THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Fax (617) 727-5874

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BOARD OF REVIEW DECISION

BR-119197 (Feb. 13, 2012) – Board concluded that the claimant quit for good cause attributable to the employer. Preliminary OSHA determinations of safety deficiencies in the workplace were sufficient to support the reasonableness of the claimant's belief that she was working in unsafe conditions. *[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 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 resigned from her position with the employer on November 18, 2010. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 13, 2010. 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 May 9, 2011. 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 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 take additional evidence and make findings of fact on the issue of the status of the claimant's complaint to OSHA. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant had a reasonable belief that her employer's needle disposal policy was unsafe.

Findings of Fact

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

1. The claimant applied for benefits on November 26, 2010. The Division disqualified the claimant on December 13, 2011. The claimant appealed on December 16, 2010.

2. The claimant worked for the employer from May 6, 2002 to November 18, 2010. The claimant worked as a full time dental assistant. During this period, the claimant sought other employment.

3. The claimant quit her employment.

4. The claimant went on maternity leave from September 10, 2010 to November 15, 2010.

5. When the claimant returned to work on or about November 15, 2010, she learned that the employer had a new policy concerning the disposal of sharp material more particularly needles used in the treatment of patients.

6. The employer informed the claimant that it wanted her to dispose only the needle and not the cap to the needle in the sharp's container. The employer demonstrated a technique to the claimant to accomplish this objective. The employer used his hands to demonstrate the procedure.

7. The employer had adopted this procedure to reduce the cost associated with the disposal of contaminated material.

8. Until November 18, 2010, the claimant failed to follow the employer's new disposal procedure. The claimant did not feel comfortable handling the needle when disposing of it in the sharp's container. The claimant feared a poking might occur with contaminated material.

9. The claimant did not inform the employer that she felt uncomfortable with the procedure until the employer addressed the capped needles in the container on November 18, 2010.

10. The employer did not ask the claimant to put her hand in the sharp's container and remove the capped needles.

11. The employer informed the claimant that she needed to follow the procedure established or leave. The claimant chose to leave.

12. Prior to leaving on November 18, 2010, the claimant did not explore alternatives to the new procedure.

13. After leaving, the claimant called OSHA and filed a complaint. The OSHA representative informed the claimant that she should attempt to return to work.

14. After her discussion with the OSHA representative, the claimant attempted to return to work on November 19, 2010. The claimant informed the employer that she would return to work if it changed the needle disposal procedure.

15. The employer chose not to have the claimant return to work.

16. The claimant filed a complaint of retaliation.

17. One of the claimant's textbooks has a provision that reads, "Carefully remove the needle with the protective cap in place. Carefully unscrew the needle. A hemostat can be used to hold the needle while it is being removed from the syringe. Also there are mechanical devices that cut the needle from the hub; after being cut, the needle falls into a closed container. The needle is discarded in the sharps container."

18. The employer would have allowed the claimant to use a hemostat rather than her hands to place the needle in the sharps container.

19. OSHA cited the employer on April 25, 2011. The claimant offered this document to support a conclusion that the claimant's concern with the needle disposal method had validity. The employer objected to the entry of this document onto the record. The document is not probative on the question of whether the disposal method violated applicable law or regulation. Although entered onto the record, the document's only legal significance is that it represents an OSHA citation. It does not establish the invalidity of the employer's procedure, and one cannot reach a conclusion that the procedure violated an applicable law or regulation.

20. Credibility Assessment: The claimant has suggested that the employer discharged her, however, it's apparent that but for the OSHA representative's direction to the claimant that she should attempt to return to work, she would not have done so. Further, in the original hearing, the claimant suggested that she did not seek other employment. Yet, the claimant had placed her resume on Craig's list in October 2010 just prior to returning to work with the employer. Based upon the foregoing, the employer's testimony continued to receive greater weight and credibility in any contested area of fact.

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 . . . [T]he 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 . . . .

The claimant resigned from her employment because she believed that the employer's new needle disposal method was unsafe. At the time of her resignation, she had not consulted with OSHA, nor explored alternatives to the new disposal policy. The review examiner denied benefits after the initial hearing because he concluded that the claimant had not made efforts to preserve her employment before resigning. Impliedly, also, the initial decision questioned the reasonableness of the claimant's concerns.

We remanded the case because the claimant's appeal included OSHA citations, which, in our view, could be evidence supporting the reasonableness of the claimant's belief that the employer's new policy was unsafe, and we therefore asked the review examiner to place them in the record and make findings on them. The OSHA citations are now in evidence as remand exhibits.

We disagree with the review examiner's perception that the citations are not evidence of the reasonableness of the claimant's belief. Plainly, they are. The federal agency charged with protecting the health of workers has seen fit to cite the employer for no fewer than eleven violations, and seek fines in the amount of $24,000. Most, if not all, of these citations relate directly or indirectly to the employer's sharps disposal procedure. We recognize that these citation" call for *proposed* fines, and that they are subject to negotiation between OSHA and the employer and thus do not conclusively establish the existence of actual safety deficiencies in the employer's business operations. However, all that the claimant needed to show, for our purposes, was a reasonable basis for her belief in the existence of these deficiencies. *See, e.g.,* Carney Hospital v. Director of Div. of Employment Security, 382 Mass 691 (1981) (rescript opinion) (nurse who left hospital because she believed that her work was causing a severe skin infection did not need to show causation in fact, but merely a reasonable belief that her work environment was causing the infection).

With regard to the claimant's purported lack of job-preservation efforts, we merely point to Finding of Fact #11, which states "the employer informed the claimant that she needed to follow

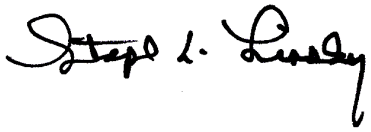
the procedure established or leave." It is well-settled law that an employee is relieved of the obligation to make job preservation efforts if it would be futile to do so. Kowalski v. Dir. of Division of Employment Security, 391 Mass. 1005, 1006 (1984) (rescript opinion).

We, therefore, conclude as a matter of law that the claimant's resignation was for good cause attributable to the employer, as defined in G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending November 27, 2010 and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 13, 2012

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 – March 14, 2012

LH/rh