IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Thomas Oshinsky,	:	
Petitioner	:	
	:	
v.	:	No. 21 C.D. 2012
	:	Submitted: September 21, 2012
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: November 29, 2012

Thomas Oshinsky (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying benefits because Claimant voluntarily quit work without cause of a necessitous and compelling nature. Claimant argues that he was forced to resign because of a conflict of interest, as defined by the policy of his employer, the Montgomery County Youth Center (Employer). Concluding that Claimant failed to establish an irreconcilable conflict of interest, we affirm the Board's holding that he was ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1]

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b). It provides, in relevant part, that an employee is ineligible for benefits for any week "[i]n which

(Footnote continued on the next page . . .)

Claimant began working for Employer in October 2002, as a secure detention counselor. On May 17, 2011, he submitted his resignation, effective June 9, 2011. In his application for unemployment benefits, Claimant stated that he was forced to resign because under Employer's anti-nepotism policy he had a conflict of interest caused by the fact that his brother-in-law, a supervisor, also worked at the Youth Center. The UC Service Center accepted Claimant's argument and granted benefits. Employer appealed, and a hearing was conducted by a Referee.

At the hearing, Claimant submitted a copy of Employer's anti-nepotism policy into evidence. It states that Employer "shall avoid hiring, transferring, or promoting relatives of employees where the possibility of favoritism or conflicts of interest might exist." Certified Record Item No. 9, Claimant Exhibit 1. The policy defines a brother-in-law as a "relative," and it defines "favoritism" or a "conflict of interest" to exist for:

> an employee who will report to a relative in a direct or indirect supervisory position; or an employee working in a departmental unit, division, work crew, or shift with a relative; or an employee working in the same department with a relative who has direct access to confidential employee information.

Id. The policy further provides that when a conflict of interest is created by a marriage, the affected employees have three months to resolve it by transfer, shift change or resignation. If the affected employees do not resolve the conflict, then Employer will.

(continued . . .)

his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature…." 43 P.S. § 802(b).

Claimant testified that he has been employed at the Youth Center since 2002. In 2009, Claimant married the sister of Daniel McGonigle, who is a supervisor at the Youth Center.[2] In 2011, Claimant learned that he had a potential conflict of interest because of this relationship. On May 5, 2011, Claimant expressed his concerns in a letter to Employer, which prompted a meeting with his supervisor, Jed Johnson.

At their meeting on May 17, 2011, Johnson informed Claimant that there was no conflict of interest. Claimant worked from 8:00 a.m. to 4:00 p.m. (first shift), and McGonigle worked from 3:00 p.m. to 8:00 p.m. (second shift); each worked different days of the week. Johnson concluded that a one-hour shift overlap, several days a week, did not present a problem. McGonigle was not Claimant's direct supervisor, and he would never be the only supervisor on a shift; accordingly, Claimant would not be required to report to McGonigle during the occasional one-hour overlap in their shifts. Further, Employer would not assign Claimant to mandatory overtime in a second shift on a day when McGonigle was working.

Claimant disagreed with Johnson's explanation and submitted a letter of resignation later in the day of their meeting. First, Claimant believed that being excused from mandatory overtime when McGonigle was working could lead to his being assigned more weekends. Second, the union contract permitted employees to trade shifts with other employees, and Claimant would be limited in his ability to trade with employees working the second shift. Third, and primarily, as a counselor in a youth detention center, it was possible that a resident would confide a problem to him regarding McGonigle's conduct, placing Claimant in a conflict

[2] Claimant has worked with McGonigle since 2006.

between his personal and professional loyalties. For these stated reasons, Claimant concluded that his resignation was necessary.

At the hearing, Claimant reiterated these reasons for his resignation. He emphasized that Employer's "assurance" that he would not be assigned mandatory overtime to a second shift where McGonigle was working meant (1) he would be assigned mandatory overtime on weekends or (2) lose the ability to work second shift. He claimed he changed shifts "a lot," although he did not explain how often he traded with employees in the second shift as opposed to the third shift. Notes of Testimony at 18 (N.T. __). Further, he acknowledged that employees were not totally free to trade shifts. For example, men and women cannot exchange shifts where their trade would upset the required male/female ratio for the shift.

In his testimony, Claimant focused on his third reason for resigning, *i.e.*, the need to report suspected misconduct of another employee. He explained that the juveniles at the detention center ranged from 10 to 20 years of age and were known to make reports of physical or sexual abuse by counselors and supervisors. He was not sure how he would respond were a juvenile to report abuse by his brother-in-law. He further explained that when a juvenile reports abuse, a counselor must gather information; notify his supervisor; and file an incident report. He expressed concern that were a juvenile to report abuse by his brother-in law, he might try to "talk the kid out of it or steer him in a different direction subtly saying you know maybe that didn't happen this way." N.T. 16. He acknowledged that he had never discussed these concerns with his brother-in-law.

Joseph Viti, assistant director of the Youth Center, testified on behalf of Employer. He explained that Claimant's claim about his mandatory overtime was a phony issue because 90% of all overtime is voluntary. Weekly, an overtime sign-up sheet is posted, and employees volunteer for the needed overtime. Further, Employer could track mandatory overtime to ensure that Claimant was not burdened with weekend hours. As to the issue of Claimant being limited in his doing an exchange with an employee in a second shift, Viti testified that Claimant had the ability to do exchanges for the third shift as well as any second shift when McGonigle is off. He did not agree that Claimant's rights under the collective bargaining agreement were impacted.

Regarding Claimant's concerns about a potential abuse report, Viti stated that Claimant had only to relay the complaint to another employee. Another counselor, supervisor or administrator would always be available to receive such a report by Claimant. In any case, once a complaint is made, Employer's policy dictates that the juvenile be separated from the unit where the accused employee works. Claimant could be separated from the juvenile lest Claimant find himself tempted to apply undue influence on the accuser.

The Referee concluded, first, that it was the responsibility of Employer, not Claimant, to enforce Employer's conflict of interest policy. Employer resolved the potential for conflict by assuring Claimant that he would not be assigned to work a shift when McGonigle would be his direct supervisor and would be present with McGonigle on the same shift for no more than an hour, several days a week. The Referee also found that Claimant's concern that he might receive a complaint of abuse by McGonigle was easily resolved: Claimant had only to direct the juvenile to another counselor. In any case, Claimant's concern

was speculative; that situation had never arisen in the many years he had worked at the Youth Center. In sum, Claimant's conflict of interest concern was for Employer, not Claimant, to enforce and resolve.

Claimant appealed to the Board. The Board adopted and incorporated the Referee's findings and conclusions and affirmed without further comment. Claimant then petitioned for this Court's review.[3]

On appeal, Claimant argues that he established a necessitous and compelling cause for leaving his employment. First, he proved that there was an irreconcilable conflict between his family and work responsibilities. Second, Claimant proved he would have been required to accept hours and conditions of employment not desired by most employees, which constituted a substantial change in the terms and conditions of his employment and, as such, a compelling reason to resign.

We begin with a review of the law. It is the claimant that has the burden of establishing that necessitous and compelling reasons existed for quitting his employment. *Empire Intimates v. Unemployment Compensation Board of Review*, 655 A.2d 662, 664 (Pa. Cmwlth. 1995). To meet this burden the claimant must establish "that [he] acted with ordinary common sense in quitting [his] job, that [he] made a reasonable effort to preserve [his] employment, and that [he] had no other real choice than to leave [his] employment." *Id.* A necessitous and

[3] Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact were supported by substantial evidence. *Shrum v. Unemployment Compensation Board of Review*, 690 A.2d 796, 799 n.3 (Pa. Cmwlth. 1997). Whether the Claimant had cause of a necessitous and compelling nature to quit is a conclusion of law subject to review by this Court. *Wivell v. Unemployment Compensation Board of Review*, 673 A.2d 439, 441 (Pa. Cmwlth. 1996).

compelling reason is one that meets "the reasonable person standard." *Truitt v. Unemployment Compensation Board of Review*, 527 Pa. 138, 143, 589 A.2d 208, 210 (1991). A reasonable person is one "who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests." BLACK'S LAW DICTIONARY 1380 (9th ed. 2009). To wit, "[t]he reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions." *Id*.

In his first assignment of error, Claimant notes that employment pressure can constitute a compelling reason to leave employment. Claimant argues that his obligation to report an allegation of abuse by McGonigle placed him under an unacceptable level of pressure. In support, he cites to precedent: *Tom Tobin Wholesale v. Unemployment Compensation Board of Review*, 600 A.2d 680 (Pa. Cmwlth. 1991), and *Zinman v. Unemployment Compensation Board of Review*, 305 A.2d 380 (Pa. Cmwlth. 1973). The Board responds these cases are distinguishable, and we agree.

In *Tom Tobin,* the employer requested the claimant to alter a computer program to make cash transactions invisible. The claimant believed the directive was made so that his employer would be able to avoid reporting and paying taxes on those sales. The claimant resigned and sought unemployment. The evidence showed that the requested changes to the program could not have resulted in illegality. However, because there was ample evidence that the claimant believed that he was being directed to do an illegal act that would negatively affect his professional integrity, his resignation was reasonable. Accordingly, we affirmed the Board's grant of benefits.

In *Zinman*, the claimant quit her job at an employment agency when the employer began to require all telephone calls to be recorded, without notifying persons on the call of the recording. After the claimant complained about the policy, the employer exempted her from having to record her conversations. Nevertheless, the claimant quit, explaining that she did not want to be associated with an agency that was recording calls. Because recording telephone calls without permission of all parties is illegal, the Board concluded that it was proper for the claimant to separate herself from her employment and awarded benefits. This Court agreed.

Tom Tobin and *Zinman* are distinguishable. In *Tom Tobin,* the claimant established that he believed he was being directed to do an illegal act. In *Zinman*, the claimant established that her employer was violating the law, even though she had been excused from participation. By contrast, here, Employer has not directed Claimant to do anything illegal or unethical.

Claimant is required to report complaints of abuse. However, were a juvenile to complain about McGonigle, Claimant had only to direct the juvenile to another counselor, supervisor, or administrator. Claimant theorized that some juveniles might feel comfortable in talking only to a particular counselor, *i.e.*, himself. The Referee found Claimant's position speculative at best, and we agree.

Further, Claimant's sole responsibility was to *report* a claim of abuse, not to investigate it. Were Claimant to receive a complaint about McGonigle, which has not happened in the years since 2006 that he has worked with McGonigle, Claimant had only to refer the complaint to another employee. As a practical matter, all employees with this reporting obligation may experience unease, because the complaint may be made about a colleague who happens to be a

close friend. Closer, even, than a brother-in-law. That unease does not relieve the employee of the need to relay the report. However, the employee can remove himself from the matter by bringing in another employee.

Claimant did not establish the existence of work pressure of the sort that would cause a reasonable person to resign his employment. The putative conflict was speculative. Further, the "pressure" alleged by Claimant was one faced by all the employees because they may be required to forward an abuse complaint lodged against a friend and well-liked colleague. Ultimately, the conflict of interest rule was for Employer, not Claimant, to enforce.

In his second issue, Claimant argues that had he continued employment, he would have been forced to accept undesirable hours and conditions of employment, which constituted a substantial change in the terms of his employment. The Board responds that Claimant was a first shift worker, and he presented no evidence as to how often, if ever, he traded with others to work second shift. Accordingly, he did not substantiate shift-trading disadvantages.

In his decision, the Referee focused on Claimant's alleged problem caused by an abuse complaint that he might receive about his brother-in-law. At the hearing, Claimant did not assert that Employer's decision to avoid assigning Claimant to overtime in shifts where McGonigle worked constituted a substantial change in his employment. In his appeal to the Board, Claimant did not raise the issue.[4] Instead, he focused on the possibility that he might have to report complaints of abuse against McGonigle as constituting a conflict of interest.

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[4] Specifically, Claimant's appeal to the Board purports that the Referee erred in finding his concerns speculative. Certified Record Item No. 11. One month later, Claimant filed an addendum to his appeal. The addendum stated that the potential conflict was not speculative because the juveniles often make claims of abuse. Claimant delayed in reporting the conflict to

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This Court will not consider matters that are raised for the first time in a petition for review to this Court. *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 611 (Pa. Cmwlth. 2011). Thus, Claimant's second issue has been waived. *Id.* *See also* PA. R.A.P. 1551(a) ("No question shall be heard or considered by the court which was not raised before the government unit" unless it involves the validity of a statute, subject matter jurisdiction, or could not have been raised through the exercise of due diligence before the government unit).

For the above-stated reasons, we affirm the Board's adjudication.

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MARY HANNAH LEAVITT, Judge

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Employer because he did not appreciate the problem until he took a professional responsibility course in law school, which he attends part-time.

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 29th day of November, 2012, the order of the Unemployment Compensation Board of Review, dated December 6, 2011, in the above-captioned matter is AFFIRMED.

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MARY HANNAH LEAVITT, Judge