and amount of the debt or obligation owed by the employee to the employer," id. at 763 n.13, and that the employer's planned deductions for the costs of the parking tickets from the claimant's wages would have been a valid set-off, under G.L. c. 149, § 150.

We, therefore, conclude as a matter of law that the claimant did not resign his position for good cause attributable to the employer.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending December 25, 2010, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF MAILING – July 29, 2011

John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin did not participate in this decision.

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 29, 2011

SF/ mt