IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philadelphia Park Casino, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 726 C.D. 2008
	:	Submitted: September 5, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: October 14, 2008

Philadelphia Park Casino (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) that reversed the referee's denial of compensation benefits under Section 402(b) (voluntary leave) of the Unemployment Compensation Law (Law).[1]

James B. Timmons (Claimant) was employed as a full-time slot technician by Employer. His last day of employment was October 20, 2007. The relevant facts as found by the Board are as follows:

> 2. Upon hire, the employer informed the claimant that he would have a choice as to what shift he wanted to work once the employer's business became established. (emphasis added).

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937), as amended, 43 P.S. § 802(b).

3. The claimant worked day shift hours of 8 a.m. to 4 p.m. Monday through Friday.

4. Once the employer's business became a little more established, the employer added additional work shifts of 3:30 p.m. to 11 p.m. and 10:30 p.m. to 8:30 a.m. Wednesday through Sunday.

5. Subsequently, the employer changed the claimant's work shift to third shift hours of 10:30 p.m. to 8:30 a.m. Wednesday through Sunday. (emphasis added).

6. In December 2006, the claimant informed the employer that working night shift hours interfered with his worship and volunteer work that he performed for his church on Sundays and did not allow him to get his needed rest. (emphasis added).

7. The employer accommodated the claimant's needs and changed the claimant's work shift to day shift hours of 8 a.m. to 4 p.m. Monday through Friday. (emphasis added).

8. From January 2007 until October 2, 2007, the claimant worked day shift hours of 8 a.m. to 4 p.m. Monday through Friday. (emphasis added).

9. On October 2, 2007, the employer informed the claimant that he would once again be required to change to night shift hours of 10:30 p.m. to 8:30 a.m. Wednesday through Sunday. (emphasis added).

10. The claimant once again told the employer that he was unwilling to work night shift hours because of his worship and volunteer work on Sunday. (emphasis added).

11. The claimant also informed the employer that he had a health condition. (emphasis added).

12. The claimant was 55 years of age and had been recently diagnosed with degenerative disc disease that he

> managed by getting the proper amount of rest. (emphasis added).
>
> 13. The employer did not offer to accommodate the claimant's schedule. (emphasis added).
>
> 14. On October 4, 2007, the claimant submitted his two-week resignation to become effective October 20, 2007.
>
> 15. The claimant was required to work third shift beginning October 10, 2007, but did not agree to work the Sunday evening to Sunday morning shift.
>
> 16. The claimant worked until October 20, 2007, hoping that the employer would offer an accommodation but the employer did not.
>
> 17. The claimant voluntarily quit his employment due to the substantial change in his work schedule and due to his health concerns. (emphasis added).

Board's Decision, March 26, 2008, Findings of Fact (F.F.) Nos. 2-17 at 1-2; Reproduced Record (R.R.) at 17a-18a. The Board reversed the referee's denial of benefits.

On appeal[2], Employer contends that the Board erred when it determined that Claimant had a necessitous and compelling reason to voluntarily terminate his employment.

Section 402(b) of the Law, 43 P.S. § 802(b) provides that "[a]n employe shall be ineligible for compensation for any week . . . in which his

[2] 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 are not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

unemployment is due to voluntarily leaving work without a cause of a necessitous and compelling nature . . . ." A claimant unemployed by voluntary termination carries the burden of proving that the termination was for a cause of necessitous and compelling nature. Lee Hospital. "Cause of a necessitous and compelling nature is construed as cause which results from overpowering circumstances which produce both real and substantial pressure to terminate employment and which would compel a reasonable person to act in the same manner." Lee Hospital, 637 A.2d 697, citing Uniontown Newspaper, Inc. v. Unemployment Compensation Board of Review, 558 A.2d 627 (Pa. Cmwlth. 1989). Finally, whether one had a necessitous and compelling reason for quitting one's job is a legal conclusion and is fully reviewable by this Court. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 358-59, 378 A.2d 829, 832-33 (1977).

Here, the Board was faced with conflicting evidence. Claimant testified that "on the first day I was there, Lowell Jacobson had made a statement to the original six technicians that . . . we would have a choice when we finally got working normal hours . . . what shift they were going to go on." Notes of Testimony (N.T.), December 19, 2007, at 5.[3] Claimant continued that Employer created a third shift from 10:30 P.M. to 8:30 A.M. on Wednesday through Saturday [into Sunday], and assigned Claimant to work it.[4] N.T. at 6. Claimant worked the third shift from November of 2006 until he notified Employer in December of 2006, that he was unable to continue because "Sundays [sic] is my day of worship .

[3] Employer did not include the N.T. in its reproduced record.

[4] Employer had three shifts. The other two were from 8:00 A.M. to 4:00 P.M. and 3:30 P.M. to 11:00 P.M.

. . [and] I'm involved in various activities with my church . . . ." N.T. at 7. Claimant said that Employer accommodated him and he was placed back on the first shift where he remained until October 4, 2007, when Claimant, again, was assigned to the third shift. N.T. at 8. Claimant responded to Jerome Doughty that "this not going to happen . . . I can't go backward in this direction . . . I said I am losing my Sunday, and on top of that why is seniority being ignored." N.T. at 9. Claimant also informed Employer that he "found out that I have degenerative disc disease" and that the third shift afforded him little time for proper rest for his back. N.T. at 12. When Employer informed Claimant that it was unable to accommodate him, Claimant tendered his two week notice and quit, effective October 20, 2007.

Jerome Doughty (Doughty), slot shift manager, testified that he was first approached by Claimant in December of 2006, "and the conversation was about Mr. Timmons [Claimant] not being able to work weekends and at that time, I said that I would do everything in my power to make sure that he had his time at that particular time, and made the schedule as such . . . [i]t would have been from 8:00 [A.M.] to 4:00 [P.M.] . . . Monday through Friday." N.T. at 16. Doughty informed Claimant in October of 2007, that he would be moved to the third shift and that "he once again just basically said he could not work those hours and he did mention something about his health issues . . . and that type of thing . . . ." N.T. at 17. Doughty continued that "nothing was permanent at that point in the conversation . . . [n]ow we talked about this over a two or three day period, and each day I reiterated to Mr. Timmons [Claimant] in fact that I did not want him to leave his employment." N.T. at 17. Doughty met with Lowell Jacobson, his supervisor, twice "the first one was to tell him of your [Claimant's] intentions . . .

[t]he second one he actually called him [Claimant] into his office when he received the resignation." N.T. at 20. Doughty stated that Jacobson "told me that I have to take a look at things at hand and make sure that they work for the company . . . my schedule isn't even set in stone . . . [t]his is something that is expected in this industry, and you just can't make that sort of promise to anyone to keep them there . . . [t]hat . . . [i]t's a business and business dictates . . . ." N.T. at 21.

In Mauro v. Unemployment Compensation Board of Review, 751 A.2d 276 (Pa. Cmwlth. 2000), this Court addressed the issue of whether an employee was entitled to benefits after a voluntary quit where an employer denied his request for a specific change in work hours. In Mauro, Philip S. Mauro (Mauro) had worked for Pencose as a carpenter/foreman for a one-week period from April 12, 1999, unti1 April 19, 1999. Mauro requested that Pencose accommodate him so that his work hours corresponded with his daughter's day care hours which were from "7:00 a.m. until 3:30 p.m. or 4:00 p.m., and Penrose agreed. After four days, Pencose ignored the agreement. "[B]efore he quit . . . he [Mauro] asked Employer [Pencose] 'if there's something that could be worked out . . .' and Pencose replied 'you got to do what you got to do.'" Id. at 278. The referee denied Mauro benefits "because when he quit . . . Mauro did not request a specific change in his work hours." Id. at 278. The Board affirmed.

On appeal, this Court reversed:

> Moreover, we note that, even if Claimant [Mauro] had not asked Employer [Pencose] whether "there's something that could be worked out" with regard to his daughter's day care, Claimant [Pencose] would still prevail in this appeal. Ordinarily, in order to be eligible

> for benefits after a voluntary quit, a claimant must demonstrate that he attempted to preserve his employment. However, here, where Claimant [Mauro] negotiated the conditions of his employment one week prior to his quit, which was occasioned by Employer's [Pencose's] unilateral change of these conditions, it was an error of law for the UCBR to ignore the conditions for acceptance of employment and to require Claimant [Mauro] to perform what would have been an obviously futile act. (emphasis added and footnote omitted).

Mauro, 751 A.2d at 279-80.

Like, in Mauro, Employer agreed to accommodate Claimant's request to work the first shift from 8:00 A.M. to 4:00 P.M. after Employer's business was established. Employer then breached the time-of-hire agreement and Claimant was assigned to the third shift from 10:30 P.M. to 8:30 A.M. Wednesday through Sunday. Claimant notified Employer that he was unable to work the third shift because it interfered with his Sunday worship and volunteer work. Employer accommodated Claimant's request pursuant to its agreement and assigned Claimant to the first shift from January of 2007 to October of 2007. On October 2, 2007, Employer notified Claimant that he would have to work the third shift. Claimant again told Employer that he was unable to work the third shift because of Sunday worship and health problems[5] and voluntarily quit after Employer was

[5] In Genetin v. Unemployment Compensation Board of Review, 449 Pa. 125, 451 A.2d 1353 (1982), our Pennsylvania Supreme Court stated:

> Where an employee because of a physical condition, can no longer perform his regular duties, he must be available for suitable work, consistent with the medical condition, to remain eligible for benefits. However, once he has communicated his medical problem to the employer and explained his inability to perform the regular assigned duties an employee can do no more.

(Footnote continued on next page…)

unable to accommodate him. There is substantial evidence[6] that "employer's change to claimant's work schedule was substantial . . . [and] that the claimant was deceived into believing he could choose his own shift once the employer became established."[7] See Board's Discussion at 3.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

(continued…)

Id. at 130-31, 451 A.2d at 1356. Here, Claimant communicated that his health condition prevented him from working the third shift and that he would be available to continue his employment working the first shift. See Board's F.F. Nos. 11, 12, and 17.

[6] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 275, 501 A.2d 1383, 1387 (1985).

[7] Employer contends that Claimant was informed that schedule changes were based upon business needs and that no shift was permanent. The Board rejected Employer's testimony. In unemployment compensation proceedings, 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 (Pa. Cmwlth. 1975).

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O R D E R

AND NOW, this 14th day of October, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge