IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert O. Lampl, Petitioner	:	
v.	:	No. 1808 C.D. 2009
	:	Submitted: February 26, 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 SIMPSON **FILED: March 31, 2010**

In this unemployment compensation case, Robert O. Lampl (Employer) asks whether the Unemployment Compensation Board of Review (Board) erred in granting benefits to Sharon Dexter (Claimant). The Board determined Employer terminated Claimant and did not prove that termination was the result of willful misconduct. See Section 402(e) of the Unemployment Compensation Law (Law).[1] Employer argues the Board erred in determining it discharged Claimant when, in fact, Claimant voluntarily quit. Employer also asserts Claimant is ineligible for benefits because she refused an offer of suitable

[1] Section 402(e) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e), provides, as relevant: "[a]n employe shall be ineligible for compensation for any week … [i]n which his unemployment is due to his discharge … from work for willful misconduct connected with his work …."

work. See Section 402(a) of the Law, 43 P.S. §802(a). Discerning no merit in these assertions, we affirm.

Beginning in 2000, Claimant performed office work for Employer, an attorney. Claimant's last day of work was May 6, 2008. Shortly thereafter, Claimant filed for unemployment benefits, which were initially granted. Employer appealed. A hearing ensued before a referee at which testimony was presented by Claimant and three witnesses on behalf of Employer.

After hearing, the referee issued a decision granting benefits on the ground Employer terminated Claimant and did not prove she committed willful misconduct. Employer appealed, and the Board issued a decision granting benefits under Section 402(b) of the Law, 43 P.S. §802(b) (regarding necessitous and compelling cause for voluntarily terminating employment). Employer appealed to this Court.

Upon application of the Board, and agreement of the parties, a single judge of this Court remanded this matter to allow the Board to reconsider its prior decision. The Board subsequently issued a decision vacating its prior decision granting benefits under Section 402(b) of the Law, and issuing a new decision granting benefits under Section 402(e) of the Law. The Board's findings on remand may be summarized as follows.

On Wednesday, May 7, 2008, Claimant contacted Employer's office manager and informed her she was unable to report to work because of a medical

issue. Employer understood Claimant's husband "head-butted" her, and Claimant had a broken nose. Bd. Op., 8/18/09, Finding of Fact (F.F.) No. 3. Claimant received treatment at a hospital emergency room. Later the same day, Claimant again contacted Employer's office manager, stating, "I don't know if I want to come back." F.F. No. 5. Employer did not accept Claimant's "suggestion of resignation." F.F. No. 6.

A few days later, on Saturday, May 10, Claimant contacted Employer's office manager and indicated she wished to return to work. However, Claimant informed the office manager she could not return to work the following week because "her face and eyes were worse." F.F. No. 8. Claimant made subsequent attempts to reach the office manager by phone, but was unsuccessful.

Claimant planned to return to work on Monday, May 19. Prior to that date, however, Claimant received a telephone message from Employer's owner stating her last paycheck was mailed, and she should not appear for work on her planned return date, or "it would be embarrassing." F.F. No. 11.

Employer's owner also sent Claimant a letter dated May 16, advising her Employer accepted her resignation of May 7 and offering her an opportunity to consider working for Employer on a part-time basis. Claimant received Employer's letter on May 20 and did not respond. Employer made an offer of employment to Claimant at the hearing.

The Board determined, although Claimant initially discussed quitting her position, Employer did not accept her resignation and allowed her additional time to consider her situation. The Board credited Claimant's testimony that she subsequently informed Employer of her desire to return to work, but because of her physical issues she was not available the following week. The Board determined Employer discharged Claimant before she could return to work. The Board further concluded Claimant's failure to return to work for physical reasons did not amount to willful misconduct. Thus, the Board granted benefits. Employer now appeals to this Court.

On appeal,[2] Employer argues the Board erred in determining it discharged Claimant. Employer further asserts the Board erred in failing to consider whether Claimant was ineligible for benefits when she refused Employer's offer of suitable work.

The Board is the ultimate fact-finder in unemployment compensation cases. Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). "[T]he weight to be given the evidence and the credibility to be afforded the witnesses are within the province of the Board as finder of fact …." Peak v. Unemployment Comp. Bd. of Review, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). In addition, we must "examine the testimony in the light most favorable to the party in whose favor the fact-finder has ruled, giving that party the

[2] Our review is limited to determining whether the Board's necessary findings were supported by substantial evidence, whether the Board committed an error of law, or whether the Board violated constitutional rights. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

benefit of all logical and reasonable inferences from the testimony …." Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review, 496 Pa. 620, 630, 437 A.2d 1213, 1218 (1981).

Employer first argues the Board erred in determining it discharged Claimant. Employer contends this determination is contrary to the Board's determination in its first decision that Claimant voluntarily quit. Employer points out that on remand there were no new facts before the Board, and there was no justification for the Board to abandon its earlier determination and substitute a new determination directly contrary to its first determination.

Employer further asserts the Board's determination is contrary to the overwhelming evidence. Specifically, Employer points out that its three witnesses all testified Claimant voluntarily quit, and this was confirmed by Employer's letter sent nine days later accepting Claimant's resignation. Employer maintains the Board's finding that it discharged Claimant is not supported by substantial evidence. Because Claimant voluntarily quit her employment, Employer argues, she is ineligible for benefits under Section 402(b) of the Law.

The question of whether particular facts constitute a voluntary quit is a question of law fully reviewable by this Court. "A claimant has the burden of proving that her separation from employment was a discharge." Kassab Archbold & O'Brien v. Unemployment Comp. Bd. of Review, 703 A.2d 719, 721 (Pa. Cmwlth. 1997). "Whether a claimant's separation from employment is a voluntary resignation or a discharge is determined by examining the facts surrounding the

claimant's termination of employment." Id. This is a question of law to be decided based on the Board's findings. Fekos Enters. v. Unemployment Comp. Bd. of Review, 776 A.2d 1018 (Pa. Cmwlth. 2001).

"A finding of voluntary termination is essentially precluded unless the claimant has a conscious intention to leave his employment." Id. at 1021. "In determining the intent of the employee, the totality of the circumstances surrounding the incident must be considered." Id.

Here, the Board determined that although Claimant initially indicated she "[didn't] know if [she] want[ed] to come back [to work,]" Employer did not accept Claimant's "suggestion of resignation." F.F. Nos. 5, 6. The Board further determined a short time later Claimant contacted Employer and stated she wished to return work, but prior to her planned return date, Employer's owner left her a telephone message informing her not to return to work, or "it would be embarrassing." F.F. Nos. 7, 10, 11. The Board further determined (with emphasis added):

> Based on the record before the Board, the Board concludes that the employer discharged the claimant from employment and Section 402(e) is applicable to this proceeding. Here, it is clear that the claimant discussed quitting with the employer. However, the employer did not accept the claimant's resignation and allowed the claimant additional time to consider her situation. The claimant is credible that she thereafter informed the employer that she wanted to work, but because of her physical issues, she was not available the following week. The employer subsequently discharged the claimant before she could return. The claimant's failure to return to work for physical reasons fails to rise to the

> level of willful misconduct and the claimant is not ineligible for benefits under Section 402(e).

Bd. Op., 8/18/09, at 3.

The Board's findings and determinations are supported by Claimant's testimony as well as the recorded telephone message from Employer's owner, which Claimant played at the referee's hearing here without objection. See Referee's Hearing, 7/7/08, Notes of Testimony, at 12-14; Reproduced Record at 13a-15a. Although Employer relies on the testimony of its witnesses to support its argument that Claimant voluntarily quit, the Board resolved the conflict of evidence in Claimant's favor. The Board's resolution of this conflict is a decision within its exclusive province as fact-finder. Peak. Further, contrary to Employer's assertions, it is irrelevant whether the record contains evidence that would support contrary findings. Duquesne Light Co. v. Unemployment Comp. Bd. of Review, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Support for our conclusion that Employer discharged Claimant is found in this Court's en banc decision in Ryan v. Unemployment Compensation Board of Review, 448 A.2d 713 (Pa. Cmwlth. 1982). There, the claimant, an apartment manager, walked off the job after a quarrel with her parents, who were also her employer. The unemployment compensation authorities denied benefits on the ground claimant quit without a necessitous or compelling reason. Before this Court, the claimant asserted that after the verbal altercation she expressed an intention to return. Several hours later, however, her father informed her not to do so. The claimant therefore argued the employer discharged her. This Court agreed, stating:

> Here, although the record reveals conflicting testimony concerning [the claimant's] intentions on returning to work, the testimony is very clear that she was shortly thereafter instructed by her father not to return to work.
>
> Consequently, the supporting circumstances outside of the initial incident leave us with no competent evidence to support a conclusion that, as a matter of law, her actions amounted to a voluntary termination of her employment. We thus conclude that she was discharged by her father. …

Id. at 715 (footnotes omitted).

Similar to the facts in Ryan, although Claimant here initially indicated she did not know if she wished to return to work, she contacted Employer a few days later and expressed a desire to return to work. F.F. Nos. 5, 7. Further, Claimant attempted to maintain contact with Employer and planned to return to work. F.F. Nos. 9, 10. Prior to her planned return date, however, Employer's owner left Claimant a telephone message, stating he sent Claimant a letter with her last paycheck and instructing her not to appear for work. F.F. No. 11. Thus, although Claimant initially contemplated quitting, she contacted Employer a short time later indicating her desire to return to work, but Employer discharged her before she could do so. Bd. Op. at 3. Based on the Board's findings and determinations, we discern no error in the Board's ultimate conclusion that Employer discharged Claimant. Ryan. In addition, Employer advances no argument that Claimant's discharge was the result of willful misconduct.

Further, we reject Employer's argument that the Board erred in determining Employer discharged Claimant where the Board's first decision, issued prior to this Court's remand order, was based on a determination that Claimant voluntarily quit.

In its first decision, the Board determined Claimant voluntarily quit her employment, but had necessitous and compelling cause to do so. Employer appealed to this Court. Shortly thereafter, the Board filed an Application for Remission of the Appeal to the Unemployment Compensation Board of Review in which the Board averred it "failed to consider all of the material facts in reaching its conclusion of law and is now desirous of reviewing its conclusion in light of those facts." Board's Application for Remission of the Appeal to the Unemployment Compensation Board of Review at ¶3. The Board's application further averred the Board contacted Employer's counsel, and Employer agreed to a remand. Id. at ¶4.

Shortly thereafter, a single judge of this Court issued an order granting the Board's unopposed application and remanding to the Board for "the issuance of an adjudication for which any aggrieved party may appeal." Dkt. No. 525 C.D. 2009, Order of 5/11/09.

On remand, "after further study and consideration," the Board vacated its first decision and issued the decision at issue here. Bd. Op. 8/18/09 at 1. No error is apparent in the Board's action.

The Board may, on its own motion, having provided proper notice and explanation, correct typographical, clerical and mechanical errors in its decisions. See Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Comp. Bd. of Review, 309 A.2d 165 (Pa. Cmwlth. 1973). In addition, the Board may correct undisputed factual errors or factual misconceptions. Id. However, the Board cannot, consistent with principles of procedural due process, reverse itself on a substantive issue previously decided in a case, absent a petition for reconsideration or the granting of an opportunity to be heard by way of brief or oral argument. Id.

In Kentucky Fried Chicken, the Board denied benefits to a claimant on the ground the employer discharged the claimant for willful misconduct. Four days later, the Board, on its own motion, vacated its prior order and issued a new order that awarded benefits on the ground the claimant was not guilty of willful misconduct. This Court disapproved that procedure.

The situation here is distinguishable from that presented in Kentucky Fried Chicken. In particular, unlike the procedure condemned by this Court in Kentucky Fried Chicken, the Board here initially issued a decision granting benefits under Section 402(b) of the Law. After Employer's appeal to this Court, the Board filed an application for remand requesting this Court's approval to reconsider its facts and conclusions. The Board notified Employer of its remand request, and Employer did not object. As such, this Court granted the Board's unopposed application for remand, instructing the Board only to "issu[e] an adjudication [that] any aggrieved party may appeal." Dkt. No. 525 C.D. 2009,

Order of 5/11/09. On remand, the Board complied with this Court's instruction. As such, no due process violation is evident here.

As a final point, Employer argues the Board erred in failing to consider whether Claimant was ineligible for benefits under Section 402(a) of the Law (relating to offers of suitable work). Employer points out that the Board specifically found: "The employer made an offer of employment to the claimant at the hearing." F.F. No. 14. Despite this finding, the Board did not consider whether Claimant was ineligible for benefits under Section 402(a) based upon her refusal to accept suitable work.

> Section 402(a) states, in relevant part (with emphasis added):
>
> An employe shall be ineligible for compensation for any week--
>
> (a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him by the employment officer or by any employer, irrespective of whether or not such work is in "employment" as defined in this act: Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof ….

43 P.S. §802(a).

Here, although the Board found Employer made an offer of employment to Claimant at the hearing, in the discussion section of its opinion, the Board stated: "The Department should note that Section 402(a) appears to be at issue based on a job offer made at the hearing. The Department should investigate

the claimant's continued eligibility under Section 402(a)." Bd. Op., 8/18/09, at 3. Upon review, we discern no error in the Board's handling of this issue.

First, Claimant's eligibility under Section 402(a) of the Law was not at issue at the hearing before the referee. See Certified Record at Item #8 (Notice of Hearing). In addition, it is unclear whether Employer provided notice of its job offer to the employment office as contemplated by Section 402(a). Under these circumstances, we believe the Board properly allowed for an opportunity for the Department to investigate Claimant's continued eligibility under Section 402(a). Indeed, as the Board asserts in its brief, this approach will allow for a complete determination of Claimant's eligibility under Section 402(a), including a determination of whether Employer timely notified the employment office of the job offer, and whether any such notification was time-barred because of prejudice to Claimant. See McKeesport Hosp. v. Unemployment Comp. Bd. of Review, 619 A.2d 813 (Pa. Cmwlth. 1992) (strict compliance with Section 402(a)'s notice provision not required where claimant is not prejudiced by the delay). In short, because it is not clear that the Board had all of the necessary information before it in order to undertake a full review of Claimants eligibility under Section 402(a), we discern no error in the Board's cautious handling of this issue.

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 31st day of March, 2010, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

ROBERT SIMPSON, Judge