

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Diane P. Gutman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1899 C.D. 2009
	:	
Respondent	:	Submitted: February 12, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: April 22, 2010

Diane P. Gutman (Claimant) appeals from the Order of the Unemployment Compensation Appeal Board (Board) which affirmed the Referee’s denial of benefits under Section 402(b) of the Unemployment Compensation Law (UC Law)<sup>1</sup> and Section 4001 of the federal Emergency Unemployment Compensation (federal EUC Act).<sup>2</sup> Claimant also appeals the Board’s determination that Claimant obtained a “fraudulent overpayment” of benefits in the

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b).

<sup>2</sup> Title IV of the Supplemental Appropriation Act of 2008, Public Law 110-252, 122 Stat. 2323, Section 4001, 26 U.S.C. § 3304. The federal EUC Act provides for up to 20 weeks of federally-funded unemployment benefits to be paid to eligible unemployed workers who have collected all their regular state unemployment benefits. To qualify for these benefits, unemployed workers must first be determined eligible for unemployment as determined under state law. In Pennsylvania, a claimant must be at least partially unemployed, able and available for suitable work, not disqualified for voluntarily leaving work, and not discharged for willful misconduct. See McKenna v. Unemployment Compensation Board of Review, 981 A.2d 415 (Pa. Cmwlth. 2009).

amount of \$9,380.00 because she did not, at the outset, disclose to the Department of Labor and Industry (Department) that she voluntarily quit her job with Peluzzi Toyota (Employer). The Board concluded that Claimant did not disclose this information to the Department until April 1, 2009, after she had received 20 weeks of benefits. The Board concluded that Claimant must repay this amount in accordance with the provisions of Sections 4005(a)-(c) of the federal EUC Act.

### **Claim History**

Claimant filed her initial Application for Benefits in March of 2008 and began to receive unemployment benefits after her separation from employment with Assouline and Roth Specialty Flooring. Claimant received bi-weekly direct deposits totaling \$938.00, i.e., \$469.00 weekly.<sup>3</sup>

On October 8, 2008, Claimant accepted a job as a full-time Internet Sales Coordinator for Employer. She notified the UC Service Center that she accepted this job and that she would work part-time through October 11, 2008, and then go to full time. Claimant continued to file bi-weekly claims for partial benefits pursuant to her initial March 2008 Application for Benefits while she worked for Employer. According to Claimant, she continued to file bi-weekly claims for partial benefits because she worked only 3 days during the first week

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<sup>3</sup> Once an initial Application for Benefits is filed, the employee must file a claim for each week she was unemployed in order to receive benefits. Generally, the employee will file for two claim weeks at one time. This is called a bi-weekly claim. Although the employee files for two weeks at one time, she must certify her eligibility for each week separately. Bi-weekly claims are filed via the Internet or Pennsylvania TeleclaimsPAT. Pennsylvania Unemployment Compensation Handbook at 6-7.

and 4 days during the second week.<sup>4</sup> Her last day of work for Employer was October 17, 2008.

After she stopped working for Employer, Claimant resumed filing bi-weekly claims for \$938.00 on her existing March 2008 Application for Benefits. Because her state benefits were exhausted, she received federal EUC Act benefits beginning October 25, 2008. Claimant received federal EUC Act benefits, bi-weekly, in the amount of \$938.00 through February 21, 2009, which was the maximum number of 20 weeks allowed.

In March of 2009, at the expiration of her 2008 “Benefit Year”<sup>5</sup> Claimant filed a “new” Application for Benefits. The UC Service Center sent Claimant a “Claimant Questionnaire” and an “Employment Separation Questionnaire” asking Claimant to explain her separation from Employer. Claimant filled out the forms and returned them on April 1, 2009. In her responses, Claimant indicated for the first time that she “quit”<sup>6</sup> her employment with Employer under the following circumstances:

Upon hire, I was told I would be earning approximately \$18-\$20 an hour with my commission plan. It became clear after working as an internet sales coordinator, the commissions were unrealistic considering the state of the economy. The consumers were not buying cars or able to get financing to purchase the vehicles.

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<sup>4</sup> This means that Claimant did not stop filing her bi-weekly claims. Therefore, she did not need to contact the UC Service Center to “reopen” or “reactivate” her claim.

<sup>5</sup> A “Benefit Year” is a 52-consecutive week period beginning with the initial Application for Benefits. Pennsylvania Unemployment Compensation Handbook at 1.

<sup>6</sup> Claimant Questionnaire, April 1, 2009, at 1.

I approached Mr. Eric Painter who hired me and after discussing the matter we amicably agreed to separate.

I continued to seek and pursue other employment and interview with other companies.

Employment Separation Questionnaire, April 1, 2009, at 2.

On April 23, 2009, the UC Service Center determined that Claimant was not eligible to receive benefits because she voluntarily quit her job. The UC Service Center also determined that Claimant received \$9,380.00 (20 weeks x \$469) in federal EUC benefits as a result of fraud.

Claimant appealed from the UC Service Center's determination. A hearing was held before the Referee on June 11, 2009, to take evidence and determine whether (1) Claimant voluntarily quit her employment with Employer; and (2) Claimant's receipt of \$9,380.00 in emergency unemployment compensation benefits should be deemed fraud. Claimant appeared with counsel. Employer did not appear. The UC Service Center provided internal documents which were marked as exhibits. Exhibit SC-11 was the UC Service Center's claim record which contained a computerized printout of Claimant's claim history, the dates and amounts of payments she received, the dates claims were made, notes, and employment history.

The Referee made the following findings of fact:

1. The claimant was employed by Peruzzi Toyota as a full-time Internet Sales Coordinator from October 8, 2008, until her last day of work on October 17, 2008 at a final rate of pay of \$10.00 per hour plus commission on sales.

2. At the time the claimant interviewed for the position, the employer told the claimant that he could see her making \$18.00 to \$20.00 per hour total including her commission.
3. The claimant's job was to call leads that were provided to her and convince them to make an appointment to visit the employer's car dealership and look at automobiles for purchase.
4. The claimant would receive the commission only if the prospective customer made an appointment and appeared at the employer's dealership for the appointment.
5. The claimant would receive an additional commission if the prospective customer purchased a car.
6. After working one week, the claimant believed that she would not be able to earn \$18.00 to \$20.00 per hour because prospective customers were not scheduling appointments.
7. The claimant believed that the job did not have the potential for her to earn an additional \$8.00 to \$10.00 per hour in commission based on her discussion with two other individuals who were internet sales coordinators.
8. On October 17, 2008, the claimant asked if she could work part-time because she wanted to seek other employment.
9. The employer denied the claimant's request, telling her that they had too much business to allow her to work part-time.
10. The claimant left employment with Peruzzi Toyota because she was dissatisfied with the earnings.
11. Continuing work was available to the claimant with Peruzzi Toyota.

12. The Department [of Labor and Industry] established a claim for Emergency Unemployment Compensation (EUC) benefits for the claimant effective September 19, 2008, based upon the claimant's March 9, 2008 application for state-funded unemployment compensation benefits for which she was found financially eligible for a weekly benefit allowance of \$469.00 with a partial benefit credit of \$188.00.

13. The claimant filed claims for EUC benefits for the compensable weeks ending October 25, 2008 through and including February 21, 2009 and received a total of \$9380.00 in gross EUC benefits in the amount of \$469.00 weekly benefit allowance for each claimed week.

14. The claimant did not report that she quit her job with Peruzzi Toyota when she filed her claims for benefits.

Referee Opinion and Order, June 19, 2009, Findings of Fact 1-14, at 1-2.

The Referee concluded that Claimant was not eligible for benefits because she voluntarily quit her employment without a necessitous and compelling reason. The Referee specifically rejected Claimant's position that the job was "misrepresented" and she was "guaranteed" to make a minimum of \$18.00-\$20.00 per hour. The Referee found that Claimant "was not guaranteed any minimum amount of commission. The Employer gave the claimant an estimate of the potential earnings, but did not promise that she would meet those expectations." Referee Opinion and Order, June 19, 2009, at 2. The Referee found the "state of the economy" was "universally known" at the time Claimant accepted the position. Therefore, Claimant failed to show that she was in any way deceived by Employer. Id. at 3. The Referee also concluded that Claimant only worked for one week and "did not make a serious effort" to see whether her sales skills would enable her to earn her desired commission. Id.

On the issue of fraudulent overpayment, the Referee found that “claimant did not report that she quit her job with Peruzzi Toyota when she filed her claims for benefits.” Id. at 2. The Referee noted that there was “no entry [on the claim record] where it is indicated that the claimant notified the Department of the reason for her separation from employment with Peruzzi Toyota until March or April of 2009.” Id. The Referee concluded that “knowingly withholding information regarding a separation from employment is attributed to the fault of claimant.” Id. (Emphasis added). The Referee concluded Claimant was overpaid in the amount of \$9,380.00 and that the overpayment must be repaid because Claimant failed to timely report to the Department that she voluntarily quit.

Claimant appealed to the Board which adopted the Referee’s credibility determinations, findings and conclusions.

On appeal to this Court<sup>7</sup>, Claimant asserts that the Board erred when it (1) concluded that she lacked a necessitous and compelling reason for leaving work; (2) concluded that she committed fraud; and (3) denied her due process.

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<sup>7</sup> Because Claimant had the burden of proof and was the only party to present evidence, this Court's review is limited to a determination of whether the Board capriciously disregarded competent evidence, there has been a constitutional violation, or an error of law. Blackwell v. Unemployment Compensation Board of Review, 555 A.2d 279 (Pa. Cmwlth. 1989).

## I.

### **Whether the Board Erred When it Concluded that Claimant Lacked A Necessitous and Compelling Reason to Leave Work**

First, Claimant contends that the Board erroneously denied her unemployment benefits pursuant to Section 402(b)<sup>8</sup> of the UC Law, 43 P.S. §802(b), and Section 4001 of the federal EUC Act. She argues that she was justified in quitting because Employer engaged in “predatory hiring practices” when it hired her for a “fictitious, non-existent” position “that did not exist.” Claimant’s Brief at 8.

By accepting a job, an employee admits to the initial suitability of the job with respect to the wages and conditions of employment. Stiffler v. Unemployment Compensation Board of Review, 438 A.2d 1058, 1060 (Pa. Cmwlth. 1982). Unsuitability of work will constitute cause of a necessitous and compelling nature for quitting only where the employee proves that she was deceived as to the conditions of the employment or that the conditions substantially changed subsequent to hire. Id.

In Stiffler, Harry Stiffler (Stiffler) quit his job with a trucking company and applied for unemployment compensation benefits where were denied

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<sup>8</sup> Section 402(b) of the Law, 43 P.S. §802(b), provides, in pertinent part that “[a]n employe shall be ineligible for compensation for any week -- ... (b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature...” Under Section 402(b), 43 P.S. §802(b), Claimant bears the burden of proving that she “acted with ordinary common sense in quitting her job, that she made a reasonable effort to preserve her employment, and that she had no other real choice than to leave her employment.” Empire Intimates v. Unemployment Compensation Board of Review, 655 A.2d 662, 665 (Pa. Cmwlth. 1995).



by the Board. On appeal to this Court, Stiffler claimed that he did not receive the wages and hospitalization he was “promised” during the interview. This Court noted that the Board found that Stiffler was hired on a commission basis and that this was spelled out to him when he was hired. The Board concluded that Stiffler terminated his employment because “he felt his earnings were insufficient, he was not receiving the hospitalization program he **wished** to receive...” Id. These findings indicated that Stiffler “was not deceived as to his salary or working conditions when he was employed.” Stiffler, 438 A.2d at 1060.

Here, as in Stiffler, Claimant failed to prove that she was “deceived” as to the conditions of the employment. The Board specifically found that the Employer did not promise or guarantee that Claimant would earn \$10.00 to \$20.00 per hour. The Board based its findings on Claimant’s testimony. By Claimant’s own account, the word “guarantee” was not used during the interview. She admitted that Mr. Price only said “**he could see**” her making \$18.00-\$20.00 per hour. Hearing Transcript (H.T.), June 11, 2009, at 11, 15. (Emphasis added).

The Referee’s findings of fact and credibility determinations, as adopted by the Board, indicate that Claimant was aware when she accepted the job that it paid \$10.00 per hour plus the potential for an additional \$8.00 to \$10.00 in commissions based on the success of her individual efforts with the appointments she made and cars sold. These findings are entirely consistent with Claimant’s uncontradicted testimony and admissions at the hearing. Neither the Referee nor the Board erred when they concluded that Claimant’s dissatisfaction, based on her speculation that she would not make as much as she hoped, did not provide her with good cause to quit after only nine days on the job.

Because Claimant failed to meet her burden of proving a compelling and necessitous reason to quit her job, the Board did not err when it affirmed the Referee's denial of benefits.

## II.

### **Whether the Board Erred When it Found Claimant Obtained a "Fraudulent Overpayment" of EUC Benefits**

Next, Claimant contends that the Board erred when it found she fraudulently obtained an overpayment of EUC benefits. She contends that the Board capriciously disregarded her uncontradicted testimony and its finding was not supported by clear and convincing evidence.

Section 4005 of the EUC Act provides that an overpayment of EUC benefits shall be classified as fraud where an individual "knowingly has failed ... to disclose a material fact, and as a result of such ... nondisclosure such individual has received an amount of emergency unemployment compensation under this title to which such individual was not entitled." 26 U.S.C. §3304.

The fact that Claimant quit her job was critical for the Department to determine her eligibility for benefits. Amspacher v. Unemployment Compensation Board of Review, 479 A.2d 688, 691 (Pa. Cmwlth. 1984). As noted, if Claimant reported that she quit, she would not have been eligible to receive EUC benefits. The question for the Referee and the Board was whether there was sufficient evidence in the record to conclude that Claimant's conduct amounted to fraud.

Claimant argues that the only evidence in the record was her "consistent" and "uncontradicted" testimony which the Board capriciously

disregarded. She claims she testified that she believed that she was “eligible for benefits in [her] own mind” at the time she applied. N.T. at 16. She argues that she reported the situation “honestly” when she filed a new application for benefits in April of 2009, and that evidence of this disclosure is inconsistent with a finding that she intended to defraud the Department.<sup>9</sup>

However, as our Supreme Court has held, the Board is the ultimate finder of fact and it alone weighs evidence and makes credibility determinations. Peak v. Unemployment Compensation Appeal Board, 509 Pa. 267, 501 A.2d 1383 (1985). Like the Referee, the Board did not find Claimant’s testimony credible.

When questioned as to whether she notified the Department that she quit her job before she resumed filing bi-weekly claims for \$938.00, Claimant did not testify that she notified the Board that she quit; only that she did “not recall” doing so. N.T. at 17. The Board then concluded from the computerized claim record (Exhibit SC-11) that Claimant did **not** notify the Department that she quit. The Board did not err.

As to whether Claimant’s failure to notify the Department that she quit amounted to a “knowing failure to disclose a material fact” under Section 4005 of the federal EUC Act, the record supports the Board’s ultimate conclusion.

Initially, this Court notes, contrary to Claimant’s position, the Board was not required to accept her testimony because it was “uncontradicted.” Even if

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<sup>9</sup> This Court notes that to aid in the determination of a claimant’s substantive eligibility, a Notice of Application and Request for Separation Information Form, Form UC-45, is also sent to **(Footnote continued on next page...)**

testimony is uncontradicted, a Board of Review is free to reject it if the Board deemed such evidence to be incredible. Blackwell. A capricious disregard of the evidence has been defined as the disbelief of testimony which an individual of ordinary intelligence could not possibly challenge or entertain the slightest doubt as to its truth. Miceli v. Unemployment Compensation Board of Review, 502 A.2d 297, 300 n. 2 (Pa. Cmwlth. 1985).

Here, this Court's review of the record reveals that Claimant's testimony as to her failure to notify the Department that she quit was not only vague; it was inconsistent with the documentation provided by the UC Service Center. The claim record (Exhibit SC-11) contains entries which indicate that Claimant reported her separations from employment on other prior occasions which demonstrated that *she was aware of her obligation to do so*. For example, on October 10, 2008, Claimant reported to the Department that she "completed her last assignment," with Stivers Staffing and that "nothing else was offered." Claim Record (Exhibit SC-11), at 2. Further, Claimant filed an initial Application for Benefits on March 8, 2008, which required her to state *whether she voluntarily quit* and, if so, to provide a complete explanation of what occurred, whether she had a definite job offer with a date to begin work prior to quitting, and whether there was a time lapse between the date she quit and the date the new job was to begin. Claimant Questionnaire, Form UC-1933C at 1.

Accordingly, the Board reasonably rejected that Claimant was unaware of her obligation to report that she quit her job with Employer. This

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**(continued...)**

the employer.

Court, therefore, concludes that the Board did not exhibit a capricious disregard of the evidence in rejecting Claimant's testimony.

Further, this Court concludes that the record supported the Board's finding that Claimant knowingly failed to disclose on her application for benefits that she voluntarily quit her job. In so holding, this Court reiterates that a claimant seeking unemployment benefits is required to divulge to the Department all pertinent information regarding the claimant's employment status. Whether a claimant quits because she believes the job was misrepresented, or for some other reason, that fact is relevant and important to the Department's determination of that claimant's eligibility for benefits. Here, by withholding that information Claimant provided an inaccurate picture of her true employment status to receive EUC benefits. The evidence supports the conclusion that Claimant was aware from prior experience and her initial Application for Benefits that this particular information was requested and was important to the UC Service Center. It was also obviously material to her receiving ongoing unemployment benefits. Certainly, the factfinder did not err when it found she knowingly failed to report that she quit her employment with Employer. See Sauer v. Unemployment Compensation Board of Review, 531 A.2d 1174 (Pa. Cmwlth. 1987).

Because there was a requisite showing that Claimant knowingly failed to disclose that she quit her job, the Board's denial of unemployment benefits and finding of a fraudulent overpayment of EUC benefits is affirmed.

### III.

#### Whether Claimant Was Denied Due Process

Claimant contends that she was denied due process because the Referee was “biased” against her. She asserts that the bias is evident when the “uncontroverted evidence of record” is compared to the Referee’s findings.

First, this Court finds that the record supported the finding of fraudulent overpayment. Again, simply because Claimant was the only one who testified does not mean the Referee or Board had to credit her testimony. Blackwell.

Second, Claimant received a full and fair opportunity to litigate whether she acted fraudulently in obtaining benefits and whether the overpayment was recoverable. Claimant was represented by counsel. She was given the opportunity to answer questions and explain her position to the factfinder. Questions regarding fraudulent overpayment were decided impartially at the administrative level and affirmed by the Board. Claimant also took advantage of the appeals process in this Court. Accordingly, there was no denial of due process.

The Order of the Board is affirmed.

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BERNARD L. McGINLEY, Judge

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Diane P. Gutman,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1899 C.D. 2009
	:	
Respondent	:	

**ORDER**

AND NOW, this 22nd day of April, 2010, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby affirmed.

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BERNARD L. McGINLEY, Judge