STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
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DECISION OF THE BOARD
DECISIÓN DE LA JUNTA

Mailed and Filed: APR 07 2009

Appeal Board No. 544039 A

IN THE MATTER OF:

[redacted]

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Department of Labor Office: 831

A.L.J. Case No. 308-01502

PLEASE TAKE NOTICE that the commissioner, or any other party affected by this decision who appeared before the Appeal Board, may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department, by written notice mailed to the Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 within THIRTY DAYS from the date this decision was mailed.

POR FAVOR TOME NOTA que el comisionado o cualquier otra parte afectada por esta decision que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decision a Appellate Division of the Supreme Court, Third Department, enviando un aviso escrito a Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 dentro de los TREINTA DIAS a partir de la fecha en que esta decision fue enviada por correo.

DOCUMENTO IMPORTANTE. PUEDE OBTENER UNA TRADUCCIÓN DEL MISMO LLAMANDO AL 1-888-209-8124 (FUERA DEL ESTADO DE NUEVA YORK 1-877-358-5306)

PRESENT: LEONARD D. POLLETTA, MARYANN K. McCARTHY MEMBERS

The claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of its decision filed July 14, 2008 (Appeal Board No. 541748), which, affirming the decision of the Administrative Law Judge, sustained the initial determination disqualifying the claimant from receiving benefits, effective January 18, 2008, on the basis that the claimant voluntarily separated from employment without good cause.

Upon due deliberation on the application, the Board has reopened and reconsidered its decision.

The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

By order filed February 3, 2009, the Board remanded the case to the Hearing Section for a hearing. The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer.

Now, based on all of the foregoing and on the entire record, the Board makes the following

FINDINGS OF FACT: The claimant, a licensed certified nursing assistant, was employed by a healthcare agency for approximately six months, beginning in July 2007. In January 2005, the claimant pled guilty to attempted assault in the third degree, a class B misdemeanor. The conviction was based on conduct which had occurred in August 2004. The claimant informed the employer of the conviction and was hired, pending the completion of the criminal background check. On November 27, 2007, the NYS Department of Health ("DOH") sent the claimant a letter advising her that her background check might disqualify her from employment and further advising her that the employer had been informed that any temporary work approval was to be promptly revoked. She was also advised of the types of documentation that could be provided to DOH to demonstrate her rehabilitation. The claimant sent DOH various documents, but DOH decided that her eligibility for employment by the agency must be denied. A letter was sent to the employer by DOH on January 11, 2008, advising the employer of this decision and directing the agency to remove the claimant from her employment. As a result, the employer sent the claimant a letter on January 17, 2007, informing her that she could no longer be employed. The claimant began training to become a certified nursing assistant in June 2005, and received her license in December 2005.

OPINION: In *Matter of DeGrego*, 39 NY2d 180 (1976), the court held that a provoked discharge occurs where an employee voluntarily engages in conduct which transgresses a legitimate known obligation and leaves the employer no choice but to discharge him. *DeGrego* established a three-prong test; in order for a claimant to be held to have provoked his or her discharge, all three prongs of the test must be met. The claimant's guilty plea establishes that she voluntary engaged in the prohibited conduct and the actions of the Department of Health establish that the employer had no choice but to discharge the claimant; the question to be determined is whether the claimant's conduct transgressed a legitimate known obligation of her employment.

We have previously held that where the conduct occurred prior to the employment and the record establishes that at the time the conduct occurred, the claimant could not know that it would affect her ability to work in her chosen field, the claimant cannot be held to have transgressed a known obligation of employment (*see*, Appeal Board No. 542980). The evidence now before the Board establishes that the claimant's conduct occurred nearly a year before she even began her training to become a certified nursing assistant. In fact, her training did not even begin until after the conviction. As the claimant was not a certified nursing assistant at the time she engaged in the prohibited conduct, she could not have known that it might affect her ability to be employed as a certified nursing assistant, either with the employer in this case or with any other employer. As there was no known obligation in August 2004, the claimant cannot be held to have provoked her discharge by virtue of the conduct which occurred at that time. Accordingly, we conclude that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective January 18, 2008, on the basis that the claimant voluntarily separated from employment without good cause, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

LEONARD D. POLLETTA, MEMBER

HY:DE

MARYANN K. McCARTHY, MEMBER