

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Garyl Violi,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 982 C.D. 2011
	:	
Unemployment Compensation	:	Submitted: November 4, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE SIMPSON**

**FILED: December 30, 2011**

Garyl Violi (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that affirmed a referee’s order denying her unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law)<sup>1</sup> on the basis that she voluntarily left work due to a conviction and incarceration. Claimant contends the Board erred in determining she voluntarily left her job with the Pocono Mountain School District (Employer). Claimant also contends the Board erred in determining Employer could refuse to participate in work release. Upon review, we affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937), as amended, 43 P.S. §802(b). Section 402(b) provides “[a]n employe shall be ineligible for compensation for any week ... [i]n which [her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature ....” Id.

## **Background**

Claimant worked for Employer as a teacher from 1987 until her last day of work in June 2009. As a result of her conviction for multiple counts of driving under the influence of alcohol (DUI), Claimant was incarcerated in county prison from late-October 2009 until mid-December 2010. In July 2010, while incarcerated, Claimant signed a separation agreement and general release (Separation Agreement) with Employer. The Separation Agreement provided that Claimant would retire by written notice to Employer on or before July 2, 2010. See Employer Separation Information, Certified Record (C.R.) at Item 2, Ex. 5A at 1.

Following her release from county prison, Claimant applied for UC benefits. The local UC service center determined Claimant ineligible for benefits under Sections 402.6 (ineligibility of incarcerated employee)<sup>2</sup> and 402(b) (voluntary quit) of the Law.

Claimant appealed. At hearing before a referee, Claimant testified she did not return to work as a teacher in September 2009 due to her impending sentencing for her DUIs. See Notes of Testimony (N.T.), 03/07/11, at 3. Although the sentencing court agreed to grant Claimant work release upon verification of employment, Employer decided not to participate in the program. Id. at 4. As a result, the sentencing court denied Claimant's request for work release. Id.

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<sup>2</sup> Added by the Act of October 1996, P.L. 738, as amended, 43 P.S. §802.6. Section 402.6 provides, "An employe shall not be eligible for payment of [UC] benefits for any weeks of unemployment during which the employe is incarcerated after a conviction." Id. Here, however, we note Claimant did not apply for UC benefits until after her release.

In a decision denying benefits under Section 402(b), the referee pertinently found:

3. [Claimant] voluntarily separated due to her incarceration based on a conviction under DUI[s].
4. [Claimant] was incarcerated from October 29, 2009 through December 16, 2010.
5. In July 2010, [Claimant] signed a separation agreement for retirement effective July 2, 2010.

Referee Op., 03/18/11, Findings of Fact (F.F.) Nos. 3-5.

In ruling Claimant ineligible under Section 402(b), the referee reasoned:

The testimony of [Claimant] established that she did leave her employment due to a conviction and incarceration. [Claimant] was incarcerated from October 29, 2009 through December 16, 2010 due to a conviction for DUI[s].

[Claimant's] separation was voluntarily [sic] and due to her own personal actions and, therefore, is not qualifying under Section 402(b) ....

Referee Op. at 2.

On appeal, the Board incorporated the referee's findings and conclusions in its decision, and affirmed. In so doing, the Board added, "[Claimant] did not return to her position because of her incarceration. [Employer]

is not obligated to accept work release.” Bd. Op., 05/05/11 at 1. Claimant petitions for review.<sup>3</sup>

### **Issues**

Claimant contends the Board erred in determining that she voluntarily left her employment, and that Employer could refuse to participate in the work release program.

### **Discussion**

Claimant’s argument is as follows. To be eligible for UC benefits, a claimant must be available for work and attached to the labor market. Greer v. Unemployment Comp Bd. of Review, 392 A.2d 918 (Pa. Cmwlth. 1978). In Greer, this Court observed there is nothing in the language of the Law indicating a claimant’s inability to leave prison to seek work, by itself, renders him ineligible for benefits. Rather, if an individual involved in a prison work release program is genuinely desirous of finding employment, imposes no limitations on acceptable work and indicates he is actively seeking employment outside prison, he may be eligible for benefits.

In Greer, the claimant made substantial, genuine efforts to find employment through the work release program. He enlisted the aid of various sources, including the local UC service center, his parole officer and his family.

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<sup>3</sup> 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 Corr. v. Unemployment Comp. Bd. of Review, 943 A.2d 1011 (Pa. Cmwlth. 2008).

Further, the prison authorities made it clear they would transport him to and from all interviews.

Here, Claimant asserts, the district attorney agreed to allow her to participate in the work release program. What is more, the sentencing judge indicated she would grant entry into a work release program upon verification of work. Further, Claimant asserts she was willing and able to work without any accommodations or changes to her terms of employment. She prepared lesson plans for her classes and also arranged transportation to and from the school.

Nonetheless, Employer chose not to accept Claimant through the work release program. Thus, Claimant asserts Employer chose to terminate her rather than allow her back to work. Consequently, Claimant argues she did not voluntarily terminate her employment and she is therefore eligible for benefits under Section 402(b) of the Law. Greer.

We disagree. In Weems v. Unemployment Compensation Board of Review, 952 A.2d 697 (Pa. Cmwlth. 2008), we rejected a similar argument. First, we recognized that incarceration due to criminal activity is not good or adequate cause for absence from employment.<sup>4</sup> An employee who engages in activities punishable by imprisonment must realize that her ability to work may be jeopardized. Id. Here, Claimant voluntarily engaged in conduct leading to her

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<sup>4</sup> We note that “good cause” precluding a determination of willful misconduct under Section 402(e) of the Law, 43 P.S. §802(e), is the equivalent of “necessitous and compelling cause” for a voluntary quit under Section 402(b) of Law. County of Fayette v. Unemployment Comp. Bd. of Review, 479 A.2d 1153 (Pa. Cmwlth. 1984).

incarceration. Therefore, her separation from employment due to her incarceration must be considered voluntary and without good cause. Id.

In Weems, we also rejected the claimant's argument that her employer's refusal to participate in a work release program justified an award of UC benefits. See also Kroh v. Unemployment Comp. Bd. of Review, 711 A.2d 1093 (Pa. Cmwlth. 1998) (Legislature had rational basis for enacting Section 402.6 of the Law denying UC benefits to incarcerated claimants regardless of their eligibility for work release, thereby effectively overruling Greer). "The decision by [e]mployer not to participate in a work release program does not excuse [c]laimant's absence from work." Weems, 952 A.2d at 700. "[The claimant] had an obligation to report to work regardless of whether [e]mployer agreed to participate in the work release program. Id. Our rationale in Weems is equally applicable here.

For these reasons, we discern no error in the Board's determination holding Claimant ineligible for UC benefits under Section 402(b) of the Law. Accordingly, we affirm.

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ROBERT SIMPSON, Judge

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	:	
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**ORDER**

**AND NOW**, this 30<sup>th</sup> day of December, 2011, the order of the Unemployment Compensation Board of Review is **AFFIRMED**.

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ROBERT SIMPSON, Judge