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IN THE COURT OF APPEALS OF INDIANA

B.F.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 93A02-1004-EX-379
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT and WHIRLPOOL CORPORATION,	)	
	)	
Appellees.	)	

APPEAL FROM THE REVIEW BOARD OF THE
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
Case No. 10-R-00668

August 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

B.F. appealed the denial of benefits by a Department of Workforce Development ("Department") Administrative Law Judge ("ALJ") to the Review Board. The Board affirmed. B.F. now appeals to this court, presenting two issues:

1. Whether the Review Board erred in failing to consider whether B.F.'s separation from Whirlpool Corporation ("Whirlpool") was a rejection of unsuitable work; and

2. Whether the Review Board's determination that B.F. voluntarily resigned her position without good cause in connection with the work is contrary to law and unsupported by substantial evidence.

We affirm.

Facts and Procedural History

B.F. was unemployed and receiving unemployment insurance benefits from the Department. Through the Department, she learned of assembly line positions with Whirlpool. She applied, interviewed, and was offered employment. B.F. testified that when she interviewed for the position, she was asked whether she could lift "a certain amount" of weight. (Tr. 8.) She could not remember how much weight was specified, but admitted that she probably said that she could lift the amount specified. B.F. was not under any doctor's orders establishing "physical restrictions or limitations" on her work. (Tr. 8.)

B.F. attended orientation for an assembly position with Whirlpool on September 18, 2009. During the orientation period, she was trained to put brackets on refrigerator shelves and spent four hours performing this task. When she arrived for work on Monday, September 21, 2009, B.F. was informed that she would instead be assigned to work pulling

refrigerators off an assembly line, placing them in rows, and then placing them onto another assembly line. B.F. performed this work for four hours, but fell behind her co-workers. When she said that she "couldn't do it," she was briefly reassigned to placing brackets on shelving, but then was placed back in the refrigerator shifting area. (Tr. 6.) She continued to work but began to experience back pain.

B.F. eventually ceased work and left without advising any supervisory personnel of her decision to resign. She then reapplied for unemployment insurance benefits and on October 19, 2009 was granted benefits on the basis of a voluntary separation with good cause in connection with the work. Whirlpool appealed, and the ALJ determined that B.F. had voluntarily left employment without good cause in connection with the work. B.F. appealed to the Board, which affirmed the ALJ's decision. This appeal followed.

Discussion and Decision

B.F. presents two issues for our review. First, she argues that the Board erred in failing to consider whether her separation from Whirlpool constituted rejection of unsuitable work. Second, B.F. argues that, even if her separation was not rejection of unsuitable work and an employment contract between her and Whirlpool had arisen, the Board's decision that she left voluntarily without good cause in connection with the work is contrary to law and unsupported by sufficient evidence.

Standard of Review

When reviewing an unemployment compensation proceeding, we are bound by the Review Board's review of factual matters, and neither reweigh evidence nor reassess witness

credibility. Ind. Code § 22-4-17-12(a); Dietrich Indus., Inc. v. Teamsters Local Unit 142, 880 N.E.2d 700, 703 (Ind. Ct. App. 2008). Thus, we consider the evidence most favorable to the Review Board's decision, and construe the logical inferences from that evidence in the same light. Dietrich, 880 N.E.2d at 703. So long as the Review Board's findings rest on substantial probative evidence, we will not set aside the Board's decision. Id. Where an appeal raises an issue of law, however, we are not bound by the Board's decision and may reverse where the Board is in error. Id. Where interpretation of the Employment Security Act is at issue, we liberally construe the Act in favor of the employee so as "to effectuate the humanitarian intent of the legislature." USS v. Review Bd. of Ind. Employment Sec. Div., 527 N.E.2d 731, 737 (Ind. Ct. App. 1988), trans. denied.

Rejection of an Unsuitable Offer of Employment

B.F. first argues that the Board failed to consider whether her departure from Whirlpool on September 21, 2009 constituted rejection of an unsuitable offer of employment. B.F.'s argument centers on the idea that Whirlpool engaged in a kind of "bait and switch," leading B.F. to believe she would be engaged in one form of work but then requiring her to do another. (Appellant's Br. 6.) This, B.F. asserts, means that there was no "meeting of the minds" between B.F. and Whirlpool. (Appellant's Br. 7.) This in turn would require the Board to review the case under Indiana Code Section 22-4-15-2,[1] which provides a more

[1] I.C. § 22-4-15-2(e) sets forth the factors for suitability of work. It states, in relevant part:

> In determining whether or not any such work is suitable for an individual, the department shall consider:
>
> (1) the degree of risk involved to such individual's health, safety, and morals;
>
> (2) the individuals physical fitness and prior training and experience;

favorable standard than that applied for voluntary separation from an employer under Section 22-4-5-1. See Martin v. Review Bd. of Ind. Employment Sec. Div., 421 N.E.2d 653, 656-57 (Ind. Ct. App. 1981). Because the Board failed to make findings or consider this argument, B.F. claims, the Board erred when it affirmed the ALJ.

Whether an employment contract exists is established by (1) an employer's offer to pay (2) consideration for the employee's services and (3) the employee's acceptance through performance. Williams v. Riverside Cmty. Corrections Corp., 846 N.E.2d 738, 745 (Ind. Ct. App. 2006), trans. denied. An employment contract may arise orally or in writing, and may be express or implied. Davis v. All American Siding & Windows, Inc., 897 N.E.2d 936, 942 (Ind. Ct. App. 2008), reh'g denied, trans. denied, 915 N.E.2d 989 (Ind. 2009). An employment contract does not arise unilaterally, however; rather, a meeting of the minds is necessary. Id. (citing Moore v. Review Bd. of Ind. Employment Sec. Div., 406 N.E.2d 325, 327 (Ind. Ct. App. 1980)). Mutual assent of the parties is required for an employment contract to arise. Id. (citing Jackson v. Blanchard, 601 N.E.2d 411, 416 (Ind. Ct. App. 1992)). Where an employment contract exists and an employer unilaterally changes the agreed-upon terms of the contract, as by changing working hours or conditions of employment, the employee may accept by continuing to work or reject the changes by quitting. Quillen v. Review Bd. of Ind. Employment Sec. Div., 468 N.E.2d 238, 241-42 (Ind. Ct. App. 1984).

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(3) the individual's length of unemployment and prospects for securing local work in the individual's customary occupation; and
(4) the distance of available work from the individual's residence.

We cannot agree with B.F. that the Board did not find facts related to the question of whether B.F. rejected an unsuitable offer of employment. The Board adopted and incorporated the ALJ's findings and conclusions when it affirmed the ALJ's decision. The ALJ found that Whirlpool "hired" B.F. "to perform general manufacturing work." (App. 3.) He also found that B.F. "worked with this employer from September 18, 2009 until September 21, 2009" and that B.F. "voluntarily resigned due to dissatisfaction with certain working conditions." (App. 3.) These facts, based on evidence in the transcript of the hearing before the ALJ, are sufficient to show that the ALJ did find facts on the question of whether an employment relationship arose and whether B.F. had not yet accepted or rejected employment with Whirlpool.

Nor can we agree, based on the ALJ's findings as adopted by the Board, that no employment contract arose such that B.F. was merely rejecting an offer of unsuitable work when B.F. left Whirlpool on September 21, 2009. Whirlpool offered to employ B.F. for pay. B.F. accepted and began to work on September 18, 2009, by attending orientation and training and attaching brackets to refrigerator shelves. When the conditions of work changed on September 21, 2009, B.F. accepted those terms by moving the refrigerators as directed. She sought to change the conditions upon finding the work difficult but did not succeed—she was taken off the job placing brackets on shelves and reassigned to her position dragging refrigerators. She then quit rather than continue to work.

That B.F. thought she would be performing one kind of work and was subsequently assigned to do another is not dispositive. The ALJ found that B.F. was hired "to perform

general manufacturing work." (App. 3.) B.F. was asked about whether she could lift a "certain amount of weight" and answered in the affirmative. (Tr. 8.) The ALJ omitted B.F.'s "bait and switch" language, excluding that statement from his decision and noting that "the individual who was training" B.F. stated that B.F. would install shelf brackets; Whirlpool made no such promise. (App. 3.) Even if B.F. and Whirlpool had agreed on September 18 that B.F. would be hired specifically to attach refrigerator shelf brackets, employers are free to change the conditions of work, which employees may accept by continuing to work or reject by quitting. See Quillen, 468 N.E.2d at 241-42.

Because B.F. accepted an offer of employment from and began work for Whirlpool, quitting work when working conditions changed, we cannot agree with her contention that her claim should have been evaluated on the standard for an individual who has rejected an offer of unsuitable employment.

Voluntarily Leaving Employment

B.F. argues in the alternative that, even if she did accept an offer of suitable work, the ALJ erred by determining that she voluntarily left that employment without good cause in connection with the work.

Whether an employee has left "without good cause in connection with the work" and is therefore disqualified from receiving full unemployment insurance benefits under Indiana Code Section 22-4-15-1(a) is a question of fact for the Board. Quillen, 468 N.E.2d at 241 (citations omitted). An employee's reasons for quitting must be objective and related to the work in order for good cause to exist. Id. (citations omitted). Where, as here, the employer

unilaterally changes the terms of the employment relationship, an employee may be able to reject the changes by quitting and thereby retain eligibility for unemployment benefits. Id. (citations omitted). To do so, however, the circumstances behind the changed terms must be objective and related to the work, but "must also be so unfair and unjust as to compel a reasonably prudent person to quit work." Id. at 241-42 (citations omitted).

Here, B.F. claims that the working conditions to which she was subjected were sufficiently "unfair and unjust as to compel a reasonably prudent person to quit work." Id. at 242. B.F.'s claim about working conditions is more properly classified as a claim that she should be afforded benefits because physically more demanding work that she found personally uncomfortable constituted good cause to leave employment. Indiana Code Section 22-4-15-1(c)(2) expressly preserves qualification for benefits to someone "whose unemployment is the result of medically substantiated physical disability and who is unemployed after having made reasonable efforts to maintain the employment relationship." Even when discomfort has physical manifestations—such as swollen feet, ankles, and legs—failure to inform the employer, failure to ask to work fewer hours, and failure to substantiate a medical problem have been held to support the Board's denial of benefits. Winder v. Review Bd. of the Ind. Employment Sec. Div., 528 N.E.2d 854, 856 (Ind. Ct. App. 1988).

Here, the ALJ's findings noted that B.F. "did not feel that she could continue to physically perform the job." (App. 3.) At the same time, the ALJ noted that B.F. had no "medical restrictions or limitations" on her ability to work. (App. 4.) B.F. herself stated at the hearing that, when the interviewer from Whirlpool asked about her ability to lift "a

certain amount of weight," she probably said she could lift the amount specified. (Tr. 8.) Rather than contact a supervisor in order to make "reasonable efforts to maintain the employment," I.C. § 22-4-15-1(c)(2), B.F. simply abandoned her employment and neither claimed to have nor produced medical documentation of any injury or work restrictions. Cf. Blackwell v. Review Bd. of Ind. Dept. of Employment and Training Svcs., 560 N.E.2d 674 (Ind. Ct. App. 1990) (reversing the Board's denial of benefits where an employee was known to have suffered an injury during a prior shift at the workplace and employer failed to announce policy on job walk-offs).

B.F. also contends that the "drastic change" in the work "from light assembly to heavy manual labor should permit [her] to resign without incurring a penalty." (Appellant's Reply Br. 5.) In support of this point, B.F. cites and relies upon Indianapolis Osteopathic Hosp., Inc. v. Jones, 669 N.E.2d 431 (Ind. Ct. App. 1996). In Jones, we affirmed the Board's decision that Jones left employment with good cause in connection with the work when Jones quit twenty-six days in advance of a significant change in the shifts she would be required to work. Jones had minor children, could not arrange for child care in response to the new shifts, and quit voluntarily before the policy went into effect. Id. at 434-35. In Jones, we noted in response to her employer's argument that Jones should have been denied benefits because she did not wait to see whether the new shift was manageable that "had Jones accepted the new shift, she might have waived her entitlement to receive unemployment compensation if she then terminated her employment." Id. at 435 (citing Gray v. Dobbs House, Inc., 171 Ind. App. 444, 357 N.E.2d 900 (1976)) (emphasis added).

Here, in contrast with Jones, B.F. waived her entitlement to receive compensation by accepting the terms of the change in work. Upon being shown her new task, B.F. did not immediately state that she was unable to perform the job. In fact, she performed the work for four hours. Thus, B.F.'s circumstances can be distinguished from those in Jones: namely, B.F. accepted changed conditions and sought relief retrospectively despite knowing the challenges posed by the changed conditions. Cf. Gray v. Dobbs House, Inc., 171 Ind. App. 444, 445, 357 N.E.2d 900, 902 (1976) (holding that accepting changed employment conditions and later terminating employment when the changed conditions prove a hardship does not constitute voluntary termination of employment for good cause in connection with the work).

Much of what remains of B.F.'s argument—that it is unreasonable to think a "52 year old woman with 'scrawny arms' and no prior experience with heavy labor would continue to work" in the refrigerator-shifting job—is an invitation to reweigh the evidence. (Appellant's Reply Br. 4.) This we cannot do. See Dietrich, 880 N.E.2d at 703. Thus, we disagree with B.F. and affirm the Board's determination that she voluntarily left employment with Whirlpool without good cause in connection with the work.

Conclusion

B.F.'s claim that she merely refused an unsuitable offer of employment fails. So too does B.F.'s challenge to the Board's determination that she left her employment without good cause in connection to the work.

Affirmed.

RILEY, J., and KIRSCH, J., concur.