

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Lawless,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1541 C.D. 2010
	:	
Respondent	:	Submitted: February 11, 2011

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: March 18, 2011

Robert J. Lawless (Claimant) petitions this Court for review of the July 2, 2010 order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of a Referee, denying benefits and finding that Claimant was overpaid. There are three issues before the Court: (1) whether the UCBR erred in finding that the Unemployment Compensation (UC) Service Center and the Referee had jurisdiction to determine Claimant's eligibility for benefits; (2) whether the UCBR's decision was supported by substantial evidence; and (3) whether Claimant was overpaid UC benefits. For reasons that follow, we affirm the UCBR's order.

Claimant was hired by Hearing Instruments, Inc. (Employer) as a hearing instrument specialist beginning July 1, 2001, and ending April 2, 2009. Employer utilized a camera to monitor patient visits and the sales pitches of the specialists who provided services to those patients. Employer did so to hone the skills of its specialists. It was Claimant's belief that the camera violated the Health

Insurance Portability and Accountability Act of 1996 (HIPAA)¹ and Pennsylvania wire-tapping laws. Employer posted signs and notices to current and perspective clients that the sessions with the specialists would be monitored. Claimant consulted with his co-workers about starting his own business partnership with plans to leave Employer on May 1, 2009. Claimant submitted his resignation on April 1, 2009 indicating his last day would be May 1, 2009. Employer accepted Claimant's resignation on April 2, 2009 and requested that he leave immediately.

Claimant subsequently applied for Unemployment Compensation (UC) benefits. On June 24, 2009, the Lancaster UC Service Center denied benefits for week ending April 4, 2009. Claimant appealed, and a hearing was held before a Referee. On August 4, 2009, the Referee reversed the UC Service Center, and found Claimant eligible for benefits for waiting week ending April 4, 2009. The UC Service Center subsequently mailed a second notice of determination denying benefits under Section 402(b) of the Unemployment Compensation Law (Law),² for weeks ending May 9, 2009 through September 26, 2009. Claimant appealed, and another hearing was held by a Referee. On April 8, 2010, the Referee mailed his decision affirming the determination of the UC Service Center concerning the weeks ending May 9, 2009 through September 26, 2009. Claimant appealed the April 8, 2010 order to the UCBR. The UCBR affirmed the decision of the Referee. Claimant appealed to this Court.³

Claimant argues that the UC Service Center and the Referee did not have jurisdiction to make a second determination of Claimant's eligibility for benefits.

¹ Pub. L. 104-191, 110 Stat. 1936 (1996).

² Act of December 5, 1936, Second Ex.Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

³ This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlt. 2005).

Specifically, Claimant contends that there was an order entered by a Referee on August 4, 2009 finding Claimant eligible for UC benefits which was adopted by the UCBR and never appealed by Employer, thus that order is final and the UC Service Center and the Referee had no jurisdiction to enter a contradicting order. We disagree.

Claimant's argument is that the UC Service Center had no jurisdiction to issue another determination because the August 4, 2009 order was not appealed within 15 days. However, this is not an untimely appeal issue. The UC Service Center recognized and noted in its initial determination that Claimant effectively had two dates of termination, April 2, 2009 and May 1, 2009, each encompassing a separate legal issue.

The first order issued by the Referee dealt directly with Claimant's initial discharge period and the issue of whether Claimant was a self-employed business person, while the second order dealt with the time period covered by Claimant's resignation and the issue of whether Claimant voluntarily terminated his employment. The notice of determination from the UC Service Center mailed June 24, 2009, specifically stated: "benefits must be allowed under Section 402(e) [of the Law⁴] *for the period up to the resignation. A separate determination under Section 402(b) [of the Law] may be issued for the period following the date of resignation.*" Reproduced Record (R.R.) at 37a (emphasis added). The UC Service Center mailed a separate notice of determination on October 15, 2009, for the latter time period. Clearly, as the two orders ruled on different issues and different time periods, the second order did not contradict the first order.

Claimant argues in the alternative that the Referee's findings of fact are not supported by substantial evidence. Specifically, Claimant contends the Referee's

⁴ 43 P.S. § 802(e).

finding that Claimant left his employment for reasons that were not necessitous and compelling is not supported by the record. We disagree.

Initially, we note that “[w]hether Claimant’s reason for terminating his employment was of a necessitous and compelling nature is a legal conclusion subject to appellate review.” *Telesound Rentals, Inc. v. Unemployment Comp. Bd. of Review*, 616 A.2d 190, 191 n.5 (Pa. Cmwlth. 1992). “Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *City of Pittsburgh, Dep’t of Pub. Safety v. Unemployment Comp. Bd. of Review*, 927 A.2d 675, 676 n.1 (Pa. Cmwlth. 2007) (quotation marks omitted).

An employee who claims to have left employment for a necessitous and compelling reason must prove that: (1) circumstances existed which produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve her employment.

Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review (Brunswick Hotel), 906 A.2d 657, 660 (Pa. Cmwlth. 2006).

Here, Claimant contends the necessitous and compelling reason was his belief that Employer was engaging in illegal activities.

[W]here there is no express violation of law, regulation or professional ethics . . . an employee does not establish cause of a compelling or necessitous nature in this type of case unless the employee proves that the duties required by employer so affected his or her professional and personal integrity that it would justify the voluntary quit.

Ayres v. Unemployment Comp. Bd. of Review, 598 A.2d 1083, 1087 (Pa. Cmwlth. 1991). Claimant’s unsubstantiated and subjective belief that Employer’s use of

cameras constituted a HIPAA violation or a Pennsylvania wiretapping violation is not sufficient to establish a necessitous and compelling reason for leaving his job.

Notwithstanding the above, Claimant's resignation letter did not include a reason for leaving his employment, and Claimant's internet application for UC benefits listed the reason for his leaving as starting his own business. During a very lengthy direct and cross examination at the hearing before the Referee, Claimant never said he specifically left for the sole reason of the cameras violating HIPAA and/or Pennsylvania wiretapping laws. His stated reasons included the change in his hours, the change in commission he was receiving, and the fact that he was starting a business with his former co-employees who handed in their resignations the same day he did. When the Referee specifically asked Claimant "why on April 1st did you make a decision to quit," Claimant responded "I thought I had an opportunity to go into business. I had been looking for another job unsuccessfully. Then one of the other employees approached me to possibly opening the business." R.R. at 105a. When asked by his attorney why he was looking for work and why he wanted to leave, Claimant responded: "Just totally unhappy with the changes, and the major thing is the camera and microphone." R.R. at 114a.

Julia McKelvey, Employer's CEO, testified that Claimant had a lengthy discussion with her about his resignation and he never mentioned the cameras. When the Referee asked Claimant at the hearing "if you have to write a primary or a secondary reason, was the – did the commission schedule even play into this," Claimant responded: "Well the commission schedule and also the hour change." R.R. at 116a. He continued to testify regarding having to work mandatory Saturdays and three nights a week. Clearly, the above testimony is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that Claimant did

not have a necessitous and compelling reason to leave his employment. Accordingly, the UCBR's decision was supported by substantial evidence.

Lastly, Claimant argues that he has not received an overpayment of UC benefits because the October 15, 2009 UC Service Center's notice of determination and the April 8, 2010 Referee's decision should be reversed. As stated, we disagree. For all of the above reasons, neither the October 15, 2009 UC Service Center decision, nor the April 8, 2010 Referee's decision should be reversed. Accordingly, the July 2, 2010 order of the UCBR is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 18th day of March, 2011, the July 2, 2010 order of the Unemployment Compensation Board of Review is affirmed.

JOHNNY J. BUTLER, Judge