IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

JASON LEEKS,	)	
	)	
Appellant,	)	
	)	
v.	)	Superior Court
	)	C.A. No. SN09A-03-009 JEB
KOHL CORPORATION,	)	
and THE UNEMPLOYMENT	)	
INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	

Submitted: November 2, 2009
Decided: January 12, 2010

Appeal of a Decision of the Unemployment Insurance Appeal Board
Decision Reversed.

OPINION

Appearances:

Jason Leeks, Pro Se Litigant

Philip Johnson, Esquire, Wilmington Delaware
Attorney for Appellee Unemployment Insurance Appeal Board

JOHN E. BABIARZ, JR., JUDGE

Factual Background

Claimant Jason Leeks was employed by Kohl Corporation as a part-time men's clothing associate from March 2008 to October 2008. On October 19, 2008, Leeks seriously injured his left knee and was taken to the hospital. Since Leeks was already scheduled to work on October 20, 21, 23, 25, and 26, his mother called the assistant store manager to let the employer know that Leeks' injury was serious and that he would not be able to work. Leeks' mother intended to convey that Leeks would not be able to work any of the scheduled days. However, the employer treated the mother's call as effective only for October 20. And, yet, Leeks' injury was severe enough to warrant prescription pain medication, further testing, possible surgery, and rehabilitation.

When Leeks' mother again called the employer on October 29, 2008, to provide follow-up information on Leeks' condition, she was informed that Leeks was no longer an employee. The employer considered Leeks to have voluntarily abandoned his employment because he did not show up for work or call the employer on October 21, 23, 25 and 26. However, Leeks never intended to abandon his job.

The employer's policy requires an associate who is going to be absent to contact management daily. The policy further indicates that unless other arrangements are made, any associate failing to make daily contact for two

consecutively scheduled workdays would be considered to have voluntarily abandoned the job. Leeks was aware of the employer's attendance policies.

However, Leeks had previously missed work for eighteen days in June 2008 due to illness. At that time, as with the October injury, his mother called the employer to let the employer know that Leeks could not work, and Leeks did not make daily contact. Furthermore, at that time, the employer did not expect daily contact. Therefore, as a result of the employer's past conduct and expectations when Leeks was absent in June, Leeks believed that the absences in October would be handled in the same manner in that he would not be required to make daily contact.

Leeks' petition for unemployment insurance benefits to the Department of Labor, Division of Unemployment, was denied by a claims deputy on December 1, 2008. Leeks appealed the denial of benefits, and a hearing before the chief appeals referee was held on December 29, 2008. The referee upheld the denial of benefits on December 31, 2008. On January 4, 2009, Leeks appealed to the Unemployment Insurance Appeal Board, a hearing was held, and, on February 27, 2009, the Board affirmed the denial of benefits. The Board concluded that Leeks voluntarily abandoned his job because he did not make daily contact during his absence due to injury.

Leeks has timely appealed the Board's decision to this honorable Court and filed an opening brief. The Board has declined to file an answering brief, and Kohl Corporation failed to appear and file an answering brief.

Standard of Review

An aggrieved party "may secure judicial review [of a decision of the Unemployment Insurance Appeal Board] by commencing an action in the Superior Court . . . ."[1] The Court reviews the Board's decision to determine if substantial evidence exists in the record to support the Board's findings of fact and to determine if the Board erred in its application of the law.[2]

Factual findings of the Board are deemed conclusive where such facts are supported by substantial evidence and upon the absence of any fraud.[3] Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] The Court, in considering an appeal of the Board's decision, does not weigh any evidence or make any

[1] 19 *Del.C.* § 3323.

[2] *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981); *Hubble v. Delmarva Temporary Staffing, Inc.*, 2003 WL 1980811, *2 (Del. Super.).

[3] 19 *Del.C.* § 3323; *Hubble*, 2003 WL 1980811 at *2.

[4] *Hubble*, 2003 WL 1980811 at *2 (quoting from *Gorrell v. Division of Vocational Rehab. and Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 96A-01-001, Graves, J. (July 31, 1996) Letter Op. at 4.).

factual findings but only determines if substantial evidence exists upon which the Board's findings can be legally supported.[5]

Furthermore, where a claimant is a pro se litigant, the Court may construe the written submissions and arguments of such a claimant as a challenge to the factual findings and legal conclusions of the Board.[6]

Discussion

Under Delaware employment law, an individual is disqualified from receiving unemployment insurance benefits if he was terminated for "just cause in connection" with his work.[7] The burden is on the employer to show that the employee was terminated for just cause.[8]

On the other hand, where a claimant quits work voluntarily, the burden is on the claimant to show good cause.[9] If the claimant can show "good cause

[5] *Hubble*, 2003 WL 1980811 at *2 (citing *McManus v. Christina Service Co.,* Del. Super., C.A. No. 96A-06-013, Silverman, J. (Jan. 31, 1997) Op. and Order at 4).

[6] *Witcher v. Delaware Park*, 2002 WL 499431, *2 (Del. Super.).

[7] 19 *Del.C.* § 3314(2).

[8] *Evans v. Tansley*, 1988 WL 32033, *1 (Del. 1988).

[9] *City of Wilmington v. Hamilton*, 2001 WL 1265840, *1 (Del. Super).

attributable to such work" for leaving the job, the claimant is not disqualified from receiving unemployment insurance benefits.[10]

Therefore, the threshold issue in this case is whether Leeks voluntarily abandoned his job or was terminated by the employer. The Court must determine if the Board's finding that Leeks voluntarily abandoned his job is supported by substantial evidence and free from legal error.

Voluntary Abandonment

In order to determine if an employee is disqualified from receiving unemployment insurance benefits due to a voluntary abandonment, the Court considers the totality of circumstances.[11] One critical factor to be weighed is whether the claimant intended to remain on the job.[12] For a termination to be deemed a voluntary abandonment or a quit, "an employee must have a conscious intent to leave or terminate the employment."[13]

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[10] 19 *Del.C.* § 3314(1).

[11] *City of Wilmington v. Unemployment Ins. Appeal Bd.*, 516 A.2d 166, 169 (Del. 1986).

[12] *City of Wilmington*, 516 A.2d at 169.

[13] *Hearn v. Environmental Indus. Services*, 1994 WL 89357, *2 (Del. Super.); *Smith v. Electronic Data Systems Federal Corp.*, 1990 WL 140068, *2 (Del. Super.) (citing *Roberts v. Com., Unempl. Comp. Bd. of Rev.*, Pa. Cmwlth., 432 A.2d 646 (1981)).

In *Smith v. Electronic Data Systems Federal Corp.*, a claimant was hospitalized and, thus, unable to report to work.[14] While her employer was informed about her illness and hospitalization, the claimant did not call her employer while she was out sick or let her employer know of the date she would be returning to work.[15] Yet, the *Smith* Court found that absence from work due to illness and a failure to report during that absence do not provide sufficient evidence to support a finding of voluntary abandonment where an employer is aware that the employee was ill immediately prior to the days absent.[16] Furthermore, the *Smith* Court suggests that a finding of voluntary abandonment cannot stand under such circumstances where it is based on the mere assumption by an employer that the employee has quit.[17]

On the other hand, in *Strong v. Unemployment Insurance Appeal Board and Pyramid Temporary Services*, the Board's finding that the claimant voluntarily relinquished her employment was determined to be supported by the evidence where the claimant had signed an agreement to keep in regular contact—at lease one call every three days—with her employer but then did not

[14] *Smith*, 1990 WL 140068 at *2.

[15] *Smith*, 1990 WL 140068 at *2.

[16] *Smith*, 1990 WL 140068 at *2.

[17] *Smith*, 1990 WL 140068 at *2.

do so.[18] There, the employer was a temporary agency whose contract required temporary employees to make regular contact in order to indicate their availability for assignments or forfeit employment.[19]

Here, the facts indicate no intent on Leeks' part to abandon his job. In fact, the opposite is true—Leeks' mother initially informed the employer that Leeks was seriously injured, was unable to report to work, and should be taken off the schedule, and, thereafter, called to update the employer of Leeks' condition. If Leeks had intended to abandon his job, he would not have someone call ten days after the injury to update the employer regarding his condition. Therefore, the Court does not find that Leeks had the requisite conscience intent to quit his job.

As in *Smith*, where the claimant was hospitalized, could not report to work, and did not call her employer while she was out sick, Leeks was at the emergency room, unable to report to work, and did not call each day of his absence. Furthermore, in *Smith*, the employer was aware of the claimant's illness and hospitalization immediately prior to the days claimant was absent. Similarly, here, Leeks' employer was aware of his injury immediately prior to the days he was absent from work due to a call by Leeks' mother. Therefore,

[18] 1994 WL 148311, *1 (Del. Super.)

[19] 1994 WL 148311 at *1.

since a finding of voluntary abandonment did not stand in *Smith*, it cannot stand here. Leeks' employer cannot simply assume that Leeks voluntary abandoned his job because he did not report to work following his injury which the employer had knowledge of.

However, in *Strong*, the Court upheld the Board's finding that a claimant voluntarily abandoned her job where she signed an agreement to keep in regular contact, one call every three days, and yet did not do so. Yet, in *Strong*, the employer was a temporary agency that required knowledge of their employees' availability in order to assign work to them which was the reason for the signed agreement. Here, the employer is a department store, not a temporary employment agency, and, the store knew that Leeks was unavailable due to the injury. And, while the employer, here, had a policy requiring contact upon absence from work that Leeks was aware of, it was not a specific signed agreement without alternatives as discussed below. Therefore, *Strong* is not applicable to the matter before the Court.

Nonetheless, the Board points to the existence of a written policy which states that, unless *other arrangements are made*, an employee who fails to make daily contact for two consecutively scheduled work days would be considered as voluntarily abandoning the job. Furthermore, the Board's factual findings indicate that the employer neither accepted Leeks' initial contact to be effective

for more than one day nor considered the initial contact to be deemed as "other arrangements."

Nevertheless, a previous absence of Leeks in June was handled by Leeks in exactly the same manner as his October absence in that Leeks made initial contact regarding his illness but did not follow-up with daily contact. Since the initial contact for the June absence was sufficient to be deemed making "other arrangements" so as to negate the requirement for daily contact, then, the October absence where Leeks acted similarly should also be deemed "other arrangements." The employer's conduct in accepting one call at the onset of Leeks' June illness as effective for the entire absence set a precedence for how "other arrangements are made." Therefore, Leeks' mother's call at the onset of Leeks' October injury, which mimicked the June circumstances, would reasonably be considered by Leeks as the making of "other arrangements." Consequently, the Court does not find that substantial evidence exists for the Board's factual finding that Leeks did not make "other arrangements" for his October absences.

For these reasons, the Court has determined that the Board erred as a matter of law in finding that Leeks voluntarily abandoned his job. Based on the evidence, Leeks was terminated by the employer—he did not quit. Thus, since the Court does not find that Leeks' termination was voluntary, the Court does

not reach the issue as to whether good cause existed for voluntary abandonment.

Accordingly, the decision of the Unemployment Insurance Appeal Board is **Reversed.**

It Is So ORDERED.

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Judge John E. Babiarz, Jr.