

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1015

CRAIG J. LEWKO

VERSUS

KURT EYSINK, ADMINISTRATOR

Judgment Rendered: MAR 20 2013

On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2011-0002692

Honorable Elizabeth P. Wolfe, Judge Presiding

Thomas J. Hogan, Jr.
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Counsel for Defendant/Appellee
Kurt Eysink, Administrator

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Handwritten signatures:
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Middle: TMH
Bottom: [unclear]

McCLENDON, J.

In this unemployment compensation case, the plaintiff appeals the judgment of the district court, affirming the decision of the Louisiana Board of Review (Board) that disqualified the plaintiff from receiving unemployment compensation benefits.¹ The judgment also affirmed the decision of the Board that the plaintiff was overpaid and that the waiver of overpayment was correctly denied. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Craig Lewko, was employed by Amerigas Propane, Inc. (Amerigas) on April 6, 2009, as a full-time service technician, until March 19, 2010, when he voluntarily quit his position as a part-time yard maintenance worker. Thereafter, Mr. Lewko filed for unemployment compensation benefits with the Louisiana Workforce Commission (LWC) and began receiving benefits. After twenty-six weeks, Mr. Lewko filed for extended benefits, which he also received. In March 2011, the LWC discovered that Mr. Lewko voluntarily left his employment because he was dissatisfied with the working conditions and determined that he was disqualified from receiving benefits effective March 11, 2010. The LWC also assessed Mr. Lewko with two overpayments, one in the amount of \$6,656.00 for the period from April 10, 2010 to October 2, 2010, and the second in the amount of \$5,788.00 for the period from October 9, 2010 to March 19, 2011. Mr. Lewko appealed the agency determinations. Following hearings before an administrative law judge (ALJ), conducted by telephone conference on July 26, 2011, the decisions of the LWC disqualifying Mr. Lewko from receiving unemployment benefits, denying his requests for a waiver of overpayment, and finding that he was overpaid \$6,656.00 and \$5,788.00, were affirmed. Dissatisfied with the decisions, Mr. Lewko filed a timely appeal to the Board. After considering the record, law, arguments, and submissions of the

¹ The Board of Review is within the Office of Unemployment Insurance Administration in the Louisiana Department of Labor. See LSA-R.S. 23:1651 and 1652.

parties, the Board adopted the findings of fact and conclusions of law of the ALJ and affirmed her decisions in all respects.

On August 16, 2011, Mr. Lewko filed a Petition for Judicial Review in the 21st Judicial District Court, naming as the defendant, Kurt Eysink, Administrator of the LWC.² After considering the record, argument of counsel, and the law, the district court, on February 13, 2012, affirmed the Board's decisions. Mr. Lewko appealed.

STANDARD OF REVIEW

Our scope of review is set forth in LSA-R.S. 23:1634B, which provides in pertinent part that "the findings of the board of review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." Thus, judicial review does not permit the weighing of evidence, drawing of inferences, re-evaluation of evidence, or substituting the views of this court for those of the Board as to the correctness of facts. **Fontenet v. Cypress Bayou Casino**, 06-0300 (La.App. 1 Cir. 6/8/07), 964 So.2d 1035, 1038. Accordingly, the scope of appellate review in this matter is limited to determining whether the facts are supported by sufficient and competent evidence and whether the facts, as a matter of law, justify the action taken. See Fontenet, 964 So.2d at 1038.

DISCUSSION

Disqualification

In his appeal, Mr. Lewko asserts that he had good cause for leaving Amerigas. He asserts that he should have been told that he would not be eligible for vacation pay as a part-time employee and that his employer would require him to pay back vacation he had already taken.

Louisiana Revised Statutes 23:1601(1)(a) provides, in pertinent part:

An individual shall be disqualified for benefits:

(1)(a) If the administrator finds that he has left his employment from a base period or subsequent employer without good cause

² The administrator is the executive director of the LWC and "shall be deemed to be a party to any such proceeding." See LSA-R.S. 23:1472(1) and 23:1634.

attributable to a substantial change made to the employment by the employer.

Good cause connected with a person's employment means a cause connected with working conditions, ability of the employee to continue the employment, availability of transportation to and from work, and other factors that affect the employee's ability or right to continue work or that affects the benefits he may receive from his employer either upon continuation of the work or on retirement. **Gonzales Home Health Care, L.L.C. v. Felder**, 08-0798 (La.App. 1 Cir. 9/26/08), 994 So.2d 687, 693, writ not considered, 08-2568 (La. 1/9/09), 998 So.2d 730. It is good cause connected with employment for an employee to quit his job when the work becomes unsuitable due to unanticipated working conditions. **Id.** However, personal reasons for resigning employment are not good cause connected with employment. **Lewis v. Administrator**, 540 So.2d 491, 495 (La.App. 1 Cir. 1989). Thus, mere dissatisfaction with working conditions does not constitute good cause unless the dissatisfaction is based on discrimination, unfair or arbitrary treatment, or is based upon a substantial change in wages or working conditions from those in force at the time the claimant's position began. **Gonzales Home Health Care, L.L.C.**, 994 So.2d at 693.

At the hearing, Mr. Lewko testified that he did not feel comfortable performing the duties of the full-time technician that he was hired to do. Therefore, he requested another position and when a part-time position in the yard became available, he took it. He admitted that the move to part-time employment was voluntary. Mr. Lewko testified that after he went part-time, he asked the Amerigas representative whether he was entitled to vacation, and she told him she would have to check with Amerigas's corporate office. Mr. Lewko testified that he kept asking about vacation, and on March 19, 2010, he was told that he was not entitled to vacation pay because he had not worked full-time for a year and was also told that he would have to repay the vacation pay advanced to him. Mr. Lewko stated that he was a full-time employee for eleven and one-

half months and thought his vacation pay should have at least been prorated. He stated that he felt as if he had been used, and he got upset and "walked."

The record shows that on March 22, 2010, Mr. Lewko filled out an internet application for unemployment benefits and provided that the reason for separation from Amerigas was "Part time or reduced hours." In the application, Mr. Lewko also commented that the "reduction in pay was due to replacement of position and new position was not what applied for." Mr. Lewko testified that he went to the LWC office when he first filed for benefits, and he filled out a form, dated March 26, 2010, regarding his reason for separation from Amerigas, and provided: "Quit 3-11-10" and "Replaced position, reduced pay, not position applied for." Additionally, in his internet application to extend his benefits, on February 23, 2011, Mr. Lewko again provided that the reason for separation from Amerigas was "Part time or reduced hours." Mr. Lewko also submitted another form to the LWC, dated March 29, 2011, for the extension of his benefits, and provided as his reason for separation: "Quit – due to unsafe work conditions, reduced to P/T, lowered pay, denied vacation benefit."

The record further shows that when Mr. Lewko was hired by Amerigas, on April 6, 2009, he signed a Vacation/Floating Holiday Policy Acknowledgement. The acknowledgement provided, in part, that "no vacation is actually earned until I have completed one year of service." He further agreed that "if termination occurs for any reason prior to my anniversary date (within the first year of employment) ... the Company has the right to deduct the full amount of any vacation pay advanced to me prior to termination of my employment."

The ALJ made the following findings of fact, with regard to Mr. Lewko's disqualification:

The claimant worked for the named employer from April 6, 2009 to March 19, 2010. He was a part time Yard Maintenance/helper, earning \$12.00 an hour.³ In September, 2009, the claimant told the manager he would like to go to other work because he felt a lack of training in his job. A part time job was found for the claimant and he took it when a replace[ment] was found for him. On March 1, 2010, the claimant began the part

³ This was Mr. Lewko's position when he ceased employment with Amerigas.

time job. He asked the employer about the vacation pay on his check. The manager check[ed] with payroll[;] on March 22, 2010, she found that the claimant would have to pay back 40 hours of vacation pay because he had not worked one year full time, which is policy of which the claimant signed. The claimant did not feel he should have to repay the vacation pay so he quit on March 22, 2010, due to having to repay the vacation pay.

The ALJ concluded:

The testimony and evidence in this case indicates the claimant left employment because he would have to repay vacation pay. Policy is that you work one year before earning vacation pay. The claimant was not entitle[d] to the vacation pay and did sign the policy. The claimant has failed to show that his leaving was for good cause attributable to a substantial change made to the employment by the employer.

Based on the stated findings of fact, the ALJ affirmed the agency determination that Mr. Lewko was disqualified from benefits effective March 11, 2010.

We have thoroughly reviewed the record and find that the evidence sufficiently supports the findings of fact of the ALJ, which were affirmed by the Board. Further, based on our review of the law, the evidence justifies the conclusion that Mr. Lewko was not eligible to receive unemployment compensation benefits based on his voluntary resignation, and thus, the Board's decision was legally correct.

Overpayment and Waiver

Mr. Lewko also argues that because any overpayment of unemployment compensation benefits paid to him was not due to any fault on his part, the LWC's right of recovery should have been waived.

The waiver of the right of recovery is found in LSA-R.S. 23:1713,⁴ which provided, in pertinent part:

A. If the administrator finds that an individual has received any payment under this Chapter to which the individual was not entitled, such individual shall be liable to repay such amount to the administrator for the unemployment compensation fund, upon demand and in accordance with agency regulations, a sum equal to the amount so received by the recipient, in addition to any penalties assessed, as provided in R.S. 23:1714 and in accordance with R.S. 23:1740 through 1749. If the claimant disagrees with such determination or assessment of overpayment, he shall have

⁴ Acts 2012, No. 344, § 1 rewrote subsection B.

the same right to file an appeal as on any other determination, as provided in R.S. 1629 et seq., for administrative and judicial remedies.

B. The issue of waiver of the right of recovery of any overpayment of benefits shall be heard upon any appeal of such determination or assessment of overpayment. The appeal referee, board of review, any court of jurisdiction, or the administrator pursuant to the conditions under Subsection C, may waive the right of recovery of any overpaid benefits received by any person who has received such benefits under this Chapter while any conditions for the receipt thereof were not fulfilled in his case, or while he was disqualified from receiving such benefits, provided that the receipt of said benefits did not come within the fraud provisions of R.S. 23:1601(8), the overpayment was without fault of the claimant, and the recovery thereof would defeat the purpose of benefits otherwise authorized or the recovery thereof would be against equity and good conscience.

Further, Section 369 of Title 40, Part IV of the Louisiana Administrative Code provides, in pertinent part:

- A. A waiver of the overpayment may be granted only if:
1. the claimant was without fault in causing the overpayment; and
 2. repayment would be against equity and good conscience.
- B. 1. To determine if fault existed on the part of the claimant, it must be established whether the claimant:
- a. gave inaccurate information;
 - b. failed to disclose a material fact;
 - c. knew or should have known that he/she is not entitled to the benefits;
 - d. caused the overpayment by an act of omission of information known to the claimant; or
 - e. had a determination of ineligibility due to fraud.
2. An affirmative finding on any one of the above precludes waiver of the overpayment.
- C. Regardless of fault for the overpayment, the following factors must also be considered to determine if repayment would be contrary to equity and good conscience:
1. whether recovery of the overpayment would cause extraordinary financial hardship to the claimant for at least three months:
 - a. extraordinary financial hardship shall be considered inability to obtain minimal necessities of living;
 - b. all cash resources and income of the claimant, as well as of the family of the claimant, shall be considered;
 2. whether the overpayment was the result of a decision on appeal;
 3. whether claimant was given notice that a reversal on appeal would result in overpayment.

Mr. Lewko maintains that the right of recovery should have been waived because the overpayment occurred without his fault, and ordering repayment in this case would be against equity and good conscience. He asserts that he reported to the LWC that he quit and also that Amerigas reported that he left

due to job dissatisfaction. Mr. Lewko also maintains that the LWC failed to give prompt notice of its determination of the claim as required by LSA-R.S. 23:1624 and 1625 and, therefore, the LWC should be estopped from seeking repayment.⁵

As previously stated, when Mr. Lewko initially applied for unemployment compensation benefits, he indicated that his reason for separation was due to a replaced position, reduced hours, and reduced pay. However, his testimony revealed that he left for personal reasons. Mr. Lewko also submitted financial information that showed he had the ability to repay the overpaid amounts.

The ALJ made the following factual findings with regard to the \$6,656.00 overpayment and request for waiver:

The claimant filed a claim effective March 21, 2010. On March 22, 2010, the claimant reported to the Agency that he worked part time/reduced hours for Amerigas Propane. On October 14, 2010, the claimant reported, his separation from Amerigas Propane was for lack of work/reduction in force. On February 23, 2011, the claimant renewed his claim and gave no new employment information. The Agency paid the claimant for weeks ending April 10, 2010 to October 2, 2010, because of the information he gave. When the Agency be[came] aware in March 2011 that the claimant had quit his employment, he was disqualified effective March 11, 2010 causing the overpayment of \$6656.00 in benefits for the weeks ending April 10, 2010 to October 2, 2010, which was during a period of disqualification. The claimant's (sic) furnished waiver information showing money tha[t] can be used to repay the over[payment].

The ALJ concluded:

The testimony and evidence in this case indicates the claimant was overpaid \$6656.00 in benefits for the weeks ending April 10, 2010 to October 2, 2010 due to failure to report separation issue properly. Therefore the claimant caused the over[payment] by not reporting separation information properly. A waiver can not be granted because the claimant is not financially unable to repay the money.

With regard to the \$5,788.00 overpayment and request for waiver, the ALJ determined:

The claimant filed an extended benefit claim effective October 3, 2010. On March 22, 2010, the claimant reported to the Agency that he worked part time/reduced hours for Amerigas Propane. On October 14, 2010, the claimant reported his separation from Amerigas Propane was for lack of work/reduction

⁵ Although Mr. Lewko attempts to make the argument that he was not notified of the determination of eligibility, the record reflects that he was properly notified of his disqualification in accordance with LSA-R.S. 23:1625.

in force. On February 23, 2011, the claimant renewed his claim and gave no new employment information. The Agency paid the claimant for weeks ending October 9, 2010 to March 9, 2011 because of the information he gave. When the Agency be[came] aware in March 2011 that the claimant had quit his employment, he was disqualified effective March 11, 2010 causing the overpayment of \$5788.00 in benefits for the weeks ending October 9, 2010 to March 19, 2011, which was during a period of disqualification. The claimant's furnished waiver information showing money tha[t] can be used to repay the over[payment].

The ALJ concluded:

The testimony and evidence in this case indicates the claimant was overpaid \$5788.00 in benefits for the weeks ending October 9, 2010 to March 19, 2011 due to failure to report separation issue properly. Therefore the claimant caused the over[payment] by not reporting separation information properly. A waiver can not be granted because the claimant is not financially unable to repay the money.

Based on the stated findings of fact, the ALJ affirmed the agency determinations that Mr. Lewko was overpaid \$6,656.00 and \$5,788.00 in benefits and that denied a waiver for those amounts.

Again, based on a thorough review of the record, we find that the evidence sufficiently supports the findings of fact of the ALJ, which were affirmed by the Board. The facts justify the conclusion that Mr. Lewko was overpaid \$6,656.00 in benefits for the weeks ending April 10, 2010 to October 2, 2010, and \$5,788.00 in benefits for the weeks ending October 9, 2010 to March 19, 2011. Further, the facts support the determinations that Mr. Lewko caused the overpayments and that he was financially able to repay the overpaid amounts. After our review of the law, we also conclude that the Board's decision was correct as a matter of law.

CONCLUSION

For these reasons, the March 12, 2012 judgment of the district court is affirmed. Costs of this appeal shall be assessed against the plaintiff, Craig J. Lewko.

AFFIRMED.