BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

VICKY L. JONES
(Claimant)

GENERAL CHEMICAL, INC.
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-166
Case No. 74-7319

The claimant appealed from that portion of the referee's decision which held that the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code on the ground that she had left her most recent work voluntarily without good cause. The decision also held that the claimant's eligibility for benefits under section 1253(c) of the code need not be considered during the disqualification period involved in the appeal and that the employer's reserve account was relieved of benefit charges under section 1032 of the code.

STATEMENT OF FACTS

Before filing her claim for unemployment benefits, the claimant last worked as a secretary for the president of the employer corporation for about three months. The final day on which the claimant worked was July 29, 1974.

The claimant was attending school at the time she became employed by the employer. For this reason, the employer and the claimant agreed she was to work only about 20 hours a week, and she was to come to work early or late, depending upon her classes, on various days of the week. At first the claimant's work was considered very good and effective. Thereafter problems developed for both the employer and the claimant. Shortly after the claimant arrived at work on July 29, 1974, the president of the employer corporation called the claimant to his office to discuss these problems. The employment relationship was terminated during the course of this discussion. The claimant promptly left work. She was paid through the time she left work for that day, but she was not paid for any time thereafter.

Both the claimant, on August 2, 1974, and the president, on August 5,1974, reported to the Department that the claimant had been "dismissed." Both the claimant in her testimony and the president, according to a Department representative's report of a telephone conversation with the president, stated the claimant was given an option of leaving at once on July 29, 1974 or of staying through the pay period. The evidence is clear that by leaving at once, the claimant missed work and pay for the remaining three hours of scheduled work on July 29, 1974 and at least seven more hours of work either on the following day on a full-time schedule or some hours on July 30 and some hours on July 31, 1974 to total seven hours on a part-time schedule. The vice-president who alone appeared to testify for the corporation at the hearing had no personal knowledge of what took place during the discussion on July 29 as he had not been present.

The referee accepted evidence upon the question of whether the claimant was or was not discharged for misconduct connected with her most recent work. Before the end of the hearing, however, the referee limited the issue to whether the claimant had good cause to leave her work when she could have worked and been paid for ten additional hours before she had to leave because of the discharge. When asked why she did not work the ten additional hours, the claimant testified: "Probably because I was mad. I was."

The question before us for consideration is whether a voluntary leaving of work or a discharge took place when the employer gave notice of discharge to the claimant with an option either to leave at once or to remain through the rest of the day and a day or two longer through the end of the pay period and the claimant left at once.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges if the claimant left his most recent work voluntarily without good cause, or if he has been discharged for misconduct connected with his most recent work.

In determining whether there has been a voluntary leaving or a discharge under section 1256 of the code, it must first be determined who was the moving party in terminating the employment relationship. If the claimant left employment while continued work was available, then the claimant is the moving party. If the employer refuses to permit an individual to continue

working, although the individual is ready, willing and able to do so, then the employer is the moving party (Appeals Board Decision No. P-B-37).

In applying the above rule, we held in Appeals Board Decision No. P-B-101 that a claimant who left employment at approximately 11:30 a.m. on a day when his services were to be terminated at 5 p.m. had voluntarily left his most recent work because the employer expected the claimant to continue working until 5 p.m. and had paid him in advance for such services.

In Appeals Board Decision No. P-B-164, the claimant was to be laid off at the end of his work shift. He did not return from his lunch hour because he felt the employer had breached an agreement of rehire. The claimant therefore missed working the last three hours of his shift. He was not paid for those last three hours he did not work. We held that the claimant's leaving of work approximately three hours before the effective time of his layoff did not alter the character of the termination as a layoff due to lack of work and therefore section 1256 of the code did not apply.

In so holding, we reasoned that to strictly construe our holdings in Appeals Board Decisions Nos. P-B-37 and P-B-101 would result in unreasonable applications of section 1256 of the code, since it could be applied, for example, to a leaving one minute early. We stated, in part, as follows:

> "Reason demands that our Appeals Board Decisions Nos. P-B-37 and P-B-101 be limited to those situations where the claimant leaves work prior to the effective date or day of termination of employment by the employer. Where the leaving occurs on the effective day of the termination by the employer, it does not constitute an intervening cause or reason for the claimant's unemployment sufficient to alter the character of the termination. Appeals Board Decision No. P-B-101 accordingly is overruled to the extent that it conflicts with these views."

In Appeals Board Decisions Nos. P-B-101 and P-B-164, we were concerned with the troublesome situation of a notice by an employer or an employee of a fixed date or day of termination of the employment relationship where there has been an acceleration by the other party of the time of leaving on the last day of work covered by the notice.

In the present case, on the other hand, while the claimant was given notice of discharge on July 29, 1974, she was also given the option of leaving work immediately or of working some ten more hours by completing the three hours left on her shift on the day of notice and the remaining seven hours of work during the pay period which ended on July 30 or July 31, 1974. She was given no choice as to whether she was to be discharged but only given some option in selecting the time of discharge.

We considered such a situation in Appeals Board Decision No. P-B-102 where the claimant submitted a resignation to the employer on June 9, 1969 to become effective when a replacement was obtained. The employer obtained a replacement who was to begin work on July 2, 1969. The claimant was absent because of illness for a portion of June 24 and all of June 25, 1969. On June 26, 1969, she telephoned the employer to offer to return to work the next day. However, the employer notified the claimant she need not return to work as the employer could handle the claimant's work. We held that the claimant was the moving party in terminating the employment relationship by giving notice of resignation effective when a replacement was obtained which took place on June 26, 1969 when the employer absorbed the claimant's duties and became the replacement.

The employer in Appeals Board Decision No. P-B-102, just as the claimant in the present case, was not given any choice as to whether the employment relationship was going to be terminated; that employer and this claimant were given a limited choice only as to precisely when the work would end. In a situation such as this, it is our opinion that we must return to a consideration of the moving party and proximate cause concepts as discussed in Appeals Board Decisions Nos. P-B-27, P-B-37 and P-B-39. In those last three cited decisions, we held that unless wages were paid through the date of notice of voluntary leaving or discharge, the voluntary act of giving such a notice of termination would be supplanted by the equally voluntary act of the other party of accelerating the ending of work as the proximate cause of the termination of the employment.

In none of those last cited decisions had the other party been notified of an option to accelerate or to fix the date of termination. Such an option is not a mere matter of form but is a matter of substance, constituting a discharge or resignation at the limited convenience of the other party. Exercise of such a limited option does not, in our opinion, constitute such an equally voluntary act as to supplant the voluntary act of discharge or resignation so as to become the proximate cause of the termination of employment. No such options were given in Appeals Board Decisions Nos. P-B-27, P-B-37 and P-B-39. We conclude in the present case that, where the employer discharged the

claimant with an option to accept the discharge as effective at once or to accept the discharge as effective in a day or so, by accepting the option to have the discharge effective at once, the claimant did not become the moving party in terminating the employment relationship.

In the present case we therefore hold that the employer was the moving party in terminating the employment relationship by discharging the claimant subject only to the claimant's option of ceasing work at once or in a day or so. Therefore, the question under sections 1256, 1030 and 1032 of the code is whether that discharge was for misconduct connected with the work.

Although the referee took evidence upon the issue of whether the claimant was or was not discharged for misconduct connected with her most recent work, before the end of the hearing the referee limited the issue to whether the claimant had good cause to leave her work with the employer. Under these circumstances, it is our opinion that the parties were not afforded a fair hearing on the issues as required under section 1334 of the code. Therefore, the referee's decision must be set aside and the matter remanded to a referee for hearing and decision on the merits. The matter already in the record before us may, of course, be considered in such subsequent proceedings. Because of this remand, we have not discussed the issue under section 1253(c) of the code, which also may be considered at the remand hearing.

DECISION

The decision of the referee is set aside. The matter is remanded to a referee for hearing and decision.

Sacramento, California, October 15, 1975

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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