

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joyce Wagner,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1287 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: November 19, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: April 4, 2011

Joyce Wagner (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of an Unemployment Compensation Referee (Referee) finding Claimant ineligible for unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law)¹ because Claimant voluntarily left her job without a necessitous and compelling reason. On appeal, we consider whether the Board erred

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

in concluding that REM Staffing, Inc. (Employer) did not substantially change the conditions of Claimant's employment such that Claimant is entitled unemployment compensation benefits.

Claimant applied for unemployment compensation benefits after becoming separated from her employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(b) of the Law. Claimant appealed the Service Center's determination, and the Referee conducted an evidentiary hearing, at which Claimant and Employer's President testified. Following the hearing, the Referee affirmed the Service Center's determination, and Claimant appealed to the Board. In affirming the Referee's determination finding Claimant ineligible for benefits, the Board made the following factual findings:

1. The claimant was last employed as a project manager by REM Staffing, Incorporated from March 5, 2008 to December 18, 2009. Her final rate of pay was \$45,000.00 per year.
2. When the claimant was originally hired, she was informed that she would have to work at the employer's Chambersburg, Pennsylvania[] office, and if needed, at its Lemoyne office.
3. The claimant accepted the position knowing that her work location might change.
4. Approximately one year before she quit, the claimant was moved to the employer's Lemoyne office.
5. When the claimant was relocated, her position changed from office manager to project manager.
6. The claimant was now working 8:00 a.m. to 5:00 p.m. at the employer's office.

7. Because she remained at the employer's office, the claimant was no longer required to do direct sales. She no longer needed a company cellular telephone or to be reimbursed for mil[e]age.
8. Approximately 6 months before the claimant quit her job, the employer allegedly changed the way that it paid her the commissions she earned.
9. The employer's policy was that it always paid commissions when its client paid an invoice. However, it had advanced the claimant her commissions in the past.
10. The claimant was informed when she took the position that her commissions would be paid when the employer's client paid an invoice.
11. In December 2009, 3 of the employer's 11 employees received Christmas bonuses. The claimant was one of the employees that did not receive a bonus.
12. The claimant was told that the bonuses were commissions earned by those employees because the employer did not want her to become upset.
13. The claimant had a history of becoming upset, walking out of [the] office after informing the employer that she quit, and then coming back thereafter to rescind her resignation.
14. The claimant voluntarily terminated her position because she objected to the employer's alleged change in when it paid her the commissions she earned, as well as the fact that she did not believe that she was properly being paid her commissions.
15. After the claimant submitted her resignation, the employer attempted to work out an agreement with her so that she could work from home.
16. After some negotiation, the claimant rejected the employer's off[er].
17. Continuing work was available to the claimant.

(Findings of Fact (FOF) ¶¶ 1-17.) The Board explained that Claimant quit her job because “she was dissatisfied with the employer’s alleged decision to change when it would pay her commissions.” (Board Decision at 3.) The Board specifically discredited Claimant’s testimony and, instead, believed Employer’s President that Employer informed Claimant when she was hired that her commissions would be paid when Employer’s client paid for its services. The Board noted that, although Employer often gave Claimant advancements on her commissions, Employer’s policy never changed. (Board Decision at 3.) Moreover, the Board credited Employer’s testimony that Claimant received all of her commissions and the only payment Claimant did not receive was a holiday bonus, which was not a commission. Finally, the Board explained that Claimant’s job title changed more than one year before she quit and her new position did not require travel. As such, the Board found that the “perks” of getting a cell phone and mileage were no longer necessary, especially because Claimant accepted the position and worked in that position without the perks for approximately one year. (Board Decision at 3.) Accordingly, the Board agreed with the Referee and concluded that Claimant failed to establish a necessitous and compelling reason to voluntarily terminate her employment. Claimant now petitions this Court for review.²

On appeal, Claimant argues that the Board erred in concluding that she was ineligible for benefits because Employer substantially changed the conditions of her

² “Our scope of review is limited to determining whether the Claimant’s constitutional rights were violated, whether an error of law was committed, or whether substantial evidence supports the findings of fact. Whether a Claimant’s conduct constitutes willful misconduct is a question of law subject to our review.” Williams v. Unemployment Compensation Board of Review, 926 A.2d 568, 571 n.4 (Pa. Cmwlth. 2007) (citations omitted).

employment from those that existed when Claimant first accepted employment. Claimant asserts that Employer made substantial changes to the conditions of her employment by: moving her from the Chambersburg office to the Lemoyne office; changing her job title from office/branch manager to project manager; ceasing to compensate Claimant for mileage and cell phone use; requiring Claimant to transport temporary workers from job sites, “many of whom were criminals”; paying Claimant’s commissions only when payment was received by Employer’s client, instead of advancing the payment of commissions; never paying Claimant a commission for work she did for a client in December 2009; and asking Claimant “to participate in unethical practices while at work, such as falsifying signatures and creating false applications.” (Claimant’s Br. at 14.) As such, Claimant contends that she had a necessitous and compelling reason to quit her employment and, thus, should have been found eligible for benefits.

A “cause of a necessitous and compelling nature” is one that “results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.” Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 358-59, 378 A.2d 829, 832-33 (1977). An employer's unilateral imposition of a substantial change in the terms and conditions of employment may provide a necessitous and compelling reason to leave employment. Chavez (Token) v. Unemployment Compensation Board of Review, 738 A.2d 77, 81 (Pa. Cmwlth. 1999). There is no talismanic percentage that determines when a unilateral change in the terms and conditions of employment is substantial; each case turns on its own facts. Steinberg Vision Associates v. Unemployment Compensation Board of

Review, 624 A.2d 237, 239 (Pa. Cmwlth. 1993). The inquiry, however, must focus on the impact that the employer's changes have upon the employee, not the employer's reasons for instituting the changes. Id. at 239-40. Whether an employer's unilateral change in the terms and conditions of employment is substantial is a question of law; however, *the resolution of that question is dependent upon the underlying facts as found by the Board.* Chavez (Token), 738 A.2d at 82.

Claimant's argument is primarily a recitation of her preferred version of the facts. Although Claimant provided testimony that would support her contentions, the Board discredited that testimony and found that the facts were contrary to those advanced by Claimant. In doing so, the Board resolved all conflicts in the evidence in Employer's favor. The law is clear that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

Here, there is substantial evidence to support the Board's factual findings that Employer did not change its conditions of employment. Employer's President credibly testified that he explained to Claimant when he hired her "that she would

work at the Chambersburg office and perhaps she would need to come to my Lemoyne office,” and that Claimant accepted “the position with that condition that at some point she would be moved to our Lemoyne office.” (Hr’g Tr. at 13.) Additionally, Employer’s President explained that Employer’s compensation policy in paying commissions never changed. Employer’s President testified that commissions were not paid to employees until Employer collected the money from its client but, on many occasions, Employer would “bend the rule for [Claimant]” and pay Claimant an advance of her commissions. (Hr’g Tr. at 13-15.) Moreover, Employer’s President testified that when Claimant moved to the Lemoyne office, “mileage reimbursement was taken out . . . because at that point she was not doing anymore sales. She was not asked to go out to get some new business and that’s the reason the mileage reimbursement was taken out.” (Hr’g Tr. at 13.) Employer’s President credibly testified that “[a]ll these conditions were explained to her at the beginning of the job when she accepted the position.” (Hr’g Tr. at 13.)

With regard to Claimant’s assertion that she was never paid her commission for work she had done for a client in December 2009, Employer’s President credibly testified that she did not deserve a commission for that particular client because the individuals Claimant placed did not meet a 30-day requirement for staying on the job. (Hr’g Tr. at 15-16.) Additionally, Employer explained that a few employees did receive extra compensation in December 2009, but that compensation was in the form of a holiday bonus, not a commission. (Hr’g Tr. at 18.)³ Claimant’s next assertion,

³ The Board acknowledges in its brief that its Finding of Fact 12 is inaccurate because Employer’s President credibly testified that a co-worker, not Employer’s President, told Claimant that the holiday bonus was a commission to prevent Claimant from getting upset about not receiving
(Continued...)

that her work conditions changed because she was now required to transport temporary workers from job sites, “many of whom were criminals,” is not supported by the credited evidence of record. Specifically, Employer’s President credibly testified that Claimant “was never obligated to pick up people. We would ask her on the way from point A to point B which is the same distance to pick up people and drop off people. If not – if she had a problem with that she should have communicated that to me and I would have somebody else to pick up the people. Very negotiable I was with that.” (Hr’g Tr. at 21.) Moreover, Claimant did not testify that she had to pick up “criminals” and transport them to job sites or that she ever felt her safety was at issue. As such, the Board did not make a factual finding that this was a reason why she quit.

Although Claimant’s job title changed from office/branch manager to project manager, the credited evidence shows that Claimant’s salary stayed the same and the Employer’s policy on paying commissions did not change. In fact, Employer’s President testified that Claimant received two raises after she moved to the Lemoyne office. (Hr’g Tr. at 21.) Moreover, while it is undisputed that Employer stopped paying for Claimant’s cell phone, Claimant failed to produce sufficient evidence to explain how this change substantially impacted Claimant. Finally, with regard to Claimant’s assertion that she quit because Employer asked her “to participate in unethical practices while at work, such as falsifying signatures and creating false applications,” (Claimant’s Br. at 14), we note that the Board specifically found

the bonus. (Board’s Br. at 11, n.5; Hr’g Tr. at 18.) However, this change has no impact on the issues before the Court.

Claimant's testimony not credible, and never made a finding that this was the reason why Claimant quit.

Based on the Board's supported factual findings, we hold that the Board did not err in concluding that Claimant failed to demonstrate a necessary and compelling reason to voluntarily terminate her employment and is, therefore, ineligible for unemployment compensation benefits.

Accordingly we affirm.

RENÉE COHN JUBELIRER, Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, April 4, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge