

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Philadelphia Housing Authority,	:	
Petitioner	:	
	:	
v.	:	No. 2530 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: May 21, 2010
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 26, 2010

The Philadelphia Housing Authority (Employer) seeks review of the order of the Unemployment Compensation Board of Review (Board) which affirmed a referee's grant of unemployment compensation benefits to Kiameshia McPherson (Claimant) under Section 402(b) of the Unemployment Compensation Law (Law).¹ Employer argues that the Board erred in determining Claimant had a necessitous and compelling reason for voluntarily leaving her employment. Additionally, Employer argues that the Board erred in failing to find that Claimant falsified her application for benefits when she claimed she lost her job due to lack of work.

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

I. Background

Claimant is an attorney who resigned from employment days after Employer transferred her to a new department. Following her separation from employment, Claimant applied for unemployment compensation benefits. The local service center initially granted her claim, but denied it four months later. The service center concluded that Claimant falsified her application for benefits by claiming work was unavailable, when, instead, she voluntarily left employment. Accordingly, the service center concluded Claimant received a fault overpayment under Section 804(a) of the Law² for the prior four months. The service center directed Claimant to repay this overpayment and also required Claimant to pay penalty weeks under Section 801(b) of the Law.³

Claimant timely appealed the service center's determination. A referee conducted a hearing at which testimony was presented by Claimant and the Employer's employment administrator. After the hearing, the referee issued a decision reversing the service center's determination. The referee's findings, later adopted by the Board, are summarized as follows.

Claimant worked for Employer in several different positions during her five year tenure. She worked as counsel in Employer's real estate investments unit for several years. Employer then transferred Claimant to a home ownership coordinator position. Several weeks later, Employer transferred her to a then-

² 43 P.S. §874(a).

³ 43 P.S. §871(b).

untitled position within its contract procurement department.

The procurement department was in the midst of extensive reorganization. Several employees within the procurement department, including its general manager, left or were leaving their employment. Additionally, at the time of the transfer several procurement department employees were on leave.

In this new position, Claimant was responsible for procuring goods and services within federal government guidelines. Claimant had no experience in either procurement or the federal guidelines. Claimant informed the assistant executive director that she believed she lacked the experience to perform the procurement job.

Employer did not immediately provide Claimant with an office in the procurement department. Accordingly, Claimant continued to work from her office space in her prior department. A manager in the procurement department told her she would be reprimanded for insubordination if she did not sit in the procurement's department's physical space.

Within days of the transfer, Claimant tendered her resignation. She based her decision on Employer transferring her to an area outside her experience and expertise. She also thought that Employer was not providing her with sufficient staff resources to fulfill her responsibilities.

Based on these findings, the referee concluded that Employer's transfer of Claimant to the procurement department was a unilateral, substantial change in employment conditions that gave Claimant a necessitous and compelling reason for leaving employment. The referee acknowledged that claimant "did not fully disclose the circumstances of her separation from work." Referee Dec., Finding of Fact No. 13. However, the referee concluded "because [Claimant's] separation was not disqualifying under Section 402(b), she was not disqualified from receiving benefits for the weeks at issue." Ref. Dec. at 2. Accordingly, the referee reversed the service center as to Claimant's eligibility for benefits. The referee also concluded that Claimant did not have to repay any benefits already received or to pay penalty weeks.

Employer appealed. The Board affirmed. The Board adopted the referee's findings, but it clarified a few facts. The Board found that Claimant's pre-procurement positions involved real estate transactions and that she served as counsel in these positions. Bd. Op., Finding of Fact (F.F.) No. 3. Additionally the Board found that the procurement position involved "little or no legal duties." F.F. No. 4. The Board concluded that Claimant was entitled to benefits under Section 402(b). The Board limited its discussion of the Section 804 issue to merely concluding that her eligibility for benefits meant there was no overpayment of benefits and no basis for penalty weeks. Employer petitions for review.⁴

⁴ Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Dep't of Corrs. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008).

Employer argues the Board erred in determining Claimant had a necessitous and compelling basis to quit her employment. Additionally, Employer argues that the Board erred in failing to address the referee's finding that Claimant misrepresented her reason for leaving Employer. Relatedly, Employer argues the Board erred in determining that Claimant was not subject to fault overpayment with penalty weeks.

II. Discussion

A. Good Cause for Voluntary Quit

Employer contends the Board erred in concluding that the new position was a substantial change in circumstances because it did not have a legal component. Employer argues that Claimant acknowledged she ceased working as "counsel" in 2005 when Employer transferred her from the real estate investment unit of PHA's legal department to the home ownership division. Additionally, Employer argues that, even if her pre-transfer position involved some legal work, Claimant failed to establish that her current position was substantially different than her prior positions.

The issue of what constitutes a necessitous and compelling reason or "good cause" for a voluntary quit under Section 402(b) is a legal question subject to appellate review. Craighead-Jenkins v. Unemployment Comp. Bd. of Review, 796 A.2d 1031 (Pa. Cmwlth. 2002). The claimant bears the burden of proving necessitous and compelling reasons for quitting. Id. The claimant must establish: circumstances that a reasonable person would find to create real and substantial pressure to terminate employment; that she acted with ordinary common sense;

that she made a reasonable effort to preserve employment; and that she had no real choice but to leave. Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). An employer's imposition of a substantial unilateral change in the terms of employment can provide necessitous and compelling cause for a voluntary quit; mere dissatisfaction with working conditions does not. Id.

The Board is the fact finder in unemployment compensation cases and has authority to resolve conflicts in the evidence and to make credibility determinations. Kelly v. Unemployment Comp. Bd. of Review, 776 A.2d 331 (Pa. Cmwlth. 2001). The Board's findings are conclusive and binding on appeal if supported by substantial evidence. Id. In examining the record, this Court is bound to review the testimony in the light most favorable to the prevailing party, giving that party the benefit of all logical and reasonable inferences. U.S. Banknote Co. v. Unemployment Comp. Bd. of Review, 575 A.2d 673 (Pa. Cmwlth. 1990).

1. Facts-Substantial Evidence

In this case, the Board found Claimant was an attorney who practiced in the area of finance and investment. The Board also found Employer employed Claimant *as* counsel in the real estate investments unit (REI) until it transferred her to the procurement department. F.F. Nos. 2-3. Employer challenges the Board's conclusion that Claimant served as counsel her entire tenure with Employer.

During the hearing, Claimant recounted her history with Employer.

She testified that Employer initially hired her to work in the legal department as counsel for Employer's REI unit. Notes of Testimony August 6, 2009 (N.T.) at 4. Two years later, Employer transferred her to Employer's home ownership division. Id. In this position, she "implement[ed] home ownership components of various development deals that [she] had worked on as an attorney" in the REI unit. Id. She testified that she went on leave.

On her return, Employer transferred her to the REI unit in the development department. Id. At this point, she was no longer in the legal department. Id. at 5. However, she testified that she was "doing the same work" in the development department as she had been doing in the legal department. Id. She was at this position until Employer transferred her to the procurement department. Id. During the hearing, the referee asked Claimant if she worked in the development department as an attorney. Claimant responded:

Once I went to the development department, I was basically a real estate development professional, wasn't doing – I mean – I did still work closely with outside counsel and with – with counsel in the legal department, but eventually that department – legal department – there was a series of lay-offs in the legal department – the REI unit of the legal department was dissolved. But we still, you know, worked closely with outside counsel.

Id. at 5.

We agree with Employer that Claimant's testimony does not support the specific finding that she was formally employed as counsel at all times prior to her transfer to the procurement position. However, her testimony establishes that for those periods when she was not formally employed as counsel, she was

engaged in equivalent work. See, e.g., id. at 5. Mindful of our duty to draw all reasonable inferences in favor of the prevailing party, it is clear that the Board's finding intended to convey that Claimant was employed at all times in legal or comparable work. We discern no error in that finding.

2. Law-Preservation of Employment

Employer next argues Claimant lacked a necessitous and compelling reason to quit because she acted unreasonably in leaving so shortly after Employer transferred her. In support of its position, Employer cites Anchor Darling Valve Co. v. Unemployment Compensation Board of Review, 598 A.2d 647 (Pa. Cmwlth. 1991) and Unangst v. Unemployment Compensation Board of Review, 690 A.2d 1305 (Pa. Cmwlth. 1996). Employer argues that Claimant failed to establish that the procurement position was substantially different than her previous position.

The Board responds that a claimant with special training and education undergoes a substantial change in circumstances when an employer transfers her to a position not requiring that training. In support of this position the Board cites Unemployment Compensation Board of Review v. Franklin & Lindsey, Inc., 497 Pa. 2, 438 A.2d 590 (1981) and United States Steel Corporation v. Unemployment Compensation Board of Review, 310 A.2d 94 (Pa. Cmwlth. 1974).

In Anchor, employer eliminated the claimant's management job but offered him a position at the same salary, but with less responsibility. He declined

the position, even on a trial basis, and instead voluntarily terminated his employment of 26 years. We held that employers have discretion to alter work assignments based on business conditions and management judgment, and that claimants must be willing to accept some changes. We also noted the record indicated that the employer was willing to give claimant the opportunity to develop the responsibilities of the position. We held claimant's declining of the position was a failure to preserve employment which made him ineligible for benefits. Anchor, 598 A.2d at 649-50.

In Unangst claimant resigned one day before returning to work from leave based on her fear that employer would be assigning her more responsibilities than she previously carried. We faulted her with never actually trying the position and seeing "how the overall workload would be absorbed among the remaining staff." Unangst, 690 A.2d at 1308. Accordingly, we denied benefits.

We conclude Anchor and Unangst are analogous to this case. Here, Employer offered Claimant a position at the same pay, in a different department, whose responsibilities were not yet fully defined. At the time she tendered her resignation the procurement department was in a state of flux. Employer was still working out the details of the position, including the responsibilities, the location of her workspace, and the extent of staff assistance. N.T. at 7. Claimant acknowledged that the general manager of the procurement department did not clearly explain what Claimant's position entailed. Id. at 6. Claimant testified that Employer did not show her a written job description. Id. at 7. Rather, Employer showed her a job title on an organization chart, and verbally described the

responsibilities. Id. Claimant resigned days after Employer transferred her. Id. at 7-8.⁵

Claimant terminated her employment relationship before allowing any meaningful opportunity to see how this transfer ultimately impacted her. Her refusal to give the job a fair try in order to determine what the responsibilities would be demonstrates an unwillingness to maintain the employment relationship. Indeed, Claimant testified that, following her resignation, she tried to “renegotiate” her final day of work because she “realized that I wanted to see – you know, give it some time and see” Id. at 8. She testified that Employer denied the request.

This case is distinguishable from Franklin & Lindsey and United States Steel Corporation, relied on by the Board. In both cases, the employers terminated the employment relationship, and then offered the claimants jobs requiring significantly less skill and experience. In contrast, Claimant here terminated the employment relationship.

Claimant bore the burden of establishing a necessitous and compelling basis for leaving her new position. She did not meet that burden, because she did not establish that she made a reasonable effort to preserve employment or that she had no choice but to leave. Additionally, the circumstances surrounding her

⁵ The Board incorrectly determined Claimant resigned in the middle of the month. She testified that she resigned at the beginning of the month, but that her resignation was effective two weeks later, in the middle of the month. The mistake as to when during the month she resigned does not control the outcome. That she tendered her resignation within days of her transfer is dispositive.

transfer are not those that a reasonable person would find to have created real or substantial pressure to terminate employment. Accordingly, we conclude the Board erred as a matter of law in determining that Claimant had a necessitous and compelling reason for resigning. As in both Anchor and Unangst, we are compelled to reverse the Board.

B. Fault Overpayment/Penalty Weeks

Employer also argues that the Board erred in failing to address the referee's finding that Claimant misrepresented her reason for leaving Employer. Further, Employer argues the Board erred in holding that Claimant was not subject to fault overpayment with penalty weeks.

Section 804 of the Law authorizes penalties and incarceration for applicants for unemployment compensation benefits who knowingly make a false statement or knowingly fail to disclose a material fact on their application. These applicants may be required to repay the amount of benefits they received, in addition to paying a penalty period of two weeks of unemployment compensation. Id. "Conduct that is designed improperly and intentionally to mislead the unemployment compensation authorities is sufficient to establish a fault overpayment." Kelly v. Unemployment Comp. Bd. of Review, 840 A.2d 469, 473 (Pa. Cmwlth. 2004) (citation omitted). "To find fault, the Board must make some findings with regard to a claimant's state of mind." Id.

Employer argues that the referee found Claimant to have been at fault. Employer argues that the Board may not disregard a referee's finding on a material point, but must offer some explanation for choosing not to use the finding.

Employer supports this position by citing Treon v. Unemployment Compensation Board of Review, 499 Pa. 455, 453 A.2d 960 (1982).

We first note the referee did not find that Claimant acted knowingly in any matter. Contrary to Employer's assertions, the Board did not ignore a material finding of the referee; rather, there was no finding for the Board to ignore.

Secondly, Employer's citation to Treon is inconsistent with numerous contemporary cases of our Court which uniformly conclude that the Board is the ultimate fact finder in unemployment compensation cases. Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064 (Pa. Cmwlth. 2009); Smith v. Unemployment Comp. Bd. of Review, 967 A.2d 1042 (Pa. Cmwlth. 2009); Carson Helicopters, Inc. v. Unemployment Comp. Bd. of Review, 960 A.2d 524 (Pa. Cmwlth. 2008); Hessou v. Unemployment Comp. Bd. of Review, 942 A.2d 194 (Pa. Cmwlth. 2008). "Credibility determinations are exclusively within the province of the Board as fact finder in unemployment cases." Melomed v. Unemployment Comp. Bd. of Review, 972 A.2d 593, 595 (Pa. Cmwlth. 2009). The Board can reject even uncontradicted evidence if it deems such evidence to be incredible. Blackwell v. Unemployment Comp. Bd. of Review, 555 A.2d 279 (Pa. Cmwlth. 1989). The Board "is not bound by the referee's credibility determinations and can reverse the referee's decision as long as its reasons for reversal are plain from the record and adequate to permit effective judicial review." Cumberland Valley Animal Shelter v. Unemployment Comp. Bd. of Review, 881 A.2d 10 (Pa. Cmwlth. 2005).

Although the Board's opinion is without any express finding regarding Claimant's intent,⁶ a fair reading of the Board's opinion compels the conclusion that the Board accepted Claimant's version of events. The Board's findings track Claimant's testimony on all material points.

Regarding her state of mind, Claimant testified that she acted mistakenly and not with wrongful intent. She testified she based her claim for unemployment benefits on "lack of work" which, she explained, was Employer's explanation for transferring her. N.T. at 9. She acknowledged that she did not explain the transfer situation in her application. She also stated, "I guess [Employer] had this need [for me] in the procurement department." Id. However, she testified, "I thought that my situation fit squarely within the unsuitable work exception to the voluntary quit provision." Id.

The Board's findings and ultimate disposition are consistent with a determination that Claimant's overall testimony was credible. Thus, we conclude the fact-finder also accepted the Claimant's testimony regarding her state of mind. Additionally, we note that the Board did not need to weigh contradictory evidence from multiple witnesses; rather, Claimant was the only witness to testify on this point.

In this particular case, remanding the matter for express finding

⁶ The entirety of the Board's discussion of the penalty issue is in this sentence: "As benefits are granted, there is no overpayment and no penalty weeks imposed." Bd. Op. at 3.

regarding Claimant's credibility or intent would unnecessarily elevate form over substance.⁷ For these reasons, we affirm the Board's determination that neither fault overpayments nor penalty weeks are appropriate in this case.

III. Conclusion

For the above reasons, we reverse that portion of the Board's order that awarded Claimant unemployment compensation benefits, but we affirm that portion of the Board's order that concluded that neither fault overpayments nor penalty weeks were appropriate.

ROBERT SIMPSON, Judge

Judge Butler did not participate in the decision in this case.

⁷ Employer's argument on this issue is based on the referee's finding that Claimant was at fault, and the Board's duty to address that finding. Employer did not ask that the case be remanded if the Court did not accept this position.

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The Philadelphia Housing Authority,	:	
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v.	:	No. 2530 C.D. 2009
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 26th day of July, 2010, the order of Unemployment Compensation Board of Review in the above-captioned matter is **REVERSED in part, and AFFIRMED in part**, as set forth in the foregoing opinion.

ROBERT SIMPSON, Judge

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HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE PELLEGRINI

FILED: July 26, 2010

I respectfully dissent. Kiameshia McPherson (Claimant) was hired to work for the Philadelphia Housing Authority (Employer) as an attorney, and she worked in that capacity for five years in various departments before being involuntarily transferred to a non-legal position in the Procurement Department where she was “responsible for procuring goods and services within federal government guidelines.”

Although an employer may make reasonable modifications in job assignments, *Druzak v. Unemployment Compensation Board of Review*, 315 A.2d 925 (Pa. Cmwlth. 1974) (a half-hour added to the work week), a substantial

unilateral change in the employment agreement renders the job unsuitable. *National Aluminum Corporation v. Unemployment Compensation Board of Review*, 429 A.2d 1259 (Pa. Cmwlth. 1978) (woman hired as secretary whose duties were replaced by clerical functions had cause of necessitous and compelling nature for leaving employment). Because this change for Claimant from practicing law to a non-legal position constitutes a unilateral change in her employment, I would affirm the Board.

DAN PELLEGRINI, JUDGE