

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---------------------------|---|--------------------------|
| Cynthia A. Rao, | : | |
| | : | |
| Petitioner | : | |
| | : | |
| | : | |
| v. | : | No. 2587 C.D. 2009 |
| | : | Submitted: June 18, 2010 |
| Unemployment Compensation | : | |
| Board of Review, | : | |
| | : | |
| Respondent | : | |
| | : | |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: September 1, 2010

Cynthia A. Rao (Claimant) petitions, *pro se*, for review of the order of the Unemployment Compensation Board of Review (Board), which affirmed the referee’s denial of benefits under Section 402(e) of the Unemployment Compensation Law (Law).¹ We affirm on other grounds.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402 of the Law provides in pertinent part as follows:

An employe shall be ineligible for compensation for any week-

Footnote continued on next page...

Claimant was employed as an endoscopy technician by the Endoscopy Center of Bucks County (Employer) for approximately two years at a final rate of pay of \$16.00 per hour. Claimant worked between thirty and thirty-two hours per week. Claimant's last day of work was February 19, 2009. The facts as found by the Board are as follows:

2. The claimant incurred an injury on February 9, 2009. The employer received a physician[']s report wherein the claimant was placed on restrictions of no heavy lifting, as well as no bending, and no excessive physical activity until further notice. Because the claimant's position required all the above activities, the employer removed the claimant from the treatment areas, and the claimant was informed that she would not be allowed to return to work until completely cleared by her physician.

3. The claimant was granted a leave of absence.

4. On February 19, 2009, the employer sent the claimant a correspondence wherein it indicated that they wanted to begin "interactive process" in order to determine whether a reasonable accommodation was available to the claimant based upon her medical condition.

5. The "interactive process" never transpired.

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act....

6. On March 25, 2009, the claimant left her supervisor an envelope with two notes. One note was from the claimant's physician dated March 6, 2009, which stated that the claimant could return to work on March 16, 2009, and also that the claimant should be limited to three days per week for the first two weeks. The other note that was left behind was a letter from the claimant wherein she stated "that due to a major scheduling conflict with my primary hospital job I can no longer come in five days a week. I will have to reduce my hours to the original three day a week schedule."

7. The claimant did not want to work five days because it was putting her at risk of losing her other job.

8. After receiving the claimant's information, the claimant's supervisor left the claimant a voicemail. The supervisor stated in the message "please contact us."

9. The employer did not have a part-time position available for the claimant.

10. The claimant did not return to work or contact the employer after March 25, 2009. The claimant was terminated for job abandonment.

Board Decision, November 9, 2009, at 1-2.

The Board resolved all conflicts in the testimony in favor of Employer and found Employer's testimony that it did not hear from Claimant after March 25, 2009, credible. The Board determined that Claimant's failure to contact Employer after March 25, 2009, rose to the level of willful misconduct. The Board found that Claimant did not have good cause for her failure to contact Employer. The Board denied Claimant benefits pursuant to Section 402(e) of the Law. However, the Board further

found that, in the alternative, Claimant violated Section 402(b) of the Law, as she abandoned her job without a necessitous and compelling cause. Claimant now petitions this court for review.²

On appeal, Claimant contends that the Board's findings of fact nos. 2, 3, 8, and 10, are not supported by substantial evidence; that Claimant's conduct did not amount to willful misconduct under Section 402(e) of the Law and that the Employer violated Claimant's constitutional rights when it terminated Claimant due to her medical condition. Further, Claimant contends that the Board and the referee violated Claimant's rights when it refused to accept certain documents from Claimant, when it submitted its own 'personal opinion' regarding when Claimant contacted the Unemployment Compensation Service Center, and in refusing to acknowledge inconsistencies between hearing transcripts, documents and findings of fact.

In the present controversy, since we affirm the Board based upon its finding that Claimant violated Section 402(b) of the Law, we need not address whether Claimant has committed willful misconduct. Section 402(b) of the Law provides that an employee shall be ineligible for compensation for any week:

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature....

² This court's review is limited to a determination of whether constitutional rights were violated, errors of law committed and whether essential findings of fact are not supported by substantial evidence. Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085 (Pa. Cmwlth. 1988).

In Charles v. Unemployment Compensation Board of Review, 552 A.2d 727, 729 (Pa. Cmwlth. 1989), we found that:

In a voluntary quit case, this court must first determine whether the facts surrounding petitioner's separation from employment constitute a voluntary resignation or a discharge.... Where an employee, without action by the employer, leaves or quits work, the employee's action is considered voluntary under the law....

Claimant bears the burden of proving his contention that his separation was involuntary. Helsel v. Unemployment Compensation Board of Review, 421 A.2d 496 (Pa. Cmwlth. 1980). "Whether a claimant voluntarily quit his employment or whether his employer discharged him is a question of law for the court 'to determine from the totality of the record.'" Port Authority of Allegheny County v. Unemployment Compensation Board of Review, 955 A.2d 1070, 1074 (Pa. Cmwlth. 2008)(citation omitted). "A finding of voluntary termination is essentially precluded unless the claimant has a conscious intention to leave his employment. In determining the intent of the employee, the totality of the circumstances surrounding the incident must be considered." Fekow Enterprises v. Unemployment Compensation Board of Review, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001)(citation omitted).

Employer testified that it received a report from Claimant's physician placing Claimant on restrictions until further notice. Notes of Testimony (N.T.) at 6; Exhibit 11A. As Claimant's position required the restricted activities, Employer placed Claimant on a leave of absence until completely cleared by her physician. N.T. at 6. Employer also sent Claimant a letter indicating that it wanted to begin the "interactive process"

to determine whether reasonable accommodations were available to Claimant based upon her medical condition. Within such letter, Claimant was asked to contact Employer. N.T. at 6; Exhibit 10.

On March 25, 2009, Claimant dropped off two notes to Employer. One note was from Claimant's physician, dated March 6, 2009, which released Claimant to return to work on March 16, 2009. The other note was from Claimant, wherein she stated "that due to a major scheduling conflict with my primary hospital job I can no longer come in five days a week. I will have to reduce my hours to the original three day a week schedule." N.T. at 5; Exhibit 11B, 13. Employer telephoned Claimant and left a message asking Claimant to "please contact us." N.T. at 5. Claimant did not contact Employer after March 25, 2009. N.T. at 7.

Here, Claimant was instructed to contact her supervisor. Her failure to do so evidences her conscious choice to quit her employment. As Claimant had "a conscious intention to leave [her] employment", the Board was correct in determining that her termination was voluntary. Fekos, 776 A.2d at 1021.

Once it is determined that a claimant voluntarily terminated her employment, the claimant bears the burden of proving "a necessitous and compelling reason for voluntarily terminating the employment relationship." Mutual Pharmaceutical Company v. Unemployment Compensation Board of Review, 654 A.2d 37, 39 (Pa. Cmwlth. 1994). Claimant must establish both that she acted with ordinary common sense in quitting her job and that she had made a reasonable effort to preserve her employment. Stiffler v. Unemployment Compensation Board of Review, 438 A.2d 1058 (Pa.

Cmwlth. 1982). Multiple causes, which as individual causes are not necessitous or compelling, do not in combination, become necessitous and compelling. Koman v. Unemployment Compensation Board of Review, 435 A.2d 277 (Pa. Cmwlth. 1981).

In the present controversy, Claimant contends that she contacted Employer on several occasions after dropping off the letters on March 25, 2009. However, the Board found Employer's testimony to the contrary, credible. All credibility determinations are made by the Board. The weight given the evidence is within the discretion of the factfinder. Fitzpatrick v. Unemployment Compensation Board of Review, 616 A.2d 110 (Pa. Cmwlth. 1992). A review of the record reveals that Employer's testimony and evidence support the Board's finding that Claimant did not contact Employer after being instructed to do so. The Board's determination that Claimant voluntarily terminated her employment was supported by substantial evidence.

Next, Claimant contends that the Board erred in failing to determine that Employer violated Claimant's constitutional rights when it terminated Claimant due to her medical condition. A review of the record reveals that Claimant was not terminated due to her medical condition, but had, in fact, voluntarily left her employment when she failed to contact Employer after March 25, 2009, regarding her employment.

Claimant also argues that the referee violated her rights when he refused to accept certain documents from Claimant. A review of the record reveals that Claimant did not present any relevant evidence for admission into the record during the hearing. During Claimant's testimony,

the referee asked Claimant what she was looking at and the following transpired:

R And I need to know what it is you're looking at there.

C I can give you, I can give these to you.

R What are they?

C These are just lists. I broke down per each letter when I got the appeal package.

R Okay.

C One is the...

R And you wrote these sometime after the event?

C No, no. Well the dateline I have...

R All I need to know is when you prepared those documents.

C Right. Was prepared from the appeal package....

N.T. at 11. When the referee was wrapping up, the following exchange between the referee, Employer and Claimant took place:

R ...I just need to know what you want to add for the record.

EW The fact we did not receive all these phone calls that I was supposed to have received, I have no record of that. And that is all I have to say.

R Okay. Alrighty. If there's nothing further, I'm going to close the hearing. I'll issue a Decision in the matter. I thank everyone for their participation.

C [inaudible] can I give you any of these or no?

R No. They're your notes, no.

N.T. at 23. Claimant's personal notes were not admitted into the record. It is at the discretion of the referee whether a party shall be permitted to present evidence and testimony which they believe is necessary to establish their rights. 34 Pa. Code §101.21. Personal notes made after the fact are hearsay and do not fall under any of the exceptions to the hearsay rule. See, Pa.R.E. 802, 803(1), 803(6), and 803.1(3). The referee did not violate Claimant's constitutional rights by not admitting Claimant's notes into the record.

Finally, Claimant contends that the referee violated her rights when the referee submitted his own 'personal opinion' regarding when Claimant contacted the Unemployment Compensation Service Center (Service Center), and that the Board violated her rights in refusing to acknowledge inconsistencies between hearing transcripts, documents and findings of fact. As stated previously, the Board is the factfinder, charged with making findings of fact and this court is charged with reviewing the Board's decision, not the referee's determination. Thus, the referee's decision is not before this court. Further, the Board did acknowledge inconsistencies in the testimony of Claimant and Employer and resolved all such inconsistencies in favor of Employer. See Board's Decision at 2. As

the Board is the arbiter of credibility, we cannot alter such findings on appeal.

Accordingly, we affirm the Board based upon Section 402(b) of the Law.

JIM FLAHERTY, Senior Judge

