

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vector Security, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1753 C.D. 2009
	:	SUBMITTED: January 22, 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
PRESIDENT JUDGE LEADBETTER**

FILED: March 30, 2010

Vector Security, Inc. (Vector) petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) which reversed the decision of the Referee and determined that Robert J. McKenna (Claimant) was eligible for unemployment compensation benefits.

Vector is in the business of selling, installing and monitoring security alarm systems. Claimant was employed as a salesman for Vector for nearly ten years, from August 30, 1999 to April 6, 2009. Claimant received a base salary, plus commissions, benefits and a vehicle allowance. On April 6, 2009, Vector's General Manager of Sales, Bob Bronder, called Claimant in to a meeting to inform him that because he had fallen short on his sales quotas for the first quarter of

2009, Claimant had two options. First, Mr. Bronder told Claimant he could remain a full-time salesman and continue to receive leads from the company, but he would no longer receive his base salary or his vehicle allowance. The second option offered Claimant was to work as a part-time salesman, commission only. Claimant did not accept either option but repeatedly told Mr. Bronder that he was not resigning. At the end of that meeting, Claimant handed Mr. Bronder a stack of approximately 153 forms which converted customers' contracts from an automatic renewal to a month to month term at the end of the customer's initial three year contract.¹ The two men shook hands and Claimant's direct supervisor, Jerry Gordon, escorted Claimant to his cubicle and helped him clear out his personal items. Mr. Bronder then memorialized the meeting in a letter to Claimant in which he stated, "Bob, because your productivity is lacking, and because you accepted neither option that was offered, please be advised your employment is being terminated effective today." Hearing of May 27, 2009, Employer's Exhibit 2, Original Record, Item 10.

Claimant filed for unemployment compensation benefits with the Unemployment Compensation Center, which granted Claimant benefits finding that Vector had initiated the separation and, therefore, Claimant had not voluntarily terminated his employment. Further, because Vector did not prove that Claimant's actions constituted willful misconduct, benefits were allowed under Section 402(e)

¹ While Vector's witness, Mr. Bronder, testified that the forms Claimant gave him were not Vector forms, he admitted on cross-examination that they were not actually cancellation forms, agreeing that they allowed the customer to renew his or her contract on a month to month basis. Mr. Bronder explained however, that they counted on customers staying with them for at least seven years and he felt this form meant that Vector would lose customers after three years because it allowed the customer to cancel at any time.

of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e).

Vector appealed and a hearing was held before the Referee on May 27, 2009, at which both Claimant and Mr. Bronder appeared and testified. Mr. Bronder testified that he became concerned in the last part of 2008 that Claimant was not meeting his required sales quota of ten units per month. This lack of productivity continued into the first three months of 2009, at which point he brought Claimant in to his office to present him with the two options concerning his future with Vector. Mr. Bronder admitted that base salary and auto allowance made up a substantial portion of Claimant's earnings, which Claimant would lose if he accepted either option. Mr. Bronder testified that after Claimant said no to either option, Claimant stood up, shook his hand, put a stack of papers on his desk and walked out. Mr. Bronder stated that he did not look at the papers at that time, but he admitted that Claimant explained to him what the papers were. Mr. Bronder stated that the letter he sent to Claimant on that same date was to confirm his impression that Claimant had resigned effective April 6, 2009. Finally, Mr. Bronder admitted that the letter stated that Claimant's employment was being terminated effective April 6, 2009; that it gave two reasons for the termination; and that the papers handed to him by Claimant were not a factor in terminating Claimant's employment.

Claimant testified that it was his understanding that he was terminated and that Mr. Bronder's letter confirms that understanding. Claimant stated that his base salary and auto allowance were approximately 35 to 45% of his earnings. Claimant testified that Mr. Bronder asked him 4 or 5 times during the meeting if he was resigning and Claimant repeatedly said no. Claimant testified that at the end

of the meeting, he felt that he had been terminated. Claimant testified that he explained what the stack of forms were to Mr. Bronder when he handed them to him at the end of the meeting, and Mr. Bronder responded that they didn't matter anymore because Vector no longer had an automatic renewal in its contracts. Claimant testified that the forms just pointed out to customers what was already in the contract, and that was that the contract would automatically renew for another three-year period, unless the customer cancelled within 30 days. Claimant stated that he felt that it was in Vector's best interest to prevent cancellation, so he wrote up this form which allowed customers to renew on a month to month basis. Claimant testified that he felt that it increased business for Vector because customers appreciated his honesty and had more faith in Vector as a result.

The Referee concluded that Vector "showed justification for changing the terms of the claimant's employment . . . but the claimant showed no justification for refusing the options presented to him that day and made no attempt to preserve his employment." Referee's Decision/Order, dated May 27, 2009, Original Record, Item 11, at 3. Accordingly, the Referee determined that Claimant had voluntarily quit his employment without necessitous and compelling cause and reversed the UC Center's determination.

Claimant then filed an appeal with the Board, which made its own findings of fact and conclusions of law and reversed the Referee, reinstating benefits to Claimant. The Board's findings are as follows:

1. The claimant was last employed as a full-time sales representative by Vector Security from August 30, 1999, until April 6, 2009, his last day of work.
2. The claimant was paid a base salary, auto allowance, and commission. The claimant also received benefits.

3. In late 2008, the claimant's sales declined and the employer became concerned.
4. Between January and March 2009, the claimant's sales continued to decline and the claimant fell short of his sales quota.
5. During this time, the claimant proposed to the employer that his wife be hired as a sales representative so that his own income would not affect his anticipated social security benefits.
6. On March 29, 2009, the claimant pursued these concerns in an e-mail to the employer. The claimant informed the employer that if no changes were made, he would be forced to resign his full-time position, possibly in July.
7. On April 6, 2009, the general manager met with the claimant. At that time, the general manager informed the claimant that in order to remain with the company the claimant had two choices: (1) remain as a full-time employee on a commission-only basis, keep his benefits, and the employer would supply leads; or (2) remain as a part-time employee, commission-only, no benefits and no leads.
8. Taking away the claimant's base salary and auto allowance would result in a 35-45% reduction in salary.
9. The claimant refused to accept either option.
10. When the general manager asked the claimant repeatedly whether he was resigning, the claimant said no.
11. The claimant stood up, shook the general manager's hand, left a stack of paperwork on the general manager's desk, and left the general manager's office.

12. The sales manager walked the claimant over to his cubicle and helped the claimant clear out his personal items.

13. By letter dated April 6, 2009, the employer terminated the claimant's employment due to low productivity and the claimant's refusal to accept either offer of continuing employment.

Board's Decision and Order, dated August 12, 2009, at 1-2. In concluding that Claimant's separation from employment was involuntary, the Board stated that:

The general manager gave the claimant an ultimatum, which the claimant did not accept, the sales manager walked the claimant to his cubicle to gather his personal belongings, and the employer followed up with a letter specifically stating that the claimant's employment "...is being terminated effective today." This had the immediacy and finality of a firing.

Id. at 3. Finally, the Board also determined that Vector had failed to establish that Claimant's discharge was for willful misconduct under the Law. Vector's request for reconsideration was denied and Vector now appeals to this court.

Vector first argues that the evidence established that Claimant voluntarily terminated his employment. Vector asserts that in an e-mail dated March 29, 2009, from Claimant to Mr. Bronder, Claimant stated that "if no changes were made to his current employment relationship he would be forced to resign his full-time position possibly in July 2009." Vector's Brief, at 10. In addition, Vector argues that Claimant's intention to resign is shown by Claimant's refusal of both options of continued employment offered him on his last day of work and by the fact that Claimant requested that Vector hire his wife so that his

own income would not affect his anticipated Social Security Benefits.² Vector also argues that Claimant did not establish necessitous and compelling reasons for voluntarily terminating his employment and therefore he is ineligible for benefits under Section 402(b) of the Law.³

In reviewing the Board's decision, we must first analyze whether the Claimant voluntarily terminated his employment or was discharged; and secondly, if we conclude Claimant voluntarily terminated his employment, whether he had cause of a necessitous and compelling reason to quit. Clearly, then, the threshold question is whether the facts surrounding Claimant's separation from employment with Vector constitutes a voluntary resignation or a discharge. *Maines v. Unemployment Comp. Bd. of Review*, 532 A.2d 1248, 1250 (Pa. Cmwlth. 1987) (citation omitted). The question of whether a claimant's separation from employment was voluntary or a discharge is one of law, which we must review by examining the totality of the facts surrounding the termination. *Key v. Unemployment Comp. Bd. of Review*, 687 A.2d 409, 412 (Pa. Cmwlth. 1996).

In this case, Claimant testified that at the end of his meeting with Mr. Bronder, he felt that he had been terminated. Claimant also testified that he repeatedly told Mr. Bronder during the meeting that he was not resigning. In

² While Vector characterizes Claimant's March 29, 2009 e-mail as Claimant's attempt to get Vector to "conceal his salary" by hiring his wife, and argues that this is evidence of both Claimant's intention to quit and alternatively, evidence that this conduct constitutes willful misconduct, the Board did not agree. Moreover, while Mr. Bronder did testify concerning this e-mail, he did not state that it was a factor in Claimant's termination nor did the termination letter of April 6, 2009, state that this e-mail, with the request that Vector hire his wife, was a reason for Claimant's termination.

³ 43 P.S. § 802(b). This section provides in pertinent part that: "An employe shall be ineligible for compensation for any week - - [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature"

addition, Claimant explained that while he was concerned about being able to remain as a full-time employee in the future due to his receiving Social Security Benefits, he was attempting to find options to remain employed and in no way did he consider his March 29, 2009 e-mail to Mr. Bronder an indication of his intention to resign. Claimant further testified that the two options offered to him would have significantly reduced his income and that he did not consider either option viable, but that he was not resigning. Claimant points out that the April 6, 2009 letter has the finality of a termination, in which it states, to wit: “Bob, because your productivity is lacking, and because you accepted neither option that was offered, please be advised that your employment is being terminated effective today.” Original Record, Item 10.

It is apparent from Claimant’s testimony that he did not have the “conscious intention to leave his employment,” without which a finding of voluntary termination is essentially precluded. *Roberts v. Unemployment Comp. Bd. of Review*, 432 A.2d 646, 648 (Pa. Cmwlth. 1981). Secondly, Employer’s language at the meeting, which it then memorialized in a letter, had the immediacy and finality of a firing. *Sweigart v. Unemployment Comp. Bd. of Review*, 408 A.2d 561, 563 (Pa. Cmwlth. 1979). Therefore, based on the totality of the circumstances surrounding Claimant’s separation from employment, we conclude that Claimant did not voluntarily terminate his employment, but that he was discharged by Vector.⁴

⁴ Moreover, as the Board stated: “even if the claimant had quit his employment, he had cause of a necessitous and compelling nature to do so. A change to a commission-only position, a minimum of 35-45% reduction in salary, or to a part-time position, is certainly a substantial unilateral change to the employment agreement. Therefore, even if the claimant had quit, he would be entitled to benefits.” Board’s Decision and Order, dated August 12, 2009, at 3.

Vector next argues that Claimant's actions amounted to willful misconduct under Section 402(e) of the Law, 43 P.S. § 802(e).⁵ Specifically, it asserts that "the Board erred in failing to adopt the Referee's finding of fact that Vector had a legitimate concern with regard to McKenna's creating, obtaining customer signatures on, and concealment from Vector, of the contract change forms and making the conclusion that such conduct constituted willful misconduct." Vector's Brief, at 13. We disagree. Aside from the fact that the Board is the ultimate fact-finder in Unemployment Compensation proceedings, a review of the record reveals that Vector repeatedly asserted that Claimant quit without notice after he refused to accept either option of continued employment offered to him.⁶ The April 6, 2009 letter to Claimant clearly sets forth that Claimant's employment was terminated for two reasons: first, due to his low productivity in selling the security systems, and second, due to his refusal to accept either of the two options for remaining employed. Vector's own witness Mr. Bronder admitted that those were the two issues he discussed at their meeting and that these were the reasons outlined in the letter. Moreover, Mr. Bronder admitted that the stack of forms Claimant gave him at the meeting was not a factor in Claimant's termination, nor did he testify to any other reason why Claimant was terminated. Thus, the Board found that these were the grounds for termination and

⁵ Employer has the burden of establishing that the Claimant's actions constituted willful misconduct. *See McLean v. Unemployment Comp. Bd. of Review*, 476 Pa. 617, 383 A.2d 533 (1978).

⁶ In Vector's Employer's Separation and Wage Information and its appeal from the UC Center's determination, Vector indicated that it was a "voluntary quit," and that "Mr. McKenna quit without notice. He was not fired." Original Record, Items 3 and 5. The Referee did not rule on the issue of willful misconduct, having determined that Claimant voluntarily quit his employment without good cause. However, the Board clearly addressed and resolved this issue, as discussed *infra*, and both parties briefed the issue as well.

that Vector did not show that Claimant's low productivity was due to willful misconduct nor that Claimant's refusal to accept either of the options constituted willful misconduct. Because we also conclude that Claimant was terminated for reasons that did not amount to willful misconduct, we affirm the Board's decision granting Claimant benefits.

BONNIE BRIGANCE LEADBETTER,
President Judge

