IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Subway List, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2258 C.D. 2007
	:	
Unemployment Compensation Board of Review,	:	Submitted: June 20, 2008
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: September 5, 2008**

Subway List, Inc. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the Referee's decision denying Holly M. Lawson (Claimant) benefits. Employer argues that the Board erred because Claimant voluntarily quit her employment or, in the alternative, in finding that Claimant's actions did not amount to willful misconduct.[1] For the reasons discussed herein, we affirm the order of the Board.

[1] For the purposes of this opinion, we have reversed the order of Employer's arguments.

Claimant applied for unemployment compensation benefits after becoming separated from her employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination denying benefits to Claimant, finding that she had voluntarily quit her employment under Section 402(b) of the Unemployment Compensation Law (Law).[2] Claimant appealed the Service Center's determination, and an evidentiary hearing was held before a Referee at which Claimant, with a witness, and Employer, with a witness, testified. Following the hearing, the Referee issued a decision affirming the Service Center's denial of benefits. Claimant appealed the Referee's decision to the Board, which, after reviewing the record, issued a decision in which it made the following findings of fact:

1. The claimant was last employed as a part-time assistant manager by Subway List, Inc. at the Frackville location for approximately two and a half years at a final rate of $9.00 per hour and her last day of work was May 18, 2007. The claimant worked an average of 25 to 35 hours per week.
2. The claimant provided the employer with documentation from her doctor stating that the claimant requested to be placed on maternity leave effective May 19, 2007.
3. The claimant began an approved eight-week period of maternity leave on May 19, 2007.
4. Subsequently, the employer extended the claimant's leave until July 31, 2007.
5. The claimant understood that she would be returning to work on August 1, 2007.
6. On June 20, 2007, the employer called the claimant to inform her that she would be receiving a certified letter.
7. On June 21, 2007, the employer sent the claimant a certified letter requesting to know her intentions in regard to returning to

[2] Act of December 5, 1936, Second Ex. Sess., P.L. 2897, as amended, 43 P.S. § 802(b).

work. The employer enclosed a questionnaire and requested that the claimant return the completed questionnaire by June 30, 2007.

8. The employer's letter indicated that the claimant's failure to return the questionnaire by June 30 would indicate that the claimant did not intend to return to work.
9. The employer's letter also indicated that if the claimant did plan on returning to work, she would need to do so before August 1, 2007.
10. On June 29, 2007, the employer put a new pay structure into effect.
11. On June 30, 2007, the claimant sent the employer a letter stating that she was unable to give the employer an answer in regard to returning to work until after her six-week checkup scheduled for July 13, 2007.
12. The employer received the claimant's letter on July 1, 2007.
13. On July 10, 2007, the employer informed the claimant that her assistant manager position was no longer available as she failed to return the questionnaire by June 30, however the claimant could return to work as a shift leader.
14. The employer also advised the claimant that her rate of pay was changing from $9.00 an hour to $8.15 an hour with a dollar per hour bonus in accordance with the new pay structure.
15. On July 13, 2007, the claimant sent the employer a certified letter stating that she would return to her assistant manager position on August 1, 2007, at the same rate of pay of $9.00 per hour, believing that the employer was reducing her pay.
16. The employer received the claimant's letter on July 14, 2007.
17. On July 16, 2007, the employer sent the claimant a letter discharging her for lack of communication in regard to her intentions to return to work and failure to follow the employer's directions to complete and return a questionnaire.

(Board Op., Findings of Fact (FOF) ¶¶ 1-17.) Based on these findings, the Board granted benefits to Claimant finding that Employer had terminated Claimant's employment, and that Claimant reasonably attempted to comply with Employer's requests for information about her intentions to return to work. The Board,

therefore, concluded that Claimant's discharge was not the result of willful misconduct, and reversed and modified the decision of the Referee. Employer now petitions this Court for review.[3]

On appeal, Employer claims the Board made two errors of law: (1) the Board erred by failing to address Claimant's voluntary quit under Section 402(b) of the Law; and (2) the Board erred because the facts as found by the Board support the conclusion that Claimant's actions amount to willful misconduct.

Employer first argues that the Board erred in applying Section 402(e) of the Law, which is applicable to employees who are discharged from their employment, instead of Section 402(b) of the Law, which is applicable to employees who voluntarily quit their employment. Employer contends that the Board should have denied Claimant benefits under Section 402(b) of the Law, as did the Service Center and the Referee, because she voluntarily quit her employment by failing to complete and return the questionnaire that Employer had mailed to her, and she failed to prove that she had cause of a necessitous and compelling nature for quitting. We disagree.

Under Section 402(b) of the Law, an employee is ineligible for compensation "for any week . . . [i]n which his unemployment is due to voluntarily

[3] "This Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

leaving work without cause of a necessitous and compelling nature…." 43 P.S. § 802(b). Whether a claimant has voluntarily quit her employment is a question of law which is subject to appellate review. Parducci v. Unemployment Compensation Board of Review, 447 A.2d 1108, 1109 (Pa. Cmwlth. 1982). The distinction between whether a claimant quit or was discharged is critical because a finding that an employer discharged a claimant shifts the burden to the employer to prove that the discharge was the result of willful misconduct. O'Keefe v. Unemployment Compensation Board of Review, 333 A.2d 815, 816 (Pa. Cmwlth. 1975). However, a finding that the claimant voluntarily quit keeps the burden on the claimant to prove that there were necessitous and compelling reasons for quitting. Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006).

Determining whether an employee has voluntarily quit her job or was discharged by the employer depends upon whether the employee had the requisite intent to quit. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 45, 565 A.2d 127, 129 (1989). "[A] finding [that claimant] voluntary [quit] is essentially precluded unless the claimant had a conscious intention to leave [her] employment." Roberts v. Unemployment Compensation Board of Review, 432 A.2d 646, 648 (Pa. Cmwlth. 1981). A claimant's intention must be determined in light of the totality of the circumstances. Philadelphia Parent Child Center, Inc. v. Unemployment Compensation Board of Review, 403 A.2d 1362, 1363 (Pa. Cmwlth. 1972).

Here, Claimant began an approved eight-week leave of absence on May 19, 2007. (FOF ¶ 3.) Employer later approved an extension of Claimant's leave of absence until July 31, 2007. (FOF ¶ 4.) Employer then sent Claimant a letter requesting that she complete an enclosed questionnaire in order to inform Employer of Claimant's intentions with regard to returning to work. (FOF ¶ 7.) Employer's letter noted that a failure to return the questionnaire by June 30, 2007, would indicate that Claimant did not intend to return to her position with Employer. (FOF ¶ 8.) Claimant responded to Employer's request by sending Employer a letter on June 30, 2007, indicating that she was unable to provide Employer with an answer about returning to work until after her six-week checkup, which was scheduled for July 13, 2007. (FOF ¶ 11.) Thereafter, on July 10, 2007, Employer sent Claimant a letter stating that because she failed to return the questionnaire, her assistant manager position was no longer available. (FOF ¶ 13.) However, Employer offered Claimant the alternative of returning as a shift leader, under Employer's new pay structure. (FOF ¶¶ 13-14.) On July 13, 2007, the date of her six-week checkup, Claimant sent Employer a letter indicating that she would be returning to her assistant manager position on August 1, 2007, with the same hourly rate of pay. (FOF ¶ 15.) Employer subsequently sent Claimant a letter on July 16, 2007, demanding that Claimant hand in her uniform and return her key to the store. (Letter from Steve Cesari, Employer's Co-Owner, to Claimant, (July 16, 2007) Service Center Ex. No. 6b, Record Item No. 3.)

Considering the totality of these circumstances, we do not believe that Claimant exhibited a conscious intention to voluntarily quit her employment. Although Claimant failed to complete and return the questionnaire as requested by

Employer, Claimant did send a letter advising Employer that she would be able to provide Employer with information regarding her return to work following her six-week checkup. Claimant's inability to predict the circumstances regarding her return to work did not demonstrate an intention to quit. See Novotny v. Unemployment Compensation Board of Review, 469 A.2d 718, 720 (Pa. Cmwlth. 1984) (concluding that failure to predict a date of return from an absence is not, by itself, indicative of an intention to quit.) Moreover, Claimant clearly articulated her intent to return to her employment through her July 13, 2007 letter. It was not until Employer sent Claimant the July 16, 2007 letter demanding that Claimant hand in her uniform and turn in her key that the employment relationship was ended, as such language possessed the immediacy and finality of a discharge. See White v. Unemployment Compensation Board of Review, 188 A.2d 759, 760 (Pa. Super. 1963) (concluding that a discharge can be inferred from language such as "turn in your key" and "turn in your uniform"). Therefore, based on the totality of the circumstances, we conclude that the Board did not err in determining that Claimant was discharged and in applying Section 402(e) of the Law.[4]

[4] To the extent that Employer may be arguing that the Board should not have modified or rejected the findings of fact of the Service Center and the Referee, we note that Section 504 of the Law, 43 P.S. § 824, expressly gives the Board the authority "to affirm, modify, or reverse" the determinations of the Service Center or the Referee on the basis of the record. The Court's have interpreted Section 504 of the Act to mean that the Board "is the ultimate fact finding body empowered to resolve conflicts in evidence, to determine the credibility of witnesses, and to determine the weight to be accorded the evidence." Unemployment Compensation Board of Review v. Wright, 347 A.2d 328, 329 (Pa. Cmwlth. 1975). Therefore, the Board was acting entirely within its powers when it made its own findings and drew its own conclusions in this case.

Next, Employer argues that, even if the Board properly determined that Claimant was discharged from her employment, the Board erred in failing to conclude that Claimant's discharge was the result of willful misconduct. Specifically, Employer contends that Claimant's failure to complete and return the questionnaire as requested amounted to willful misconduct.

Section 402(e) of the Law provides that an employee shall be ineligible for benefits "for any week . . . [i]n which [her] unemployment is due to [her] discharge or temporary suspension from work for willful misconduct connected with [her] work." 43 P.S. § 802(e). Willful misconduct, while not defined by Section 402(e) of the Law, has been defined through case law to mean:

> an act of wanton or willful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has a right to expect of an employee, or negligence indicating an intentional disregard of the employer's interest or of the employee's duties and obligations to the employer.

Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 83-84, 351 A.2d 631, 632 (1976) (quoting Moyer v. Unemployment Compensation Board of Review, 110 A.2d 753, 754 (Pa. Super. 1955)). The employer has the burden of proving willful misconduct. Moore v. Unemployment Compensation Board of Review, 578 A.2d 606, 608 (Pa. Cmwlth. 1990). When a charge of willful misconduct is based on a refusal or failure to follow a directive, both the reasonableness of the directive by the employer, and the reasonableness of the employee's refusal must be examined before a determination of willful misconduct can be made. Frumento, 466 Pa. at 87, 351 A.2d at 634-635. Failure to abide by a

directive, when an employee makes a good faith effort to comply but cannot through no fault of her own, is not willful misconduct. Howard v. Unemployment Compensation Board of Review, 379 A.2d 1085, 1086 (Pa. Cmwlth. 1981).

As discussed earlier, although Claimant never actually completed and returned the questionnaire to Employer, the letters that Claimant sent served the same purpose of advising Employer of her intentions with regard to returning to work. Therefore, we conclude that the Board properly determined that Claimant reasonably attempted to comply with Employer's request and that her actions did not constitute willful misconduct.[5]

[5] Employer also raises two subsidiary arguments based upon the Board's opinion. First, Employer argues that the Board erred in finding that it was unreasonable for Employer to expect Claimant to return to work before the end of her maternity leave of absence. We disagree. The Board found that Employer agreed to extend Claimant's maternity leave until July 31, 2007. (FOF ¶ 4.) The Board also found that Claimant believed that she was to return to work on August 1, 2007. (FOF ¶ 5.) We believe that it was not unreasonable for the Claimant or the Board to interpret Employer's agreement to extend Claimant's leave of absence "until July 31, 2007" to mean that Claimant was to return to work from her leave of absence on August 1, 2007. Thus, contrary to Employer's assertion, the Board did not err in finding that it was unreasonable for Employer to expect Claimant to return to work before the end of her maternity leave.

Additionally, to the extent that Employer argues that the Board erred in finding it was unreasonable for Employer to remove claimant from her assistant manager position during her approved leave of absence, we again disagree. Employer's own letter and questionnaire, dated June 21, 2007, states that Employer and Claimant had an agreement for Claimant to return to her assistant manager position at the end of her maternity leave. Based on this agreement, it was reasonable for Claimant to assume that she would be entitled to step back into that role once she came back at the end of her leave. Therefore, this Court agrees with the Board that it was unreasonable to remove Claimant from her assistant manager position during her approved leave of absence, when she had an agreement with Employer to resume that position at the end of her leave.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Subway List, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2258 C.D. 2007
	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, September 5, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **affirmed.**

RENÉE COHN JUBELIRER, Judge