IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edwin M. Livingood,	:	
Petitioner	:	
	:	No. 1818 C.D. 2013
v.	:	Submitted: April 11, 2014
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: September 11, 2014**

Edwin M. Livingood (Claimant), represented by counsel, petitions for review of an order of the Unemployment Compensation Board of Review (Board) that found him ineligible for unemployment compensation (UC) benefits under Section 402(b) of the Unemployment Compensation Law (Law)[1] (voluntary quit). Claimant contends the Board erred in determining he quit for medical reasons when he sought to remain employed in another capacity. Claimant also asserts that he was not required to complete paperwork for medical leave because he was not disabled. Because the Board properly determined Claimant failed to preserve his employment in a reasonable manner requested by his employer, we affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937), as amended, 43 P.S. §802(b).

I. Background

Claimant worked as a full-time driver for Albright Life (Employer) since the summer of 2011. Prior to accepting a position with Employer, Claimant suffered a severe eye injury. Although Claimant was able to drive following his injury, and he passed Employer's pre-employment vision screenings, his vision worsened over time. He required corrective surgery in January 2013. After the surgery, Claimant's physician advised Claimant that he could no longer drive. However, Claimant could perform other tasks related to his position.

Claimant took preapproved leave, and he provided a medical excuse for his absence from January 23 through January 29, 2013. Pursuant to its policy, Employer sent Claimant forms to request medical leave under the Family Medical Leave Act (FMLA), 29 U.S.C. §§2601-2654, and to detail any work restrictions that he may have upon his return to work.

There is no dispute that Claimant did not return the forms to Employer.

Claimant extended his leave and submitted a second medical excuse, advising Employer he was not able to return to work until February 12, 2013. Bd. Op., 9/6/13, Finding of Fact (F.F.) No. 5. During a series of telephone conversations, Claimant informed Employer of his inability to return to work as a driver, and requested alternate work assignments. F.F. No. 7. Claimant believed his completion of FMLA forms was an admission of disability that would preclude him from being employed in another capacity. He was also concerned about taking unpaid, as opposed to paid, leave.

Before his scheduled return, Employer held a face-to-face meeting with Claimant regarding his position and to clarify the leave process. Matt Hazen, Employer's Executive Director (Executive Director), attended the meeting in person, and Edie Moyer, Employer's human resources director (HR Director), participated by telephone. At the meeting, Claimant explained he did not return the FMLA forms because he did not want to take unpaid medical leave. Instead, he wanted to continue as an employee performing tasks within his capabilities. However, Claimant did not specify his physical limitations. Importantly, Executive Director and HR Director advised Claimant that the completed FMLA forms would enable Employer to assess how it could accommodate his restrictions in another position.

On February 20, 2013, Employer sent Claimant a final letter advising him to return the FMLA forms within a week, or he would be considered to be on an unapproved leave of absence. Ultimately, Employer placed Claimant on unapproved leave because it lacked sufficient documentation to approve medical leave or to find suitable alternate work for Claimant.

Claimant applied for UC benefits, which the local service center denied under Section 401(d) of the Law, 43 P.S. §801(d) (available for suitable work), and Section 402(b) of the Law. The local service center also imposed a non-fault overpayment under Section 804(b) of the Law, 43 P.S. §874.

Claimant appealed. A referee conducted a hearing where Claimant, represented by counsel, and Employer, represented by a tax representative,

appeared. Executive Director and Alma Ayers, Employer's Leave Coordinator (Leave Coordinator) testified on behalf of Employer.

Claimant testified he took vacation time and personal time to cover the weeks of his absences for his surgery and recovery. He explained he did not take FMLA leave because "[t]hat's for a disability." Referee's Hr'g, Notes of Testimony (N.T.), 6/11/13, at 15. Claimant's physician released him to return to work, albeit with restrictions, so he did not think it was necessary to complete the FMLA forms. Claimant emphasized he desired to remain employed by Employer, and sought alternate positions because he could no longer perform his primary function of driving. Despite his requests, Employer never presented Claimant with alternate positions.

Executive Director explained that Employer sent Claimant the FMLA forms pursuant to its policy for any unscheduled leave beyond three days for medical reasons. Employer received two letters from Claimant's physician, the first regarding his scheduled leave for the surgery, and the second extending his work absence through mid-February. At that point, Claimant exceeded his two weeks of paid leave. During the face-to-face meeting, Executive Director explained the FMLA paperwork and again requested the forms from Claimant. Executive Director also requested Claimant's work restrictions because Employer needed that information to evaluate whether it could accommodate his continued employment. Throughout the process, Employer attempted to learn about any restrictions that would dictate suitable alternate positions for Claimant.

Executive Director conceded that FMLA leave is not mandatory, and is unpaid leave taken at an employee's option. He confirmed that Employer sent the FMLA forms to Claimant's physician the day after the face-to-face meeting, seeking Claimant's job restrictions. Claimant's physician did not complete the FMLA forms.

Leave Coordinator testified that Employer has the right to expect Claimant to complete the FMLA paperwork, and to count any leave that qualifies under FMLA against the mandatory 12 weeks of FMLA, "even if it's paid leave." Id. at 21. That way, an employee's job is protected, and his insurance is continued at the same rate. She explained to Claimant that because he missed four consecutive days of work, regardless of his personal and vacation leave availability, Employer required him to complete the FMLA forms, including the physician's certification. Despite her repeated requests, Claimant did not return the forms or provide Employer with any documentation specifying his work restrictions.

Ultimately, the referee denied benefits under Section 402(b) of the Law. However, the referee found Claimant met his burden of showing his availability for work under Section 401(d)(1) of the Law. The referee also affirmed the non-fault overpayment.

Claimant appealed to the Board. The Board issued an order affirming the referee's decision to deny benefits under Section 402(b) of the Law. But, the Board reversed the availability for work decision pursuant to Section 401(d)(1), because Claimant failed to establish the extent of his medical restrictions.

Claimant now petitions for review.[2] Notably, Claimant did not challenge the denial of benefits under Section 401(d)(1) of the Law,[3] or contest the overpayment determination on appeal.

II. Discussion

The only issue before this Court is whether Claimant qualifies for benefits under Section 402(b) of the Law. Section 402(b) provides that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature …." 43 P.S. §802(b). An employee who claims to have left employment for a necessitous and compelling reason bears the burden of proof. Middletown Twp. v. Unemployment Comp. Bd. of Review, 40 A.3d 217 (Pa. Cmwlth. 2012). Whether a claimant has a necessitous and compelling reason to terminate employment is reviewable by this Court as a question of law. Id.

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[2] Our review is limited to determining whether the necessary findings of fact were supported by substantial evidence, whether errors of law were committed, or whether constitutional rights were violated. Doyle v. Unemployment Comp. Bd. of Review, 58 A.3d 1288 (Pa. Cmwlth. 2013).

[3] Claimant did not specifically challenge the Board's determination regarding Section 401(d)(1) of the Law, 43 P.S. §801(d)(1). The Board determined that "the claimant has not demonstrated that he is able and available to accept suitable employment because he has not presented credible testimony or evidence regarding his medical restrictions for the week at issue." Bd. Op., 9/6/13 at 3.

Nevertheless, Claimant briefly asserted he was able to work and available for suitable work as part of his burden of proving a voluntary quit for medical reasons. See Waste Management v. Unemployment Comp. Bd. of Review, 651 A.2d 231, 236 (Pa. Cmwlth. 1994) (explaining good faith burden involves claimant showing he "is available for suitable work, consistent with the medical condition …."); Gen. Bldg. Servs., Inc. v. Unemployment Comp. Bd. of Review, 591 A.2d 774, 776 (Pa. Cmwlth. 1991) (same).

An employee who claims to have left employment for a necessitous and compelling reason must show that: (1) circumstances existed that produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve his employment. Solar Innovations, Inc. v. Unemployment Comp. Bd. of Review, 38 A.3d 1051, 1056 (Pa. Cmwlth. 2012). "[E]mployer has no burden of proof" in a voluntary quit case. Earnest v. Unemployment Comp. Bd. of Review, 30 A.3d 1249, 1256 (Pa. Cmwlth. 2011) (quoting Johnson v. Unemployment Comp. Bd. of Review, 869 A.2d 1095, 1104 (Pa. Cmwlth. 2005)).

To establish a medical condition as a compelling reason, a claimant must show that: (1) adequate health reasons existed to justify voluntary termination; (2) he communicated his medical problem to his employer; and, (3) he is available for suitable work, consistent with his medical condition. Genetin v. Unemployment Comp. Bd. of Review, 451 A.2d 1353 (Pa. 1982). If any one of these conditions is not met, a UC claim is barred. Lee Hosp. v. Unemployment Comp. Bd. of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Our Supreme Court explained an employee may discharge his duty to preserve employment in the context of a medical condition as follows:

> [w]here 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 regularly assigned duties, an employee can do no more. The availability of an employment position, the duties

> expected to be performed by one serving in that capacity, and the desirability of that individual for service in that capacity are managerial judgments over which the employee has no control. As long as the employee is available where a reasonable accommodation is made by the employer, that is not inimicable to the health of the employee, the employee has demonstrated the good faith effort to maintain the employment relationship required under the [Law].

Genetin, 451 A.2d at 1355 (emphasis added). Crucial to determining whether an employee remains "available" for work despite his medical condition, and that he made a "good faith effort" to retain employment, the employee must provide an employer the necessary information for assessing a reasonable accommodation. Bonanni v. Unemployment Comp. Bd. of Review, 519 A.2d 532 (Pa. Cmwlth. 1986).

This Court previously addressed the extent of an employee's good faith duty under Genetin as follows:

> we believe that the employer's request for a specification of what a claimant can and cannot do is reasonable when considered in the context of the above quoted portion of Genetin. We fail to see how an employer can make a reasonable accommodation when that employer does not know what is reasonable.

Bonanni, 519 A.2d at 536 (emphasis added); see also Watkins v. Unemployment Comp. Bd. of Review, (Pa. Cmwlth., No. 928 C.D. 2013, filed January 23, 2014) (unreported), Slip Op. at 13, 2014 WL 261444, *5 ("Significantly, in order to make a reasonable accommodation, an employer must have sufficient information to know what is reasonable.").

It is axiomatic that to trigger an employer's duty to accommodate an employee's medical condition, an employer must have sufficient knowledge of that employee's capacity for suitable employment. Blackwell v. Unemployment Comp. Bd. of Review, 555 A.2d 279 (Pa. Cmwlth. 1989); Bonanni; Watkins. Therefore, to establish he made a "good faith effort" in this context, an employee must communicate his "specific physical restrictions" to his employer. Fox v. Unemployment Comp. Bd. of Review, 522 A.2d 713, 715 (Pa. Cmwlth. 1987).

There is no dispute that Claimant advised Employer about his impaired vision and its impact on his return to work. While he could no longer drive for Employer, Claimant indicated he could perform telephone and computer tasks. However, he alluded to having other physical restrictions without providing any details as to the nature or parameters of the alleged restrictions. See R.R. at 22a, 27a. For example, he advised Leave Coordinator as to lifting restrictions, but he did not know what they were. R.R. at 27a.[4]

Based on the circumstances, the Board determined Claimant established a medical reason for leaving employment.[5] The Board found Claimant

[4] The dissent's statement that "[Claimant] had no other medical impairments [beyond his vision]," Dissent Op. at 2, is not an accurate reflection of the evidence.

[5] Claimant contests that he quit or voluntarily left employment. However, he exhausted his leave and refused to complete the paperwork necessary for additional medical leave. This Court previously held that an employee's refusal to support an absence for medical reasons with appropriate documentation is a voluntary separation, because it was the employee's choice to not provide the necessary documentation. See Kenwar, Inc. v. Unemployment Comp. Bd. of Review, 401 A.2d 873 (Pa. Cmwlth. 1979).

submitted two medical excuses to Employer related to his eye surgery. F.F. Nos. 3, 5. The Board also found Claimant requested alternate work duties. F.F. No. 7.

Although Claimant showed his willingness to remain employed, the Board determined he did not show a good faith effort to maintain employment. Specifically, he did not submit the medical paperwork Employer repeatedly requested regarding his medical restrictions for returning to work. F.F. Nos. 8, 10. Therefore, the Board determined Claimant did not establish a necessitous and compelling reason to quit.

Claimant contends the Board erred in determining him ineligible for UC benefits when Employer did not offer him an alternate position, despite his ability to work. Claimant relies on Waste Management v. Unemployment Compensation Board of Review, 651 A.2d 231 (Pa. Cmwlth. 1994), to support his position.

In Waste Management, this Court reversed the Board and held the claimant quit for a necessitous and compelling reason. There, the claimant truck-driver took leave from work because of a back injury. When released by his physician, the claimant sought light-duty work from his employer. The employer informed the claimant that no light-duty work was available at that time. This Court held the claimant met the standard in Genetin.

However, the material facts in Waste Management are distinguishable. Unlike the claimant in Waste Management, Claimant did not submit the requested

documentation to Employer about his work restrictions to preserve his employment. Such documentation was necessary to enable Employer to determine a reasonable accommodation when Claimant could not work as a driver. Bonanni; Fox. Importantly, in Waste Management, the claimant informed his employer about his ability to perform only light-duty jobs. That enabled his employer to make a determination that it did not have suitable work within the claimant's restrictions. In contrast to Waste Management, Claimant never triggered Employer's duty to accommodate and find suitable employment for him.

Substantial evidence supports the Board's findings that Employer repeatedly requested the medical documentation both from Claimant, and from Claimant's physician, to no avail. R.R. at 21a, 27a, F.F. No. 6. Employer specified that the restrictions were needed for two reasons: the FMLA *and* Claimant's request for employment back with different responsibilities. R.R. at 27a. Claimant responded that he understood. R.R. at 22a, 27a. Because Claimant failed to specify his medical restrictions to Employer, he did not make a good faith effort to preserve his employment. Genetin; Bonanni. Thus, Claimant did not establish his medical condition as a necessary and compelling justification for leaving employment.

III. Conclusion

For the above reasons, we discern no error or abuse of discretion by the Board in determining Claimant was ineligible for UC benefits under Section

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

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edwin M. Livingood,	:	
Petitioner	:	
	:	No. 1818 C.D. 2013
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 11th day of September, 2014, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edwin M. Livingood,	:	
Petitioner	:	
	:	
v.	:	No. 1818 C.D. 2013
	:	Submitted: April 11, 2014
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

DISSENTING OPINION BY
PRESIDENT JUDGE PELLEGRINI FILED: September 11, 2014

Because Albright Life (Employer) did not establish that Edwin M. Livingood (Claimant) voluntarily left his employment under Section 402(b) of the Unemployment Compensation Law (Law),[1] I respectfully dissent.

Claimant worked as a full-time driver for Employer. After suffering a severe eye injury, his condition worsened and required corrective surgery in January 2013. He left on preapproved paid leave from January 23, 2013, through January 29,

[1] Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937), *as amended*, 43 P.S. §802(b).

2013 and provided a medical excuse for that leave. Claimant then extended his leave until February 12, 2013, and submitted a second medical excuse. He was left with no vision in his left eye. He had no other medical impairments. Although he was not applying for leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§2601-2654, Employer sent him FMLA forms during his first paid leave because its policy was to send those forms to all employees who missed four consecutive days of work, even if they had personal and vacation days left. FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons.

After the surgery, Claimant lost vision in one eye, and while he could drive his own car, his physician told him he could no longer drive for Employer. Claimant requested alternative work assignments to accommodate his disability. Under the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101-12213, an employer must make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. §12112(b)(5).

Employer again asked that Claimant complete the FMLA forms that would enable Employer to ascertain how to accommodate his restrictions in another position. Claimant did not want to complete the FMLA forms because he was not asking for unpaid leave, but wanted to continue working for Employer in a capacity within his restrictions. When he refused to fill out the FMLA forms, Employer did

not ask Claimant or his physician to provide a medical report detailing his conditions or restrictions, nor did it direct him to its own physician to make that determination as it can under the ADA. Instead, Claimant was terminated because he voluntarily left his employment.

The majority affirms the Board's denial of benefits which found, despite Claimant's request for a reasonable accommodation to continue working, that he voluntarily left work without a necessitous and compelling reason to do so. 43 P.S. §802(b).[2] Agreeing with the Board the majority states, "Although Claimant showed his willingness to remain employed, the Board determined that he did not show a good faith effort to maintain employment. Specifically, he did not submit the medical paperwork Employer repeatedly requested regarding his medical restrictions for returning to work." (Slip Opinion p. 10.) The "medical paperwork" he did not provide was the FMLA forms.[3]

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[2] The Board also denied benefits under Section 401(d)(1) of the Law, 43 P.S. §801(d)(1), on the basis that Claimant was unavailable for work. It arrived at that conclusion because he did not fill out the FMLA forms informing of what jobs he could do within his restriction. Not only was he not required to fill out the FMLA forms, that position simply ignores an employer's obligations under the ADA.

[3] The Board, in its findings of fact, found:

> 4. The employer provided the claimant with Family and Medical Leave Act (FMLA) forms to request leave and detail any work restrictions that he may have upon his return.
>
> 5. The claimant did not return the FMLA forms, but received another medical excuse extending the claimant's inability to report to work until February 12, 2013.

(Footnote continued on next page…)

I disagree with the majority because Claimant did not voluntarily leave work. While he was medically unable to perform his pre-injury job, there is no dispute that he asked to continue to work in a position to accommodate his disability as was his right under the ADA. It was the basis for his objection to filling out the FMLA forms because he wanted to continue working. If he was terminated because he failed to fill out the FMLA forms, he should have been terminated for willful misconduct, not because he voluntarily left his employment. Because there is no evidence that he voluntary quit and was not terminated for willful misconduct, the Board should be reversed on this basis alone.

In any event, Claimant was not required to fill out the FMLA forms because it was Employer's policy to have everyone apply for FMLA if they were off work for four consecutive days. FMLA is an employee benefit, not an employer

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(continued…)

> 6. The employer scheduled a telephone meeting with the claimant and explained the importance of submitting the FMLA paperwork and submitting any work-related restrictions.
>
> 7. The claimant requested alternate work duties.
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> 8. The employer did not receive completed FMLA forms from the claimant or his doctor.
>
> 9. On March 1, 2013, the employer placed the claimant on unapproved leave because it had not received completed FMLA forms or details regarding his work restrictions from his doctor as requested.

(Reproduced Record at 42a-43a).

benefit. If an employee does not want to apply for FMLA leave and does not have paid leave and is absent from work without an excuse, an employer can terminate the employee for willful misconduct for being absent without leave. Employer's Executive Director conceded that FMLA leave is not mandatory, and it is taken at an employee's option.

Moreover, very recently, the Ninth Circuit in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014), adopting the views of the Sixth and Seventh Circuit, held that an employer could not force an employee to apply for FMLA leave, holding that:

> An employer's obligation to ascertain "whether FMLA leave is being sought" strongly suggests that there are circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA. And a compelling practical reason supports this conclusion. Holding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers like Foster Farms in an untenable situation if the employee's stated desire is not to take FMLA leave. **The employer could find itself open to liability for forcing FMLA leave on the unwilling employee**. See, e.g., Wysong v. Dow Chem. Co., 503 F.3d 441, 449 (6th Cir.2007) (noting that "[a]n involuntary-leave claim," alleging that an "employer forces an employee to take FMLA leave," is "really a type of interference claim**"). We thus conclude that an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection.** See, e.g., Ridings v. Riverside Med. Ctr., 537 F.3d 755, 769 n. 3 (7th Cir.2008) ("If an employee *does not wish to take FMLA leave* but continues to be absent from work, then the employee must have a reason for the absence that is acceptable under the employer's policies, otherwise

> termination is justified." (Italics in original; Bold emphasis added)).

Not only is it optional on the employee whether to take FMLA, it appears that requiring an employee to take such leave is a violation of the FMLA itself, which would make an employer culpable for money damages.

If an employer wants to know the condition of the employee to comply with the ADA, it must follow procedures under the ADA and not the FMLA. Under the ADA, an employer can ask the employee who is seeking accommodation to submit a medical report outlining the nature of his disabilities to determine whether the employer can reasonably accommodate such a request. There are even readily available forms that an employer can use to be completed by an employee's physician. *See* http://askjan.org/media/medical.htm. Moreover, an employer can ask to consult with an employee's doctor to determine what employment would be suitable for an employee or could even require an employee to submit to a medical examination by a doctor of Employer's choice to determine an employee's limitations. What an employer cannot do is make an employee apply for another governmental benefit, such as the FMLA, which appears to be illegal, so it can make that determination.

For the foregoing reasons, I respectfully dissent.

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DAN PELLEGRINI, President Judge