

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephen C. Gallagher, :  
Petitioner :  
v. :  
Unemployment Compensation :  
Board of Review, : No. 1081 C.D. 2008  
Respondent : Submitted: November 21, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McGINLEY

FILED: December 23, 2008

Stephen C. Gallagher (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits under Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup>

The facts, as initially found by the referee and adopted by the Board, are as follows:

1. The claimant was last employed as a mortgage broker by the Lincoln Mortgage Associates from November 1, 2004, at a final rate of pay of \$35,000 to \$50,000 per year straight commission and his last day of work was December 31, 2007.
2. When the claimant first accepted his position as a mortgage broker, he understood that the position would

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

be paid on a strictly commission basis, and that his income would fluctuate depending upon whether he could get people approved for mortgages.

3. In 2007, the claimant's income decreased dramatically, due to a downturn in the mortgage industry.

4. The claimant resigned his employment on December 31, 2007, because he was not making enough money to continue going to work.

Referee's Decision, April 3, 2008, (Decision), Findings of Fact Nos. 1-4 at 1.

The Board affirmed<sup>2</sup> and agreed with the referee's reasoning:

At the time the claimant began his employment, he understood that his income would be made strictly from his commission getting people approved for mortgages. However, in 2007, his income was drastically reduced as a result of a downturn in the financial markets that made it harder for him to get people approved for mortgages. The claimant understood the fluctuating nature of his income at the time he accepted his job, depending upon financial conditions in the industry. While the claimant is certainly not required to work without sufficient compensation, the fact that the claimant is no longer making sufficient commission income is not a necessitous and compelling reason to resign his employment to render him eligible for unemployment compensation.

Decision at 2.

Claimant contends that he made a mistake in his interpretation of the term "quit" when he filled out the unemployment compensation claim form and

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<sup>2</sup> Claimant requested reconsideration which the Board denied.

that the referee's findings as adopted by the Board were not complete and that the reasoning and conclusions based on those facts were inaccurate.<sup>3</sup>

Claimant asserts that he made a literal interpretation of the word "quit" on the unemployment compensation claim form and checked this box, but, in reality, he was laid off. Claimant further asserts that Lincoln Mortgage Associates (Employer) went from eighty employees to three employees in the last eight months of his employment. According to Claimant, Employer allowed him to continue to come to work while he looked for another job within the mortgage industry. Claimant states in his brief that Employer informed him that he would be laid off effective December 31, 2007. Claimant asserts that he testified that he quit at the hearing because he did not want to appear inconsistent with the form. Further, Claimant asserts that Employer's failure to attend the hearing supports his argument that he was laid off.

At the hearing, the referee inquired as to how Claimant left his employment. Claimant explained that he quit because he was not making money.<sup>4</sup>

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<sup>3</sup> This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

<sup>4</sup> The referee questioned Claimant concerning his termination of employment:

Referee: Okay. Now as to the reason you're no longer working for Lincoln Mortgage Associates, did you quit, were you fired, were you laid off?

Claimant: Basically what it came down to was the business itself is just barely alive. The mortgage industry is getting no business at

**(Footnote continued on next page...)**

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**(continued...)**

all. My earnings for the last three quarters were just a couple thousand dollars. . . .

Referee: As to the reason that you're no longer working, did you quit . . .

Claimant: Yeah. I was looking to take employment elsewhere and I went through the process and that job never got approved with the company but at the same point I could not [sic] . . . afford to keep going to a job where I had no means to make any money.

Referee: Okay, so I mean, did you resign your employment?

Claimant: I would say so . . . there are points where the owner of the company would say, hey what are you going to do? . . . I would always say I'm going to hang in, you know what I mean? And he's like well your wife works and . . . you can get by but it had gotten to the point where it was just unbearable. So . . . they could have laid me off at any time. There was no reason for them to. They had nothing to lose by having an employee.

Referee: But did they – why aren't you working there anymore?

Claimant: I left.

Referee: You left, okay. Did you tell the owner that you were leaving?

Claimant: Uh-huh.

Referee: Okay. And you told him it was because you weren't making money anymore?

Claimant: I was going to find employment, . . . .

. . . .

Referee: Okay, but on – so did you decide to resign on the 31<sup>st</sup> of 2007?

Claimant: Yes.

Referee: Okay and so that's when you told your employer?

**(Footnote continued on next page...)**

Claimant's testimony established that he quit and was not laid off and Employer's failure to appear before the referee was immaterial.

Claimant next contends that the Board erred when it determined that he did not have a necessitous and compelling reason for leaving. Claimant argues that the decline in Employer's business and its decision to stop advertising and marketing resulted in a drastic reduction in Claimant's income which was commission-based and a necessitous and compelling reason for Claimant to quit.

The issue of whether a termination of employment is voluntary is a question of law subject to this Court's review. The failure of an employee to take all reasonable steps to preserve employment results in a voluntary termination. Westwood v. Unemployment Compensation Board of Review, 532 A.2d 1281 (Pa. Cmwlth. 1987). An employee voluntarily terminating employment has the burden of proving that such termination was necessitous and compelling. The question of whether a claimant has a necessitous and compelling reason to terminate employment is a question of law reviewable by this Court. Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282 (Pa. Cmwlth. 1981). Good cause for voluntarily leaving one's employment results from circumstances which produce pressure to terminate employment that is both real

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**(continued...)**

Claimant: Yeah, I let them know and . . . the owner of the company . . . he's had some troubles and we sat down and talked and I'm sure he would have laid me off . . . .

Notes of Testimony, March 31, 2008, at 3-5.

and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1995).

Mere dissatisfaction with one's working conditions is not a necessitous and compelling reason for terminating one's employment. McKeown v. Unemployment Compensation Board of Review, 442 A.2d 1257 (Pa. Cmwlth. 1982). A substantial unilateral change by the employer of the terms and conditions of employment which results in a voluntary quit is a necessitous and compelling reason. McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266 (Pa. Cmwlth. 2003). A substantial reduction in pay may constitute a necessitous and compelling reason for voluntarily terminating employment. John Kenneth, Ltd. v. Unemployment Compensation Board of Review, 444 A.2d 824 (Pa. Cmwlth. 1982).

However, here, when Claimant was hired, it was with the understanding that his salary was based entirely on commission. As a result, his salary fluctuated. As business conditions in the mortgage industry declined in general and with Employer in particular, Claimant's salary dropped dramatically, but Employer did not institute the changes which resulted in the decline of his income. The reduction in marketing and advertising expenses did not directly affect the terms and conditions of Claimant's employment. In fact, Claimant did not mention the drop in marketing and advertising expenses during the hearing

before the referee. This Court agrees with the Board and the referee that Claimant did not have a necessitous and compelling reason for terminating his employment.

Accordingly, this Court affirms.

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BERNARD L. MCGINLEY, Judge

