Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-221

NOVEMBER TERM, 2005

Anthony Redington	}	APPEALED FROM:
	}	
	}	
v.	}	Employment Security Board
	}	
Department of Employment & Training	}	
(Department of Human Resources, Employer)	}	DOCKET NO. 01-05-051-01

In the above-entitled cause, the Clerk will enter:

Claimant appeals from the Employment Security Board=s decision upholding the denial of his claim for unemployment benefits. We affirm.

Claimant was last employed as a policy analyst for the Agency of Transportation. After the transfer of his position from the Department of Public Service to the Agency in March 2003, claimant became dissatisfied with his job duties, which consisted primarily of gathering and organizing data relating to railroad crossings. Soon after claimant=s transfer to the Agency, his supervisor became dissatisfied with claimant=s job performance. In November 2003, claimant was assigned a six-month prescriptive period of remediation, during which time his job performance would be periodically reviewed. Claimant was warned by letter that his failure to improve and maintain his level of performance would result in progressive disciplinary measures up to and including dismissal from state employment. In the summer of 2004, after the remediation period ended, claimant=s supervisor concluded that claimant was still not satisfactorily performing his duties. On September 16, 2004, claimant and his employer signed an agreement under which claimant would be placed on paid administrative leave for three months and would submit his resignation effective December 17, 2004Cthe date at which claimant would be eligible for retirement.

Shortly after submitting his resignation, claimant sought unemployment compensation benefits. The claims adjudicator determined that claimant was not entitled to benefits because he left his job voluntarily without good cause attributable to his employer. See 21 V.S.A. ' 1344(a)(2)(A). Following separate hearings, that decision was first upheld by the appeals referee and then by the Board. Claimant appeals the Board=s decision, arguing that (1) the evidence does not support the Board=s findings and conclusions; (2) the duties to which he was assigned fell outside his job description; and (3) the Board erred in concluding that he left his job by mutual agreement and not for good cause attributable to his employer.

The gist of claimant=s argument on appeal is that he was coerced into leaving his employment by being placed in a Aresign or be fired@ situation. According to claimant, his employer wanted to force his resignation for a number of reasons unrelated to his job performance, including his age, his union and whistle-blowing activities, and his advocacy for roundabouts. Based on his claim that he was assigned duties outside his job description, he contends that reversal in this case is compelled by Kuhn v. Dep=t of Employment Security, 134 Vt. 292 (1976).

Claimant=s reliance on Kuhn is misplaced. In that case, the employer fired the employee for refusing to take on the responsibility of certifying the safety of motor vehicles, which the employee felt he was not qualified to do. We rejected the employer=s challenge to the award of unemployment benefits, concluding that the Board=s refusal to find

misconduct on the part of the employee was supported by evidence that the employee had acted in good faith and in the best interests of society. Kuhn, 134 Vt. at 294-95. The instant case does not concern the issue decided in KuhnCwhether the employee engaged in misconduct that justified his termination. Conversely, the issue raised in the present caseCwhether claimant voluntarily left his job without good cause attributable to his employerCwas not even addressed in Kuhn because the employer failed to raise it in the proceedings below. Id. at 293.

Here, claimant argues that his employer tried to force upon him a set of tasks wholly unrelated to his policy analyst position and then unfairly found his performance unsatisfactory for failing to successfully undertake such tasks. The record does not support this argument. To the extent that claimant is suggesting that the employer was precluded from requiring him to perform those tasks, his remedy was a grievance procedure through the Labor Relations Board. In any event, the Employment Security Board found that defendant was clearly capable of performing the railroad-highway crossing work assigned to him, which had become a top priority for the employer. In his testimony before the appeals referee, claimant himself stated that he had done similar work for the state in the mid-1990=s, but had later been able to get back into work involving more policy analysis. According to claimant=s testimony, he became unhappy when the director of the Agency of Transportation put him Aback into a technician role.@ Thus, claimant=s own testimony demonstrates that he had done that type of work before, and that he was capable of doing it satisfactorily. In short, claimant has failed to demonstrate either that his assigned duties were outside the scope of his employment, or that his employer=s assignment of duties was just cause for him to leave his employment, which would have made him eligible for unemployment benefits. Nor has claimant demonstrated that he was forced to resign because of factors unrelated to his job performance, such as his age, his union or whistle-blowing activities, or his support for roundabouts. The Board described these allegations as meritless, and we agree that they are not supported by the record.

A case more on point is Hamilton v. Dep=t of Employment Security, 139 Vt. 326 (1981). In that case, the employer became dissatisfied with the probationary employee=s work and advised him that he could be dismissed if his job performance did not improve in the ensuing two to three weeks. Shortly thereafter, the employer and the employee mutually concluded that it would be best for all concerned if the employee left his job, and the employee resigned. The personnel department had previously advised the employer that he had insufficient grounds to terminate the employee. The Board concluded that, under the circumstances, the employee=s departure was coerced, but this Court reversed that determination on appeal. Noting that there was no express evidence of the employer having advised the employee that he would be discharged if he did not resign, we concluded that there was insufficient evidence to support the Board=s determination that the employee=s resignation had been coerced. Hamilton, 139 Vt. at 329. The mere fact that the employer wanted and encouraged the employee to resign was insufficient evidence to justify the Board=s finding of coercion. Id. While we acknowledged that the employee might have eventually been discharged, and that his possible discharge might have been a factor in his decision to resign, we explained that resigning based on only the possibility of being fired Adoes not justify the award of [unemployment compensation] benefits.@ Id. at 328; see Lane v. Dep=t of Employment Security, 134 Vt. 9, 11 (1975) (finding that employer giving employee alternatives of Ashaping up or shipping out@ did not support conclusion that resignation was coerced). We stated that we could not say that the employee was coerced, given that he chose to resign after conferring with the personnel department and discovering that he could obtain reduction-in-force benefits only by resigning. Id.

The case before us is remarkably similar to Hamilton. Claimant was assigned a prescriptive period of remediation and warned of the possibility of other disciplinary measures, including dismissal, if his job performance did not improve. When his employer expressed continued dissatisfaction with his job performance at the end of the remediation period, claimant chose to resign rather than risk dismissal or an adverse decision in a grievance procedure. The parties agreed that claimant would go on paid administrative leave for three months and then retire from state service with full benefits. Claimant himself testified before the appeals referee that he decided to accept the retirement agreement because he could not be sure of the outcome of any potential grievance and because Aa bird in the hand is worth two in the bush.@ The evidence supports the Board=s findings that (1) the employer never told claimant that he would be discharged if he did not resign, and (2) it was unclear whether the employer would have fired claimant if he had not resigned. Given these facts, there was ample support for the Board=s conclusion that claimant=s resignation was not coerced. In short, claimant has not met his burden of demonstrating that the Board erred by concluding that he voluntarily left his employment for good cause not attributable to his employer. See Skudlarek v. Dep=t of

Employment & Training, 160 Vt. 277, 280 (1993) (holding claimant bears burden of proving that voluntary termination was for good cause attributable to employer); Cook v. Dep=t of Employment & Training, 143 Vt. 497, 501 (1983) (concluding question of whether resignation is for good cause attributable to employer is within special expertise of Board, whose decision is entitled to great weight on appeal).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice