

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Anita Kay Galko,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2158 C.D. 2010
	:	SUBMITTED: April 1, 2011
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: August 23, 2011

Petitioner, Anita Kay Galko, petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of the unemployment compensation referee, which concluded that Petitioner was ineligible for unemployment compensation benefits because she refused a suitable offer of work without good cause. We affirm.

Petitioner was employed by McGinnis Food Center (Employer) from September 3, 2008, through October 22, 2009, as a full-time cheese department team leader at \$9 an hour. This position involved managing, setting displays, and sales. Petitioner applied for unemployment compensation benefits after she was terminated. Petitioner has a bachelor's degree in equine science and business

administration. She was previously self-employed in the equine field and worked in retail sales for a department store and jewelry retailer.

On December 11, 2009, Employer sent Petitioner a letter offering reemployment effective January 4, 2010, as a full-time cashier with the same wages, hours, benefits, and seniority. The letter also requested that Petitioner provide a letter from her doctor outlining any work restrictions. Further, Employer stated that Petitioner's health benefits would resume retroactively to her last date of employment and that she would be reimbursed for any monies expended to continue her benefits subsequent to her termination. On December 15, 2009, Petitioner requested the opportunity to view her personnel file and an extension of time for acceptance of the reemployment offer. Employer acquiesced to Petitioner's requests and met with her on December 29, 2009. Following the meeting, Employer sent Petitioner a letter reminding her that she needed to respond to the offer by January 12, 2010, and requested that she forward a healthcare provider's statement detailing her ability to work and any restrictions she may have.

On December 23, 2009, Employer notified the service center of its reemployment offer. Petitioner ultimately refused the reemployment offer on January 12, 2010, because she believed that, based on her educational and employment background, employment as a cashier was not suitable and the location of the cash registers would aggravate her medical condition. Employer notified the service center of Petitioner's refusal on January 13, 2010. Prior thereto, however, Petitioner received an offer of employment from First Commonwealth Bank on December 31, 2009. She accepted part-time employment as a bank teller and began training on January 11, 2010.

The unemployment compensation service center issued a determination granting benefits. Employer appealed the determination¹ and a notice of hearing was issued. A hearing was on held on January 4, 2010, regarding Petitioner's eligibility for benefits pursuant to Sections 402(e), 401(d)(1),(2), and 402(b) of the Unemployment Compensation Law² (the Law), 43 P.S. §§ 802(e), 801(d)(1),(2), and 802(b). On January 19, 2010, the referee issued a determination that Petitioner was eligible for benefits under Section 402(a), 43 P.S. § 802(a), because Employer failed to notify the Department of Labor within seven days of making Petitioner a job offer. Employer sought reconsideration and this determination was vacated. On February 22, 2010, a notice of determination that Petitioner was eligible for benefits for the weeks ending January 9, 2010 through February 13, 2010 under Section 402(a) was issued. Employer appealed this determination.

A hearing was scheduled to determine whether Petitioner had good cause to refuse a suitable offer of reemployment. The referee held two hearings on May 5, 2010, and May 28, 2010. Joan Manoli and Jennifer Kinzler of Employment Development and Management Consultants (EDMC), a labor and employment relationship advisor, testified for Employer. Petitioner testified on her own behalf. The referee issued a decision denying benefits, finding that the employment offered to Petitioner was suitable and that she did not have good cause to reject the offer.³ The referee concluded that the cashier position was suitable because

¹ A copy of this determination cannot be found in either the reproduced record or the original record.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§ 751-914.

³ The referee also found that "employer properly notified the service center within seven days of the claimant declining the [job] offer." Reproduced Record (R.R.) at 4a. Section 402(a) **(Footnote continued on next page...)**

Petitioner had previously accepted retail work despite possessing a bachelor's degree; she had failed to provide medical documentation from her doctor that the position was not suitable; she testified that after reviewing her personnel file, she did not want to return to work with Employer; and she failed to provide substantial evidence that the temperature at the cashier stations was not suitable for her.

Petitioner appealed the referee's decision to the Board. The Board affirmed the referee's decision, concluding that Petitioner had failed to establish that her reasons for refusing reemployment were reasonable and substantial. The Board also found that Petitioner had not suffered any prejudice when Employer notified the service center one day after she refused the reemployment offer. This appeal followed.

Petitioner challenges the Board's decision on several grounds. First, Petitioner argues that the Board's analysis of the suitability of the cashier position was flawed. Petitioner also asserts that the Board relied upon evidence that was improperly admitted and denied her constitutional right of cross examination. Further, Petitioner contends that the Board erred in holding that Employer complied with the seven day notification requirement of Section 402(a) of the Law. Petitioner argues that the Board erred in failing to dismiss Employer's appeal because Employer, a Pennsylvania corporation, was not properly represented at the referee hearing. Finally, Petitioner asserts that Employer's appeal was barred by collateral estoppel.

(continued...)

of the Law requires that an employer notify the service center within seven days of **making** the offer, not within seven days of the claimant declining the offer. However, as discussed *infra*, this conclusion is harmless error.

Petitioner contends that the Board erred in holding that she refused suitable work without good cause. Section 402(a) provides, in relevant part, that an employee shall be ineligible for compensation for any week

[i]n which his unemployment is due to failure, without good cause ... to accept suitable work when offered to him by the employment officer or by any employer ... Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof

43 P.S. § 802(a). Section 4(t) of the Law defines, in relevant part, suitable work as:

all work which the employe is capable of performing. In determining whether or not any work is suitable for an individual, the department shall consider the degree of risk involved to his health, safety and morals, his physical fitness, prior training and experience, and the distance of the available work from his residence. The department shall also consider among other factors the length of time he has been unemployed and the reasons therefor, the prospect of obtaining local work in his customary occupation, his previous earnings, the prevailing condition of the labor market generally and particularly in his usual trade or occupation, prevailing wage rates in his usual trade or occupation

43 P.S. § 753(t).

Analysis under Section 402(a) requires a two prong inquiry. First, the court must determine whether the proffered work was suitable in light of the factors in Section 4(t) of the Law. If the work is suitable, the court must determine whether the claimant's failure to accept such work was with good cause. Courts have equated "good cause" under Section 402(a) of the Law as synonymous with "good faith" requiring positive conduct which is consistent with a genuine desire to

work and to be self-supporting. *Sem-Pak Corp. v. Unemployment Comp. Bd. of Review*, 501 A.2d 694 (Pa. Cmwlth. 1985). A claimant's reasons for refusing to accept the position must be substantial and reasonable, rather than arbitrary, whimsical, capricious or immaterial. *Id.* A claimant is entitled to a "reasonable opportunity" to find work commensurate with her training and experience. *Dep't of Educ. v. Unemployment Comp. Bd. of Review*, 890 A.2d 1232, 1236 (Pa. Cmwlth. 2006). Suitability of work and good cause are questions of law. *Id.* at 1235.

The Board, which adopted and incorporated the referee's findings and conclusions, determined the cashier position was suitable because Petitioner had previously worked in retail sales. Although the job as cheese department team leader involved marketing (arrangement of cheese displays) and supervisory responsibilities, while the position of cashier did not, both the cashier position and position in the cheese department involve retail sales. Other than the loss of limited supervisory authority, the job as a cashier provided the same hours, wages and benefits. Further, Petitioner did not produce any evidence that the cashier position was not suitable because she was incapable of performing the work. We conclude that the Board did not err in finding the job suitable.

The Board also found that Petitioner did not have good cause to refuse the position; rather, she just did not want to work for Employer. Petitioner asserts that she had good cause to reject the offer because it was not suitable for a person of her education and experience and because it would compromise her health. Petitioner's argument regarding her education is without merit. Her degree is in equine science and business administration, yet she has consistently worked in the retail field, which does not require use of any special skills that she may have

obtained during her education in equine science. As noted above, Petitioner did not provide any medical evidence that the cashier position was unsuitable and the position did not require her to take a reduction in hours, wages or benefits. Further, Petitioner had been unemployed for nearly seven weeks when Employer offered her reemployment. The Board did not err in concluding that Petitioner lacked good cause to reject the offer.

Petitioner argues that the Board erred in relying upon documents that were admitted into evidence over her counsel's objection and erred by allowing EDMC to testify on behalf of Employer. Specifically, Petitioner asserts that the December 11, 2009 letter, which offered reemployment, is hearsay because Employer attempted to introduce it into evidence through the testimony of Ms. Manoli of EDMC rather than through the testimony of its signatory. We disagree. This is not a hearsay issue. The letter was not introduced to prove the truth of any statements of fact contained therein, but to show that a letter containing an offer of employment was sent to Ms. Galko, and the terms of the letter speak for itself. While the objection raised might more accurately relate to whether the document was properly authenticated, there is no genuine issue of authentication. Not only was the letter introduced through Ms. Manoli, who authored it on behalf of the company's owner, but Petitioner herself admitted receiving it, and Petitioner's written response, specifically referencing that letter, was admitted.

Petitioner also argues that the failure of Noreen Campbell to appear and testify regarding the December 11 letter deprived Petitioner of her constitutional right to cross-examination of the author of the letter. This argument similarly lacks merit. As noted above, the letter itself set out the terms and conditions of the offer, and the person who drafted it was available for cross

examination. Petitioner does not suggest how questioning the person who signed the letter would have served any purpose, since the only relevant issue was what job offer was conveyed to Petitioner, not what might have been in the owner's mind.

Petitioner asserts that the Board erred in excusing Employer's failure to strictly comply with the seven day notification requirement of Section 402(a) of the Law. Although Section 402(a) provides that the employer must notify the unemployment compensation center of a claimant's refusal of suitable work within seven days of making a job offer, courts have held that it is directory and not mandatory and therefore that compliance is not required when it would be inconsistent with the objectives of the Law and the claimant is not prejudiced by the delay. *McKeesport Hosp. v. Unemployment Comp. Bd. of Review*, 619 A.2d 813 (Pa. Cmwlth. 1992).

Petitioner argues that Employer did not notify the service center of its reemployment offer until January 13, 2010, some three weeks after expiration of the seven day deadline. However, a review of the record reflects that on December 23, 2009, EDMC notified the service center of its reemployment offer of December 11, 2009. This notification was a mere five days after the seven day deadline expired. This slight delay did not cause any demonstrable prejudice to Petitioner. In fact, Petitioner took more than a month to make a decision and inform employer of her decision to decline the reemployment offer. The Board did not err in failing to dismiss Employer's appeal based upon its late notification.

Petitioner challenges as improper Employer's representation by EDMC and its attorney, Edward R. Ehrhardt. Petitioner asserts that this representation created a conflict of interest because counsel represented two

separate corporations, Employer and EDMC. Employer had an ongoing relationship with EDMC to advise and represent it regarding human resource issues. EDMC represented in correspondence to the Department of Labor that it was authorized to represent Employer pursuant to a power of attorney. EDMC retained counsel to represent Employer's interests in the case at bar. We discern no conflict of interest in Mr. Ehrhardt's representation. Moreover, at the hearing, Petitioner failed to object to Mr. Ehrhardt's representation of Employer. R.R. at 10a. Therefore, this argument is waived. *Schaal v. Unemployment Comp. Bd. of Review*, 870 A.2d 952 (Pa. Cmwlth. 2005).

Finally, Petitioner contends that a prior determination that she was eligible for benefits collaterally estops any finding that she is ineligible for benefits under Section 402(a). A hearing was on held on January 4, 2010. A transcript of testimony from the January 4 hearing is not part of either the reproduced or original record. However, the Referee pointed out when the issue was raised that the prior hearing dealt with Petitioner's eligibility based on and following her initial termination, while the instant matter concerned the cessation of benefits after she refused the offer of re-employment. R.R. at 11a. Such issues are distinct and properly dealt with in separate proceedings. At all events, the record simply provides no support for Petitioner's claim of issue preclusion.

For all the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of August, 2011, the order of Unemployment Compensation Board of Review is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge