

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kenneth Bostic,	:	
Petitioner	:	
	:	
v.	:	No. 1531 C.D. 2009
	:	Submitted: January 8, 2010
Unemployment Compensation Board	:	
of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH

FILED: February 16, 2010

Kenneth Bostic (Claimant) petitions pro se for review of the July 17, 2009, order of the Unemployment Compensation Board of Review (Board), affirming the decision of a referee that Claimant was ineligible for benefits pursuant to section 402(b) of the Unemployment Compensation Law (Law).¹ We now affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b). Section 402(b) of the Law provides that an employee shall be ineligible for benefits when “his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” 43 P.S. §802(b). Cause of a necessitous and compelling nature includes those circumstances which place a real and substantial pressure on the employee to terminate employment and which would cause a reasonable person under like circumstances to do the same. Uniontown Newspapers, Inc. v. Unemployment Compensation Board of Review, 558 A.2d 627 (Pa. Cmwlth. 1989). Whether or not a claimant has a necessitous and compelling (Footnote continued on next page...)

Claimant worked for the City of Philadelphia (Employer) as a sanitation laborer from June 28, 2006, to September 5, 2008. Claimant had a “long term substance abuse problem.” (Finding of Fact No. 3). Employer became aware of Claimant’s problem and granted him substantial periods of leave to address the same. In fact, Employer afforded Claimant approximately 259 days of leave from July of 2007 to August of 2008 to seek treatment for his substance abuse problem.² Employer typically limits leaves of absence to a total of one year for an employee’s entire employment history. (Finding of Fact No. 2).

In late 2008, Claimant requested a further leave of absence in excess of 120 days. Specifically, Claimant requested a leave of absence from September 18, 2008, through January 31, 2009, so that he could enter another substance abuse rehabilitation program. On this occasion, however, Employer denied Claimant’s request, citing its one-year leave of absence policy. On September 5, 2008, Claimant voluntarily quit his employment. (Finding of Fact No. 7).

Claimant filed a claim for benefits with the Philadelphia Unemployment Compensation Service Center (Service Center) asserting that he was forced to resign because Employer refused to grant him a leave of absence. Claimant further indicated that, because his substance abuse problem resulted in a parole violation, he was required to enter another rehabilitation program. The

(continued...)

cause for terminating his employment is a question of law that is fully reviewable by this Court. Livingston v. Unemployment Compensation Board of Review, 702 A.2d 20 (Pa. Cmwlth. 1997).

² The evidence of record reveals that Claimant was granted the following periods of leave: July 18, 2007, through October 4, 2007; October 16, 2007, through January 8, 2008; and May 3, 2008, through August 3, 2008. (Finding of Fact No. 4).

Service Center concluded that Claimant was ineligible for benefits under section 402(b) of the Law because he failed to present sufficient evidence that he voluntarily left work for “cause of a necessitous and compelling nature.”³ 43 P.S. §802(b). Claimant appealed, and the case was assigned to the referee for a hearing.⁴

The referee conducted a hearing on April 15, 2009. Claimant appeared at this hearing without counsel. In his testimony, Claimant reiterated that he quit his employment because Employer refused to grant him a leave of absence to seek long-term treatment for his substance abuse problem. Claimant indicated that both he and his parole officer believed he needed such further treatment. Claimant did acknowledge, however, that Employer granted him at least four prior leaves of absence to address his problem. Claimant also acknowledged that he did not follow the instructions he received from the rehabilitation programs during his leaves of absence, which resulted in the continuation of his substance abuse problems.

Kenny Wilson, Employer’s human resource associate, testified that Claimant voluntarily quit his employment after Employer denied his fifth request for a leave of absence. Wilson stated that Employer believed it had granted Claimant sufficient time to address his problems. Wilson also noted Employer’s policy of limiting such leaves of absence to a total of one year for an employee’s

³ We note that the Service Center also concluded that Claimant was eligible for benefits under section 401(d)(1), 43 P.S. §801(d)(1), which requires claimants to be “able” and “available” for work. However, section 401(d)(1) is not at issue herein.

⁴ In his appeal form, Claimant indicated that Employer informed him that if he did not resign he would be terminated and that, by resigning, there was still a possibility of getting his job back at a later time.

entire work history. Wilson proceeded to detail Claimant's various leaves of absence as noted above.

The referee affirmed the Service Center's determination that Claimant was ineligible for benefits under section 402(b) of the Law. In rendering his decision, the referee stressed Employer's willingness to allow Claimant sufficient periods of time to seek help for his problem as well as Employer's one-year leave of absence policy. The referee commended Claimant's efforts at rehabilitation as "laudable"; however, the referee concluded that Claimant had not established cause of necessitous and compelling nature to quit in light of Claimant's four previous leaves of absence and his acknowledgment that his previous attempts at rehabilitation had failed because he did not comply with the requirements of those programs.

Claimant appealed to the Board, which affirmed the referee's decision and adopted and incorporated the referee's findings and conclusions. The Board specifically noted that Claimant was "clearly at fault for bringing about his own separation as he was still abusing drugs despite repeated participation in treatment programs." (Board op. at 1.) Claimant then filed a petition for review with this Court.

On appeal,⁵ Claimant essentially argues that the Board erred in denying him benefits under section 402(b) because the Board's findings are not supported by substantial evidence. We disagree.

⁵ Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), petition for allowance of appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

A claimant whose unemployment is due to voluntary termination bears the burden to prove that such termination was for a necessitous and compelling reason. Id. Additionally, such a claimant must establish that he acted with ordinary common sense in quitting his job, that he made a reasonable effort to preserve his employment, and that he had no other real choice than to leave his employment. Empire Intimates v. Unemployment Compensation Board of Review, 655 A.2d 662 (Pa. Cmwlth. 1995).

Upon review of the record in this case, and contrary to Claimant's argument, we conclude that the findings adopted by the Board are supported by substantial evidence. Indeed, Claimant's own testimony supports the Board's findings.

Claimant also takes issue with the Board's statement that he was "clearly at fault for bringing about his own separation as he was still abusing drugs despite repeated participation in treatment programs." (Board op. at 1). In this regard, we note that in section 3 of the Law, 43 P.S. §752, our Legislature declared that the purpose of the Law is to assist those who were unemployed "through no fault of their own." While not utilized herein by the Board, this section can be an independent basis for disqualifying a claimant from benefits.⁶ See Smith v. Unemployment Compensation Board of Review, 967 A.2d 1042 (Pa. Cmwlth. 2009); Kawa v. Unemployment Compensation Board of Review, 573 A.2d 252 (Pa. Cmwlth. 1990); Adams v. Unemployment Compensation Board of Review, 397 A.2d 861 (Pa. Cmwlth. 1979).

⁶ Generally, however, this section is used to disqualify claimants who were discharged for misconduct unrelated to work.

In Kawa, this Court affirmed an order of the Board denying the claimant benefits under section 402(b). The claimant in that case quit his employment following the suspension of his license due to a drunken driving conviction and citing a lack of public transportation. The Board in Kawa used section 3 as an interpretive aid in applying section 402(b) and in concluding that the claimant had not established cause of a necessitous and compelling nature to quit his employment. On appeal, we concluded that the Board properly relied on section 3 of the Law to interpret section 402(b). We also noted that the claimant's commuting problems stemmed from the loss of his license due to his own misconduct. Similarly, in this case, the Board appears to have relied upon section 3 as an interpretive aid by emphasizing in its decision that Claimant himself was at fault for his resignation/unemployment. The Board did not err in doing so. Kawa.

In Jamison v. Unemployment Compensation Board of Review, 602 A.2d 420 (Pa. Cmwlth. 1992), this Court upheld the denial of benefits to a claimant under section 402(e) of the Law, 43 P.S. §802(e) (relating to willful misconduct), where the claimant failed to report to work after entering an alcohol detox program. The Board in Jamison rejected the claimant's argument that his alcoholism was not a voluntary condition such that he had good cause for his absences. Affirming, we stated that "[a]lcoholism 'provides no excuse for the consequences of the alcoholic's actions.'" Jamison, 602 A.2d at 422 (citing Morrell v. Unemployment Compensation Board of Review, 485 A.2d 1214, 1216 (Pa. Cmwlth. 1992)). In light of our decisions in Jamison and Morrell, we hold

that Claimant's desire for additional drug rehabilitation treatment did not provide him a necessitous and compelling reason to quit his employment.⁷

Accordingly, the order of the Board is affirmed.

PATRICIA A. McCULLOUGH, Judge

⁷ We note that this Court has previously upheld a determination of eligibility under section 402(b) where an employer fails to make reasonable accommodations to a claimant following an employer-approved leave to seek treatment at a rehabilitation center for alcohol and drug abusers. See Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994). Here, however, Employer afforded Claimant substantial amounts of time to address his substance abuse problem, namely four leaves of absence totaling approximately 259 days. Claimant only began working for Employer in June of 2006 and resigned in September of 2008. Essentially, Claimant spent approximately one-third of his employment on leave.

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ORDER

AND NOW, this 16th day of February, 2010, the order of the
Unemployment Compensation Board of Review is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge