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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 2/21/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JOHN S. HASTINGS,)
) No. 1 CA-UB 12-0073
) 1 CA-UB 12-0083
 Appellant,) (Consolidated)
)
 v.) DEPARTMENT A
)
 ARIZONA DEPARTMENT OF ECONOMIC) **MEMORANDUM DECISION**
 SECURITY, an Agency,) (Not for Publication -
) Rule 28, Arizona Rules of
 and) Civil Appellate Procedure)
)
 MESA UNIFIED SCHOOL DISTRICT 4,)
)
 Appellees.)
)
)
)

Appeal from the A.D.E.S. Appeals Board

Cause Nos. U-1274090-BR & U-1274092-BR

AFFIRMED

Arizona State University Civil Justice Clinic Tempe
by Victoria E. Ames, Faculty Supervisor
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W I N T H R O P, Judge

¶1 John S. Hastings ("Claimant") appeals from two Arizona Department of Economic Security ("ADES") decisions finding that he voluntarily left his last employment without good cause and therefore was overpaid benefits in connection with his claim against a previous employer. Because the record reasonably supports the decisions, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2009 and 2010, while receiving unemployment benefits related to separation from a past employer, Claimant worked one and one-half days as a substitute teacher for Mesa Public Schools ("MPS") and reported his earnings to ADES. As more fully explained below, an Administrative Law Judge later determined that, shortly after completing his last assignment for MPS on February 19, 2010, Claimant requested to be removed from MPS's list of available substitute teachers. He continued to receive unemployment benefits related to the prior employment until such benefits were terminated in September 2010.

¶3 When Claimant later requested that his claim be reopened, an ADES deputy determined that Claimant had been overpaid benefits because he had voluntarily left his employment with MPS without good cause; accordingly, a determination of "non-fraud" overpayment issued for the benefits Claimant had received since February 20, 2010.

¶14 Claimant appealed, arguing that though he no longer sought to reopen his prior benefits claim and did not wish to open any claim against MPS, he should not be responsible for repaying benefits. Accordingly, the matter proceeded to hearings before the ADES Appeal Tribunal. At the hearings, Claimant testified that his experience working for MPS had been "terrible" and "horrific": his two assignments were more like babysitting than teaching; a beverage container he brought with him to school went missing on his last assignment; he was unable to recoup the money he spent to obtain his substitute teacher certification; he was asked to participate in unpaid training; and the computer-generated telephone system that MPS used to notify substitute teachers of available assignments interfered with his ability to sleep because it "bombarded" him with late-night and early-morning telephone calls about assignments he could not accept because they were either geographically distant or beyond his areas of proficiency. Claimant further indicated that on completion of each of his two assignments, he left notes for the school principal, complaining about the nature and conditions of the assignment. Claimant testified that he did not receive any response.

¶15 An MPS representative testified that Claimant had called MPS to ask to be removed from the list of available substitute teachers for unspecified personal reasons. The

representative further testified that MPS's computer system did not make calls during the hours about which Claimant complained, and, moreover, Claimant had the ability to block calls during times of his choosing and limit calls by assignment location and subject area, but did not do so. Claimant conceded he had called the district office, but denied he quit for "personal reasons." He also acknowledged the district website allowed him to set parameters for grade level, subject, days and geographic availability, but indicated he was unable to "log in" to the website.

¶16 After the hearings, the Tribunal issued decisions finding that Claimant had voluntarily left his employment with MPS without good cause in February 2010, which disqualified him for continuing benefits and meant that he had been overpaid the benefits he later received, for "non-fraud" reasons. Claimant petitioned for review of the Tribunal's decisions. The ADES Appeals Board affirmed the decision regarding Claimant's reason for leaving MPS, but modified it to specify that Claimant left that employment on February 19, 2010. The Board also affirmed the decision regarding overpayment, but modified it to hold the overpayment obligation ineligible for waiver.

¶17 Claimant requested further review and the Board again affirmed. Claimant then timely applied for an appeal to this

court, and we granted his application pursuant to A.R.S. § 41-1993(B).

STANDARD OF REVIEW

¶18 We view the evidence in the light most favorable to affirming the Board's decisions, and will affirm if any reasonable interpretation of the record supports the decisions. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997). We must accept the Board's factual findings unless they are arbitrary, capricious, or constitute an abuse of discretion. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). We review de novo whether the Board properly applied the law. *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995).

DISCUSSION

I. *THE RECORD REASONABLY SUPPORTS THE BOARD'S DETERMINATIONS THAT CLAIMANT WAS DISQUALIFIED FROM RECEIVING BENEFITS AND RECEIVED AN OVERPAYMENT BY REASON OF HIS VOLUNTARY QUIT FROM HIS LAST EMPLOYMENT WITHOUT GOOD CAUSE.*

¶19 For each week of unemployment, an eligible claimant must file a continued claim for unemployment benefits that includes a statement of all intervening employment held and wages earned that week, so that earnings exceeding thirty dollars may then be deducted from the weekly benefit amount. A.A.C. R6-3-5475(G)(2)(a); A.R.S. § 23-779(C). The claimant must also report his ability to work, his availability for work,

his efforts to seek work, and his receipt or refusal of any offers of work, and he must acknowledge his duty to notify ADES of changes in any circumstances that may affect his eligibility for benefits. A.A.C. R6-3-5475(G)(2)(b)-(d). If the claimant voluntarily leaves any intervening employment during a continuous period of filing, the intervening employment will be considered his "last employment," and the claimant will be disqualified from receiving continued benefits if it is found that he left that employment without good cause. A.A.C. R6-3-5495(A)(3), (B)(4); A.R.S. § 23-775(1).

¶10 Here, Claimant properly reported his earnings from the MPS work to ADES, but did not notify ADES of his separation from MPS's employ. Though the Board failed to explicitly note that MPS was Claimant's "last employment," it made the necessary factual findings to support that conclusion and disqualify him from receiving benefits: it found that Claimant voluntarily left his employment with MPS without good cause. Claimant contends that these findings were not supported by the evidence. We disagree.

¶11 First, the evidence was sufficient to support the Board's finding that Claimant voluntarily quit his employment with MPS. A separation from employment "is a quit when the worker acts to end the employment and intends this result." A.A.C. R6-3-50135(A)(1)(a). In determining whether a separation

is a "quit," ADES must consider all relevant factors, including the parties' remarks and actions, who initiated the separation, and the parties' intentions. A.A.C. R6-3-50135(A)(2)(a)-(c). Here, an MPS representative testified that Claimant had called MPS and asked to be removed from MPS's list of available substitute teachers. Claimant acknowledged that he had placed a call to MPS airing his grievances, and never explicitly denied that he had asked to be removed from the list during that call.¹

¹ Claimant's assertion on appeal that he "flatly denied" having asked to be removed from the list is unsupported by the record. The record shows only that Claimant denied having asked to be removed from the list for personal reasons. Claimant never testified that he did not request removal; did not timely object to the MPS representative's testimony concerning the fact of the request; and never disputed the issue even when asked repeatedly by the Administrative Law Judge to specify the date on which, in the judge's words, he called "to let [MPS] know that [he] no longer wanted to be on the calling list" and "w[as] quitting." Claimant did make a hearsay objection when the MPS representative read aloud the note in his personnel file documenting the call; however, the hearsay objection was not a denial of the underlying factual assertion.

We also note that the Tribunal and the Board may admit hearsay evidence when the evidence possesses probative value commonly accepted by reasonably prudent persons. A.R.S. § 23-674(D); *Emp't Sec. Comm'n v. Myers*, 17 Ariz. App. 87, 90, 495 P.2d 857, 860 (1972). At oral argument on appeal, Claimant, for the first time, relied on *Begay v. Arizona Department of Economic Security*, 128 Ariz. 407, 626 P.2d 137 (App. 1981), to argue that the Board should not have considered MPS's evidence regarding the phone call. We generally consider arguments raised for the first time at oral argument on appeal to be untimely and waived. *Mitchell v. Gamble*, 207 Ariz. 364, 369-70, ¶ 16, 86 P.3d 944, 949-50 (App. 2004). We therefore need not address Claimant's argument. But even if the argument were not waived, we find *Begay* is clearly distinguishable. In *Begay*, the Board improperly relied on speculative double-hearsay evidence without significant indicia of reliability to make a finding

Claimant also testified that because his "experience [with MPS] was so horrific[,] [he] ha[dn't] even attempted to use [his substitute teacher certificate] since [his] last day of employment with [MPS.]" Based on the evidence, the Board could reasonably conclude that Claimant both intended and initiated the separation, and therefore voluntarily quit.

¶12 The evidence was also sufficient to support the Board's finding that Claimant lacked good cause for quitting. Good cause for quitting generally requires that the claimant gave the work a fair trial, attempted to adjust unsatisfactory working conditions, or requested a leave of absence necessary to resolve a personal difficulty, unless such efforts would have been impracticable, impossible, or obviously unfruitful. A.A.C. R6-3-50210(C)-(D). Here, the evidence showed that Claimant worked for MPS for only one and one-half days, limited his efforts to resolve his complaints about the nature and quality of his assignments to leaving notes for the school principals, and failed to take advantage of procedures by which he could have resolved his complaints about the calls he received from MPS's computer system. No evidence suggested that it would have been impracticable, impossible, or unfruitful for Claimant to

that directly opposed the claimant's uncontradicted testimony. 128 Ariz. at 409, 626 P.2d at 139. Here, by contrast, the Board reasonably relied on a phone message from Claimant, as documented in a personnel file that MPS maintained in the regular course of business.

have undertaken additional reasonable efforts to address his dissatisfactions before quitting.² The Board's finding of an absence of good cause was reasonably supported by the evidence.

¶13 Based on the Board's findings, Claimant was properly disqualified from receiving benefits under A.A.C. R6-3-5495(A)(3), and an overpayment was properly assessed against him for the benefits he received after quitting MPS.

II. THE OVERPAYMENT WAS APPROPRIATELY CALCULATED AND CLASSIFIED.

A. The Overpayment Was Appropriately Calculated Based on the Last Day Claimant Provided Services.

¶14 Claimant challenges the amount of the overpayment determination on the ground that the evidence does not support the Board's finding that he quit MPS on February 19, 2010. A "quit" requires that the claimant "act[] to end the employment." A.A.C. R6-3-50135(A)(1)(a); see also *Figueroa v. Ariz. Dept. of Econ. Sec.*, 227 Ariz. 548, 551, ¶ 15, 260 P.3d 1113, 1116 (App. 2011) (claimant did not act to separate her employment before being discharged when she merely stated that she planned to quit on a certain future date). Here, the evidence showed that

² We recognize that substitute teaching is, at best, a challenging assignment; however, having obtained the certificate and having accepted the position, Claimant was obligated to take reasonable steps to remedy concerns with work assignments or conditions. Such reasonable efforts could have, at a minimum, included personal contact during the work day with district personnel in charge of substitute assignments, and/or seeking assistance in accessing and creating the substitute personal preferences parameters available on the district's website.

Claimant completed his last assignment for MPS on February 19, 2010. But the MPS representative was unable to specify the date of Claimant's phone call to MPS beyond "late February, early March," and Claimant testified that he could not recall the date of the call.

¶15 Claimant contends that because the exact date of the phone call was not proved, "it is impossible to determine the extent of any overpayment." We agree that the phone call effectuated the quit. But were we to accept Claimant's argument, then no overpayment could ever be assessed when there was any uncertainty as to the precise date of a quit. We decline to adopt such a position. In these circumstances, where MPS identified a general time frame consistent with the last day Claimant provided services and Claimant has failed to dispute that time frame or offer any evidence of an alternative date, the Board acted within its discretion by calculating the overpayment based on the last day of services.

B. The Overpayment Is Not Eligible for Waiver.

¶16 An overpayment is classified as "non-fraud" when it was "created because the claimant unintentionally gave incorrect or incomplete information." A.A.C. R6-3-1301(8). Claimant does not dispute the Board's classification of his overpayment as "non-fraud," and we conclude that the evidence reasonably supports that classification. Claimant contends, however, that

"non-fraud"-induced overpayment involves no "fault" and therefore he should be eligible for waiver of the obligation to repay. Claimant's argument fails as a matter of law.

¶17 In general, a claimant who is overpaid unemployment benefits is responsible for repaying ADES for those benefits. A.R.S. § 23-787(A). The exception to this general rule is set forth in A.R.S. § 23-787(C), which provides that "[i]f benefits to which a person is not entitled are received without any fault on the person's part and if repayment or deduction from future benefits would be against equity and good conscience, [ADES] may waive all or a portion of the amount overpaid."

¶18 The meaning of the word "fault" in A.R.S. § 23-787(C) is not defined in either Title 23 of the Arizona Revised Statutes or Title 6 of the Arizona Administrative Code, and Claimant's reliance on a federal regulation with no analog in state law is misplaced. Both Claimant and ADES agree that the common definition of "fault" means responsibility for an error. Claimant contends, however, that an overpayment is ineligible for waiver only when such responsibility for error results from knowing or intentional misconduct. We disagree. The key consideration is responsibility, not *mens rea*. Claimant was responsible and therefore at fault for the "non-fraud" overpayment because it resulted from incorrect or incomplete information that he provided -- he did not inform ADES that he

declined to work as a substitute teacher despite his ability to do so. He is therefore ineligible for waiver under A.R.S. § 23-787(C). Moreover, even if Claimant had been "without any fault" as required by A.R.S. § 23-787(C), the record reveals no evidence to support his argument that this case satisfies that subsection's additional requirement that "repayment or deduction from future benefits would be against equity and good conscience."

C. The Determination of Overpayment Provided Sufficient Notice Regarding Overpayment Classifications.

¶19 Claimant finally argues that he did not receive fair notice that "fault" was a key issue in the overpayment proceedings. We agree with ADES that the determination of overpayment provided sufficient notice of the various overpayment classifications and the limited availability of waiver. The determination clearly identified Claimant's overpayment as "non-fraud," provided complete definitions of the "administrative," "non-fraud," and "fraud" overpayment classifications, and accurately identified "administrative" as the only classification eligible for waiver under A.R.S. § 23-787.

CONCLUSION

¶20 The record reasonably supports the Board's decisions.
We affirm.

/s/

LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

BARRY C. SCHNEIDER, Judge *Pro Tempore**

*The Honorable Barry C. Schneider, Judge (Retired) of the Maricopa County Superior Court, is authorized by the Chief Justice of the Arizona Supreme Court to participate in the disposition of this appeal pursuant to the Arizona Constitution, Article 6, Section 3, and A.R.S. §§ 12-145 to -147 (2003).