IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lloyd Smith,	:	
Petitioner	:	
	:	
v.	:	No. 242 C.D. 2020
	:	Submitted: December 18, 2020
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge[1]
HONORABLE CHRISTINE FIZZANO CANNON, Judge

OPINION BY JUDGE BROBSON **FILED: September 9, 2021**

Lloyd Smith (Claimant), *pro se*, petitions for review of an order of the Unemployment Compensation Board of Review (Board), dated January 24, 2020, which denied him unemployment compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law),[2] relating to voluntarily leaving work without cause of a necessitous and compelling nature. For the reasons set forth below, we affirm.

Claimant was employed as a District Supplemental Custodian by Bethlehem Area School District (Employer) until his separation from employment on

[1] This case was assigned to the opinion writer before January 4, 2021, when Judge Brobson became President Judge.

[2] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b). Section 402(b) of the Law provides that an employee is ineligible for unemployment benefits for any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature."

August 21, 2019. (Certified Record (C.R.), Item No. 2 at 3.) On that date, Employer issued to Claimant a Statement of Charges and Notice of Hearing letter (letter), notifying him that it was suspending his employment without pay pending school board action and recommending to the school board that his employment be terminated. (*Id*.) The letter required that Claimant surrender his keys and employment identification, but it also advised Claimant that he had a right to request a hearing on the matter by August 27, 2019. (*Id*.) The letter provided that, if Claimant failed to request a hearing, the school board would discharge him at a public meeting without a hearing. (*Id*.) In the letter, Employer detailed an altercation Claimant had with another employee, which prompted the recommendation for termination. (*Id.* at 3-4.)

Claimant applied for unemployment benefits on September 5, 2019, reporting that he was discharged. (C.R., Item Nos. 4, 1 at 2.) In its employer questionnaire, filed September 10, 2019, Employer stated that it discharged Claimant for willful misconduct for violating company policy concerning appropriate employee behavior, citing Claimant's altercation with the coworker. (C.R., Item No. 3 at 3-5.) The Altoona UC Service Center denied benefits pursuant to Section 402(e) of the Law,[3] concluding that Claimant committed willful misconduct when he violated Employer's work rule concerning appropriate and orderly behavior. (C.R., Item No. 8.) Claimant filed a timely appeal, and an unemployment compensation referee (Referee) conducted a hearing on October 29, 2019. (C.R., Item Nos. 9-11.)

At the hearing, Employer presented the testimony of its human resources manager, and Claimant presented his own testimony as well as that of his wife.

[3] Section 402(e) of the Law, 43 P.S. § 802(e), provides that an employee is ineligible for unemployment benefits for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work."

(C.R., Item No. 12 at 1.) During the hearing, Employer changed its position, contending that Claimant voluntarily resigned his position as part of a workers' compensation settlement, executed on September 18, 2019. (*Id*. at 5-11.) Employer argued that Claimant did so to avoid the possibility of termination at a future school board hearing. (*Id*.)

After the hearing, the Referee issued a decision awarding Claimant benefits. (C.R., Item No. 13.) In reaching that decision, the Referee held that Claimant did not voluntarily quit his employment; rather, Employer discharged him and failed to establish that Claimant engaged in willful misconduct under Section 402(e) of the Law. (*Id*. at 2-3.)

Employer appealed the Referee's decision to the Board. (C.R., Item No. 14.) The Board reversed, concluding that Claimant voluntarily resigned his position when he signed the resignation form in relation to the workers' compensation settlement. (C.R., Item No. 17 at 2-3.) In doing so, the Board issued its own findings of fact, as follows:

> 1. [C]laimant was last employed by [Employer] as a full-time supplemental custodian from February 22, 2016, until August 21, 2019 . . . .
>
> 2. On August 21, 2019, [E]mployer met with [C]laimant after receiving reports that [C]laimant made racist comments toward[] a coworker[,] and that [C]laimant pushed . . . [the coworker].
>
> . . . .
>
> 4. That same day, August 21, 2019, [E]mployer presented [C]laimant with a letter of suspension that advised him [that] he was suspended "pending board action," and that under Section 514 of the Public School Code of 1949, [Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. § 5-514,] and [the] Local Agency Law[, 2 Pa. C.S. §§ 551-555, 751-754,] the administration was recommending discharge by the

school board, and that he had a right to a hearing, which he had until August 27, 2019, to request.[4]

5. It was also verbally explained . . . that the administration was recommending discharge and it would be presented to the school board for their [sic] approval at a board hearing and that he could request a hearing.

6. Only the school [b]oard had the authority to discharge [C]laimant.

7. [C]laimant did not request a hearing by August 27, 2019, because he "just felt that it wasn't worth going through it."

8. At some point prior to August 21, 2019, [C]laimant allegedly injured himself at work and filed a workers' compensation claim.

9. [C]laimant [stated]:

> [I] "wasn't really enthused about going back to work [for the employer] because I had an injury—I have two injuries . . . ."
>
> . . . .
>
> "I really didn't want, because you know something, my leg was still bothering me and I didn't get a break from that, and we were understaffed, and I hurt my shoulder . . . my shoulder was bothering me. I was like, up to here with it. The thing is here, I was just totally disgusted with the school."

10. On September 18, 2019, [C]laimant signed a workers' compensation settlement agreement and resigned his position with the school board[5] as part of that agreement because he wanted to settle his workers' compensation claim.

11. As part of the [school] board meeting held in September 2019[,] the school board accepted [C]laimant's resignation.

(*Id.* at 1-2.)

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[4] The Board's decision appears to misidentify the date on which Employer met with Claimant. According to the August 21, 2019 letter, Employer met with Claimant on August 5, 2019, not August 21, 2019. The error, however, does not affect the analysis or outcome.

[5] In this finding, it appears that the Board mistakenly referred to Claimant as being employed by the school board instead of Employer. Thus, we will treat this finding as a finding that Claimant resigned his position with Employer (not the school board).

In reaching its conclusion, the Board reasoned:

> [C]laimant testified he believed he was discharged on August 21, 2019, by [E]mployer because he was told to hand in his keys and badge and not come back. However, the [Board] credits the testimony of [E]mployer's human resources manager that when [C]laimant was presented with the letter he was told the administration was recommending discharge to the school board and that he could request a hearing to dispute the recommendation over [C]laimant's contrary testimony that he was not told anything when he was given the August 21, 2019[] letter except not to come back. The Board also credits the testimony of [E]mployer's human resources manager that when she spoke to [C]laimant about his failure to request a hearing by the required date, [he] told her "I just felt that it wasn't worth going through it." Further, the Board does not credit [C]laimant's testimony that he only signed the workers' compensation settlement agreement and the paper wherein he resigned his employment as part of that settlement because he believed he had already been discharged. If [C]laimant had truly believed he had been discharged, there would be nothing left for him to resign from. [C]laimant testified that he was injured and "wasn't really enthused about going back to work . . . because he had . . . two injuries["] . . . and . . . was "totally disgusted with the school." The Board credits that testimony. Based on [C]laimant's testimony and his voluntarily executed resignation, the Board concludes (1) [C]laimant was not discharged[] but instead quit and Section 402(b) of the Law is applicable in this case, and (2) [C]laimant quit in order to settle a workers' compensation claim. Resigning to settle a workers' compensation agreement does not provide a necessitous and compelling reason for quitting[, and,] therefore[,] [C]laimant is ineligible for benefits under Section 402(b) of the Law.

(*Id.* at 2-3.)

On appeal,[6] Claimant argues that the Board erred in concluding that he voluntarily resigned his position as opposed to having been discharged from

[6] This Court's standard of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. 2 Pa. C.S. § 704.

employment.[7] In support of his argument, Claimant directs our attention to Employer's letter of suspension without pay, dated August 21, 2019. Pursuant to the letter, Claimant had the option to request a hearing with the school board by August 27, 2019, and failure to do so would result in the termination of his employment. He contends that, because he opted not to request a hearing and the letter provided that if he did not request a hearing his employment would be terminated, the Board erred in concluding that he voluntarily quit his employment. He disputes that the resignation paper he signed as part of his settlement of his workers' compensation claim evidenced his intent to resign. Rather, he asserts that his lawyer told him to sign the letter because the school board had already terminated his employment. He points to the August 21, 2019 letter in support of that position.

Employer responds that, although it suspended Claimant's employment without pay following allegations of an incident with a coworker, Employer, as a school district, could not terminate Claimant's employment without approval of the school board. Employer notes that Claimant injured himself at work prior to August 21, 2019, and filed a workers' compensation claim. Claimant applied for unemployment compensation benefits on September 5, 2019. While on suspension from work, Claimant signed a workers' compensation settlement agreement and resigned his position as part of the agreement because he wanted to settle the workers' compensation claim. At the time he settled his workers' compensation claim, the school board had not yet acted to terminate his employment. Thus,

[7] Claimant does not dispute any of the factual findings, and, therefore, those findings of fact are binding on appeal. *Campbell v. Unemployment Comp. Bd. of Rev.*, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997).

Employer contends that Claimant quit his employment to settle his workers' compensation claim.[8]

A claimant seeking unemployment compensation benefits bears the burden of establishing either that (1) his separation from employment was involuntary or (2) his separation was voluntary but he had cause of a necessitous and compelling nature that led him to discontinue the relationship. *Spadaro v. Unemployment Comp. Bd. of Rev.*, 850 A.2d 855, 859-60 (Pa. Cmwlth. 2004). In other words, to be eligible for unemployment compensation benefits, the claimant bears the burden of proving separation from employment, whether voluntary or involuntary. *See Bowman v. Unemployment Comp. Bd. of Rev.*, 410 A.2d 422, 423 (Pa. Cmwlth. 1980). Whether a claimant's separation from employment is the result of a voluntary action or a discharge is a question of law subject to review by this Court and must be determined from a totality of the facts surrounding the cessation of employment. *Key v. Unemployment Comp. Bd. of Rev.*, 687 A.2d 409, 412 (Pa. Cmwlth. 1996).

"A finding of voluntary termination is essentially precluded unless the claimant has a conscious intention to leave his employment." *Spadaro*, 850 A.2d at 859 (quoting *Fekos Enters. v. Unemployment Comp. Bd. of Rev.*, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001)). Voluntary termination is found where, without action by the employer, an employee resigns, leaves, or quits his employment. *Fishel v. Unemployment Comp. Bd. of Rev.*, 674 A.2d 770, 772 (Pa. Cmwlth. 1996). On the other hand, to be interpreted as a discharge, the employer's language must possess the immediacy and finality of a firing. *Charles v. Unemployment Comp. Bd. of*

[8] In its brief, the Board states that "Claimant is entitled to benefits for the weeks prior to his voluntary resignation, as his unemployment was involuntary and, pursuant to the Board's finding[s] and controlling caselaw, Employer failed to prove willful misconduct." (Board's Brief at 5.)

Rev., 552 A.2d 727, 729 (Pa. Cmwlth. 1989). Where an employee resigns to avoid an imminent discharge, such resignation is treated as a discharge. *Pa. Liquor Control Bd. v. Unemployment Comp. Bd. of Rev.*, 648 A.2d 124, 126 (Pa. Cmwlth. 1994), *appeal denied*, 656 A.2d 120 (Pa. 1995). Where an employee resigns his position to avoid the *possibility* of discharge, however, such resignation is considered a voluntary termination on behalf of the employee. *Charles*, 552 A.2d at 729.

In *Fishel*, this Court considered whether a school district's recommendation to the school board to terminate a suspended teacher, Fishel, constituted a discharge for purposes of unemployment compensation when the termination required school board approval to be effective. There, Fishel resigned her position with a school district after the school district placed her on leave without pay and recommended to the school board that she be dismissed. While Fishel ardently maintained that she was given no choice—*i.e.*, that she was told to resign or be terminated—she admitted she was informed that the alternative procedure would be a hearing before the school board at which she may or may not be terminated. We concluded that the school district's language in that circumstance did not contain the immediacy and finality of a firing because Fishel was apprised that the school board could potentially vote *not* to terminate her employment. Faced with these facts, we held that Fishel's resignation was done to avoid the possibility of termination and was, therefore, a voluntary quit under Section 402(b) of the Law. *Fishel*, 674 A.2d at 771-73.

Here, the letter, which Claimant testified he read several times (*see* C.R., Item No. 12 at 16, 19-21), contained the following language:

> You are hereby notified that . . . [Employer] will recommend that the [school board] dismiss you from employment . . . .
>
> If you disagree with this action or are desirous of a [s]chool [b]oard hearing, you have the right to demand a hearing, and a hearing will be

> given to you. Your demand for a hearing must be received by . . . no later than 3:00 p.m. on August 27, 2019. If you demand a hearing in a timely fashion, a hearing will be scheduled . . . . If you fail to demand a hearing by August 27, 2019, the [s]chool [b]oard will discharge you and permanently remove you from employment at a public meeting and without a [s]chool [b]oard hearing. Your failure to request the hearing will constitute a waiver of your rights as set forth below.

(C.R., Item No. 2 at 3.) The letter also advised Claimant of his rights, if he chose a hearing, to be represented by counsel, to hear witnesses and evidence against him, to cross-examine witnesses, to present witnesses and evidence, to present evidence as to whether discharge or a lesser personnel action was appropriate, and to choose either a public or private hearing. (*Id.*) The letter further provided that Claimant had the right to voluntarily resign by submitting a letter of resignation. (*Id.*)

Thus, the language used in the letter to Claimant is similar to the language used by the school district in *Fishel*. It advised Claimant that he had a right to a hearing, such that the termination of his employment was not clear and imminent, but rather, a *possibility*. Hence, had Claimant resigned prior to the August 27, 2019 deadline to request a hearing, *Fishel* would apply, and Claimant would be ineligible for benefits because he resigned in the face of a possibility of termination. Claimant, however, chose not to avail himself of the opportunity for a hearing. According to the language in the August 21, 2019 letter, Claimant was set to be terminated at a later school board meeting. Before this meeting occurred, however, Claimant resigned his position in conjunction with a workers' compensation settlement agreement with Employer, signed on September 18, 2019. Claimant's argument is essentially that, at the time he signed the resignation form, he believed he would be imminently discharged in accordance with the language set forth in the

August 21, 2019 letter, and his resignation was, therefore, not voluntary.[9] We disagree. Claimant's discharge was only imminent because Claimant failed to request a hearing before the school board. Where a claimant's own actions cause a discharge to change from a possibility to a certainty and the claimant then resigns in the face of that certainty, such resignation is not made in the face of imminent discharge pursuant to Section 402(b) of the Law.

Notwithstanding the foregoing, the facts of this case demonstrate that Claimant did not resign because he believed he would be imminently discharged. Our imminent discharge precedent concerns circumstances where a claimant resigns to *avoid* an imminent termination. *See Pa. Liquor Control Bd.*, 648 A.2d at 126-27. Here, however, Claimant *opted to be terminated* because he "wasn't really enthused about going back to work," and because he felt that going through the hearing process was not worth it. (*See* C.R., Item No. 12 at 15, 25.) Claimant's resignation, therefore, was done for the sole purpose of settling a workers' compensation claim with Employer. Claimant did not resign to avoid being fired. In this regard, we agree with the Board's conclusion that a workers' compensation settlement is not cause of a necessitous and compelling nature to voluntarily terminate one's employment. Thus, Claimant is ineligible for benefits pursuant to Section 402(b) of the Law.

[9] To the extent Claimant argues that he believed he was already discharged at the time he signed the resignation form, and, therefore, it was not a voluntary resignation, we disagree. The August 21, 2019 letter clearly conveys that Claimant *would be* discharged at a public meeting without a hearing, in the event he chose not to request a hearing by August 27, 2019. The discharge had not occurred at the time Claimant resigned on September 18, 2019. The Board also discredited Claimant's testimony that he believed he was already terminated, noting that if Claimant believed he was discharged, then there would be nothing left from which he could resign. We agree with the Board's decision in this regard.

Accordingly, we affirm the decision of the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lloyd Smith, Petitioner	:	
v.	:	No. 242 C.D. 2020
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 9th day of September, 2021, the order of the Unemployment Compensation Board of Review, dated January 24, 2020, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge