

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas L. Kelly, :
Petitioner :
v. : No. 968 C.D. 2009
Unemployment Compensation : Submitted: November 20, 2009
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY

FILED: January 28, 2010

Thomas L. Kelly (Claimant) petitions for review of the April 16, 2009 Order of the Unemployment Compensation Board of Review (Board), which affirmed the Referee's decision determining that Claimant was ineligible for benefits under Section 402(h) of the Unemployment Compensation Law (Law)¹ because Claimant exercised a substantial degree of control over the policies and operations of Marconi Broadcasting Company (Company) and must be considered an ex-businessperson. We affirm.

¹Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(h). Section 402(h) provides, in pertinent part, that an employee shall be ineligible for compensation for any week in which he is engaged in self-employment.

Claimant founded the Company in January of 2007 and held the positions of President and General Manager. Claimant also owned corporate stock. As President and General Manager, Claimant had a substantial degree of control over corporate policies and operations. For instance, Claimant was in charge of hiring and firing employees and making all policy decisions on programming and sales.

Claimant was dismissed as President and General Manager of the Company, and he applied for unemployment benefits. However, his application was denied. Claimant filed an appeal, and after a hearing, a Referee affirmed the denial of benefits. Claimant appealed to the Board, which also affirmed. Claimant now petitions this Court for review.²

Claimant argues that the Board erred in concluding that, at the time his employment was terminated, Claimant exercised substantial control over the operation of the Company. Claimant contends that he did not exercise substantial control over the company at the time of his termination because he was forced to reduce his ownership share in the Company to 25% in exchange for capital contributions, because he no longer participated in hiring or firing and because he no longer had the authority to sign contracts or checks over \$1,000. We disagree.

The Law was not enacted to compensate individuals who fail in their business ventures and become unemployed businessmen. *Essick v. Unemployment Compensation Board of Review*, 655 A.2d 669 (Pa. Cmwlth. 1995). A claimant who owned stock in a corporation and had a substantial degree of control over the

² This Court's scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

policies and operations of the corporation is considered an ex-businessperson and, as such, is not covered by the Law. *Starinieri v. Unemployment Compensation Board of Review*, 447 Pa. 256, 289 A.2d 726 (1972). Whether a claimant exercised substantial control over a corporation is based on the claimant's control at the time of termination. *Geever v. Commonwealth, Unemployment Compensation Board of Review*, 442 A.2d 1227 (Pa. Cmwlth. 1982).

Here, at his termination, Claimant was in charge of hiring and firing employees and making all policy decisions relating to programming and sales. Claimant's loss of control over the Company as a result of his termination is irrelevant. Because Claimant exercised a substantial amount of control over the day-to-day operations of the Company at the time of his termination as President and General Manager of the Company, he is ineligible for UC benefits.

Accordingly, we affirm.

KEITH B. QUIGLEY, Senior Judge

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 28th day of January, 2010, the April 16, 2009
Order of the Unemployment Compensation Board of Review is hereby affirmed.

KEITH B. QUIGLEY, Senior Judge