

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Amy Huetter,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1194 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: April 29, 2011
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: July 26, 2011

Amy Huetter (Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the Unemployment Compensation Referee (Referee) finding that Claimant voluntarily separated from her employment and that she was ineligible for benefits pursuant to Section 402(b) of the Unemployment Compensation Law¹ (Law). On appeal, Claimant challenges certain credibility and factual findings of the Board and

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

contends that, because there was misbehavior in the hearing, the Referee misunderstood the facts and she is, therefore, entitled to unemployment compensation (UC) benefits.

Claimant worked for B & J Creamery, Inc. (Employer) from September 2008 until October 9, 2009. Claimant applied for UC benefits and, on November 2, 2009, the Duquesne UC Service Center (Service Center) initially found her eligible due to involuntary termination of employment under Section 402(e) of the Law. 43 P.S. § 802(e). (Notice of Determination at 1, R. Item 4.) After reviewing further information from Employer, the Service Center issued a redetermination a day later, finding Claimant ineligible under Section 402(b) of the Law because she voluntarily terminated her employment and did not have necessitous and compelling reasons for doing so. (Notice of Redetermination at 1, R. Item 5.) Claimant appealed and a hearing commenced before a Referee. (Petition for Appeal, R. Item 7.)

At the beginning of the Referee hearing, there was confusion as to who would speak for the Employer: Employer's owner, who was Claimant's manager, or Employer's president. (Hr'g Tr. at 6, R. Item 10.) The owner stated that he would speak for Employer, and Claimant did not object. (Hr'g Tr. at 6, R. Item 10.) The owner testified that, on October 9, 2009, Claimant told him she did not know what to do after Employer terminated her mother-in-law over a "stealing issue" the day before and that Claimant had to leave her employment. (Hr'g Tr. at 7, R. Item 10.) The owner stated that Claimant felt obligated to support her mother-in-law, and felt uncomfortable at work after her mother-in-law was gone. (Hr'g Tr. at 10, R. Item 10.) The owner testified that Claimant told him that she would stay and make ice

cream before she left for the day. (Hr'g Tr. at 8, R. Item 10.) In response to Claimant's offer to stay and make ice cream, the owner informed Claimant that the offer was not necessary and, when Claimant stated that she would then come in and make the ice cream on the next Monday, the owner stated that her offer also was not necessary. (Hr'g Tr. at 8-9, R. Item 10.)

The owner's daughter, a manager at Employer, then testified that she and Claimant had a conversation during which Claimant stated that she did not know what she was going to do about her employment and gave the owner's daughter one of her keys to the workplace. The owner's daughter stated that she offered to take Claimant's second key and give it back to her if Claimant decided to return. The owner's daughter then testified that Claimant gave her both sets of keys. (Hr'g Tr. at 12-13, R. Item 10.)

Claimant testified that she told the owner that she was in an uncomfortable position; when she was leaving for the day she was told by the owner's daughter to leave her keys at the store; and subsequently was told by the owner that October 9, 2009 was her last day. (Hr'g Tr. at 6, 15-16, R. Item 10.) On cross-examination, however, Claimant admitted that the owner had said they did not want her to leave, but understood if she did. (Hr'g Tr. at 16, R. Item 10.)

Based on the evidence presented at the hearing, the Referee held that the Claimant had left her employment voluntarily and, because Claimant showed no evidence indicating a reasonable effort to preserve employment or evidence indicating action with "ordinary common sense in leaving," she was ineligible for

benefits under Section 402(b) of the Law. (Referee's Decision at 2.) Claimant then appealed to the Board, which made the following findings:

1. The claimant was last employed by B & J Creamery, Inc. as a full-time assistant manager from September 2008 until her last day worked of October 9, 2009, at a final rate of pay of \$ 8.50 an hour.
2. The claimant's mother-in-law, the owner's sister, was the manager.
3. The claimant's mother-in-law had a falling out with the owner and was separated on October 8, 2009.
4. The next day, the claimant told the owner that she did not know what she was going to do about her employment because she felt uncomfortable being there.
5. The claimant also conveyed that it would be difficult for the claimant to quit as she did not want to leave the employer without enough help.
6. The owner told the claimant that she was welcome to stay. The owner also told the claimant that he understood if she felt that she had to leave.
7. The claimant spoke to the owner's daughter at the end of her shift.
8. The claimant told the owner's daughter that the claimant did not know what she was going to do and handed the daughter one of the two keys to the property that the claimant had.
9. The daughter asked the claimant if she wanted to give the daughter the second key and save a trip later.
10. The claimant said "okay" and asked what she should do if she decided to stay.
11. The daughter told the claimant that the daughter would meet the claimant at the store on Monday if the claimant decided to stay.
12. The claimant did not return to work, and the employment relationship ended.

(Board's Decision, Finding of Facts (FOF) ¶¶ 1-12.) The Board noted various points of conflict in the testimony and found Employer's witnesses' testimony credible that Claimant left voluntarily. (Board's Decision at 2.) The Board, therefore, affirmed the Referee's decision finding Claimant ineligible for benefits under Section 402(b) of the Law. Section 402(b), the Board stated, deems a claimant ineligible for any week where unemployment is due to a voluntary separation of employment without cause of a necessitous and compelling nature. (Board's Decision at 2.) Further, the Board stated that it was Claimant's burden to prove a cause of a necessitous and compelling nature for terminating her employment. (Board's Decision at 2.) Although the Board found Claimant's unease reasonable, it concluded that such discomfort did not constitute a cause of a necessitous and compelling nature required under the Law to afford UC benefits. (Board's Decision at 2.)

Claimant presents four arguments in her brief in opposition to the Board's determinations, specifically: (1) "Hostile environment"; (2) "Not creditable [sic] people lied under oath"; (3) "Misrepresentation of the actual owner"; (4) "Personal vendetta."² (Claimant's Br. at 10.) From these assertions, we discern that Claimant

² Claimant further argues that: (1) she was unaware of the ability to object in the hearing; (2) the correct owners did not testify at the hearing and are arguing against her eligibility for benefits out of spite; and (3) her mother-in-law was not present at the hearing. After a thorough review of the record, we conclude that: (1) Employer offered no objectionable testimony in the hearing, the Referee gave Claimant ample opportunity to challenge Employer's witnesses' testimony, asking Claimant if there were any questions regarding the testimony, and Claimant objected to statements of Employer's witness, stating that "there's lies on that saying that . . . my mother-in-law quit," (Hr'g Tr. at 8, 10, 13, 17, R. Item 10); (2) as Employer's "correct owners" were in attendance at the hearing, Claimant had the opportunity to request their testimony, but did not; and (3) if Claimant wanted her mother-in-law to attend the hearing, she could have requested her mother-in-law's attendance or requested the Referee to issue a subpoena compelling her mother-

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is arguing that: (1) the findings of credibility were incorrect; and (2) the determination of her ineligibility for UC benefits under Section 402(b) of the Law is not supported by substantial evidence. Claimant further argues that the owner's actions in the hearing were intimidating, influencing her testimony and the Referee's findings regarding her eligibility.

Claimant first challenges the credibility determination of the Board. Here, the Board found Employer's witnesses' testimony credible when they stated that Claimant voluntarily left her job. The Pennsylvania Supreme Court has held that the Board is the ultimate finder of fact. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985). The Supreme Court further noted that "[q]uestions of credibility and resolutions of evidentiary conflicts . . . are not subject to re-evaluation on judicial review." Id. (quoting Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034, 1036 (Pa. Cmwlth. 1979)). Furthermore, findings of facts are conclusive as long as the record, when viewed in the light most favorable to the prevailing party, contains substantial evidence to support those findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 358, 378 A.2d 829, 831, 832 (1977).

Claimant argues that Employer's witnesses lied during their testimony and that she and the Referee were intimidated by the owner's demeanor in the hearing (Claimant's Br. at 7). She strenuously argues that we should accept her version of the facts over Employer's version, acknowledging that "this basically comes down to my

in-law's attendance, see Section 506 of the Law, 43 P.S. § 826 (stating that the department or the board can issue summons or subpoena to compel the attendance of witnesses).

word against theirs, although I can tell you I did enjoy my position and had no intention of quitting my job.” (Claimant’s Br. at 10). Claimant also contends that the owner was very hostile at the hearing, and she was scared to speak up. Our review of the record indicates that both the owner and the Referee expressed frustrations throughout the hearing, but that there was no indication that the Referee was intimidated. Additionally, although Claimant argues that the Board’s credibility findings were incorrect and that she was intimidated, Claimant ultimately did affirm in her testimony that Employer understood the difficulty of the situation Claimant was in, would allow her to stay, but would understand if she left. (Hr’g Tr. at 16, R. Item 10.) Therefore, this Court may not overrule the credibility determinations of the Board upon appeal.

Claimant next argues that the Board’s finding that she voluntarily left her employment was not supported by substantial evidence.³ (Claimant’s Br. at 8-9.) In reviewing the Board’s findings of fact, we examine the record, including all logical and reasonable inferences therefrom, to determine whether those facts are supported by substantial evidence in the record, which must be viewed in the light most favorable to the party that prevailed in the determination. Taylor, 474 Pa. at 355, 358, 378 A.2d at 831-32. The Pennsylvania Supreme Court defines substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Peak, 509 Pa. at 274, 501 A.2d at 1387. The fact that a

³ Claimant also raises an issue regarding a dispute over the number of keys in her possession at the time of termination. However, Claimant fails to describe the relevance of this issue to the case. Furthermore, the owner’s daughter testified that Claimant had two keys, (Hr’g Tr. at 12-13, R. Item 10), which the Board credited. (FOF ¶¶ 9, 11, 12.) We cannot review that credibility determination.

claimant believes a different version of events took place does not create grounds for reversal if the Board's findings are supported by substantial evidence. Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). "Whether a claimant was discharged is a question of law to be determined based upon the Board's factual findings." Fekos Enterprises v. Unemployment Compensation Board of Review, 776 A.2d 1018, 1021 (Pa. Cmwlth. 2001) (citing Beverly Enterprises, Inc. v. Unemployment Compensation Board of Review, 702 A.2d 1148, 1151 (Pa. Cmwlth. 1997)). A finding of voluntary separation from employment is precluded unless a claimant has a conscious intention to sever employment. Fekos Enterprises, 776 A.2d at 1021. This intent is determined by considering the totality of the circumstances surrounding the incident of separation. Id. This Court cannot overrule the Board simply on the ground that it disagrees with the Board's finding of facts on review of record. Taylor, 474 Pa. at 357, 378 A.2d at 831-32.

Here, Employer's witnesses testified that Employer asked Claimant to stay but would understand if she chose to leave. (Hr'g Tr. at 7, R. Item 10.) The owner's daughter also testified that she asked Claimant if Claimant wanted to leave her keys when Claimant left on Friday and told Claimant that if Claimant wanted to return to work on Monday, the next workday, she would meet Claimant at the store and give the keys back. (Hr'g Tr. at 12-13, R. Item 10.) Claimant did not return to work on Monday. (FOF ¶ 12.) The Board credited this testimony, which supports the Board's finding that Claimant voluntarily left her employment. In fact, Claimant, on cross-examination, confirmed that this is what occurred on her last day. (Hr'g Tr. at 16, R. Item 10.) Because the credited testimony is that Employer wanted Claimant to

remain working and Claimant did not return to work the next workday after her October 9, 2009, discussion with Employer's managers, we conclude that the Board did not err or abuse its discretion in concluding that Claimant voluntarily separated her employment and that her claim should be considered under Section 402(b) of the Law.

Claimant has maintained throughout these proceedings that she did not voluntarily leave her employment and that she was fired; thus, she did not present any argument or evidence that she had necessitous and compelling cause for voluntarily leaving her employment. If separation from employment has been deemed voluntary, in order to receive benefits a claimant has the burden to prove that he or she had cause of a necessitous and compelling nature to quit his or her job. Cumberland Valley Animal Shelter v. Unemployment Compensation Board of Review, 881 A.2d 10, 14 (Pa. Cmwlth. 2005). Therefore, because Claimant has not asserted before the Referee, the Board, or this Court that she had cause of a necessitous and compelling nature for *voluntarily* leaving her employment, we agree with the Board that this issue was waived.⁴

⁴ Because the Board cited the Claimant's work situation resulting from her mother-in-law's firing, (Board's Decision at 2), we believe that it is worth analyzing here. We note that even if Claimant raised this issue at the hearing, she would not prevail. Under Section 402(b), employees are eligible for UC benefits if there is a cause of a necessitous and compelling nature to quit their work. We note that this Court has held that family issues can rise to a necessitous and compelling cause in Section 402(b) cases. See, e.g., Flatley v. Unemployment Compensation Board of Review, 500 A.2d 515, 516 (Pa. Cmwlth. 1985) (stating that an employee who left work voluntarily had the burden to prove that the separation was reasonable and due to situations beyond her spouse's control); Shaffer v. Unemployment Compensation Board of Review, 928 A.2d 391, 394 (Pa. Cmwlth. 2007) (holding that a cause to leave work does not become necessitous and compelling due to child care matters where the claimant did not check alternative child care options); Dopson v. Unemployment Compensation Board of Review, 983 A.2d 1282, 1286 (Pa. Cmwlth. 2009) (holding
(Continued...)

For the foregoing reasons, the Board did not err or abuse its discretion in finding Claimant ineligible for UC benefits and we must, therefore, affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

that a cause to leave work does not become necessitous and compelling in the matter of child care where it is a purely personal preference). Had Claimant argued, on appeal, that she had cause of a necessitous and compelling reason to quit, we would have to disagree under these facts. This case is distinguishable from the previously noted cases because Claimant's supposed reason for quitting was due to emotional discomfort, not the need to take care of a family member. We agree with the Board that such emotional discomfort does not rise to the level of the necessitous and compelling nature standard.

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Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, July 26, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is **Affirmed**.

RENÉE COHN JUBELIRER, Judge