IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vito Rinaldi Chevrolet, Inc., Petitioner	:	
	:	No. 139 C.D. 2012
v.	:	
	:	Submitted: June 22, 2012
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: August 16, 2012

Vito Rinaldi Chevrolet, Inc. (Employer) petitions for review of the January 27, 2012 order of the Unemployment Compensation Board of Review (Board) that reversed a referee's decision and held that Richard K. Monberger (Claimant) was not ineligible for unemployment compensation benefits pursuant to section 402(b) of the Unemployment Compensation Law (Law).[1] For the reasons set forth below, we vacate and remand.

Claimant worked for Employer as a car salesman for approximately two years; his last day of work was August 25, 2011. (Board's Findings of Fact,

[1]Act of December 5, 1936, Second Ex. Sess., PL (1937) 2897, as amended, 43 P.S. §802(b). Pursuant to section 402 (b) of the Law, an employee is ineligible for compensation for any week in which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

No. 1.) After two incidents in which Claimant's sales manager allegedly yelled and swore at Claimant, Claimant quit. (Board's Findings of Fact, No. 5.)

On October 25, 2011, the local service center determined that Claimant was ineligible for benefits under section 402(b) of the Law. (Reproduced Record (R.R.) at 1a.) Claimant timely appealed, and a referee held a hearing on December 6, 2011.

Claimant testified that he quit because his sales manager, Nick Givitski, yelled and swore at him on two occasions. Specifically, Claimant stated that in November 2010, he directed a question to Givitski, who responded: "If you can't handle your customers, there's the F'in door." (R.R. at 13a.) According to Claimant, he complained to Bob Rinaldi, Employer's owner, about Givitski's conduct; about two weeks later, Givitski apologized, and Claimant forgave him. (R.R. at 13a-14a.) Claimant testified that the second incident occurred about ten months later, when Claimant asked Givitski why Givitski was rushing him through a sale and Givitski answered: "you know what F you. F you and F your 17 cars you sold last month, I'm tired of it, F you." (R.R. at 9a, 14a.) Claimant stated that he informed Don Rinaldi, Employer's general manager, of Givitski's abusive language, said that he could not continue working under those conditions, and quit. (R.R. at 10a.) Claimant testified that two weeks after the second incident, Bob Rinaldi wanted Claimant to speak to the manager of a sister dealership thirty or forty miles away about working there, but that there was no actual job offer. (R.R. at 14a-15a.)

Don Rinaldi testified that on the evening of the second incident, he saw Givitski and Claimant yelling at each other from across the street at a Chrysler dealership also owned by Employer, but he could not hear what was being said.

(R.R. at 18a.) According to Don Rinaldi, he took Claimant to the Chrysler dealership to calm the situation down and offered Claimant a comparable job at the Chrysler dealership that same night. (R.R. at 18a-19a.) Don Rinaldi stated that Employer also offered Claimant a job at a third dealership it owned, R. and R. Auto Group. (R.R. at 20a-22a.)

The referee determined that Claimant rejected Employer's offer of an equivalent job at the Chrysler dealership and thus was ineligible for benefits under section 402(b). Claimant then appealed to the Board, which reversed, making the following findings:

> 1. [Employer] last employed the claimant as a full-time salesperson for approximately two years through August 25, 2011.
>
> 2. In November 2010, after the claimant directed a customer's question to his sales manager, the manager yelled and swore at the claimant.
>
> 3. The claimant complained of the sales manager's conduct to the employer's owner, who placated the parties, but issued no discipline.
>
> 4. On August 25, 2011, after the claimant asked his sales manager why he was being rushed through a sale, the manager again yelled and swore at the claimant.
>
> 5. On August 25, 2011, the claimant quit because his sales manager yelled and swore at him on two occasions.

(Board's Findings of Fact, Nos. 1-5.)

The Board made no findings as to whether Employer offered Claimant a job at a different car dealership. Based on the above findings, the Board

concluded that Claimant met his burden of proving that he had a necessitous and compelling reason to quit his job, noting as follows:

> Here, the claimant provided credible, unrebutted, firsthand testimony that his sales manager twice yelled and swore at him. After the first instance, the claimant approached the employer's owner about the sales manager's abusive conduct. Although the claimant and the sales manager made up, the abusive conduct repeated ten months later. Although the employer's general manager testified that both the claimant and sales manager were swearing, he admitted that he was unable to hear what was said. The claimant never admitted that he was swearing at the sales manager, so the Board specifically discredits the general manager's claim. Because the claimant notified the employer of a past instance of the sales manager's abusive conduct, he showed a necessitous and compelling reason to quit when the abusive conduct repeated.

(Board's op at 2.)

On appeal to this Court,[2] Employer first argues that the Board erred in concluding that Claimant had a necessitous and compelling reason to quit work. We disagree.

The question of whether a claimant had a necessitous and compelling reason to quit is a question of law subject to this Court's review. Craighead-Jenkins v. Unemployment Compensation Board of Review, 796 A.2d 1031 (Pa. Cmwlth. 2002). In order to demonstrate a necessitous and compelling reason to quit, the claimant has the burden of proving that: (1) circumstances existed which

[2] This court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

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. Brunswick Hotel and Conference Ctr., LLC v. Unemployment Compensation Board of Review, 906 A.2d 657 (Pa. Cmwlth. 2006). Profanity in the workplace and abusive conduct may present adequate justification to terminate one's employment, and a claimant need not be subjected to such language or conduct indefinitely. Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). However, a claimant must make a reasonable effort to maintain his employment, such as informing his supervisor of the offensive or abusive conduct. Id.

In support of its position, Employer relies on Green v. Unemployment Compensation Board of Review, 101 A.2d 119 (Pa. Super. 1953). In Green, a coworker struck the claimant during a dispute. Both employees were called to the superintendent's office and requested to shake hands and make up. The aggressor was willing to do so, but the claimant refused and quit his job. The Superior Court concluded that the claimant failed to meet his burden of showing good cause for quitting, noting, among other things, that the claimant could have "continued in his employment without any undue hardship." Id. at 120.

Here, unlike in Green, Claimant was subjected to two separate instances of abusive conduct. After the first incident, Claimant did not quit his job; rather, he notified upper management, reconciled with Givitski, gave him a second chance, and returned to a working relationship. Employer argues that Claimant did not take sufficient steps to preserve his employment because, on the second occasion, he "simply informed [Don Rinaldi] that he was quitting and nothing

[Don Rinaldi] said to him changed his mind." (Employer's brief at 13.) However, we disagree that Claimant was obligated to take any further steps after he informed Don Rinaldi of the second incident.

We also disagree with Employer's assertion that Porco is controlling here. Porco involved a claimant who was subjected to periodic abusive, hostile and profane language from his supervisor. The claimant unsuccessfully attempted to resolve the problem between himself and the supervisor but did not notify upper management about the abuse before quitting his job. This Court determined that the claimant failed to make a reasonable effort to preserve his employment because he never notified upper management of the problem and thus the employer had no notice or opportunity to address the situation. Unlike the claimant in Porco, here Claimant immediately reported Givitski's actions directly to Employer's owner.

In First Federal Savings Bank v. Unemployment Compensation Board of Review, 957 A.2d 811 (Pa. Cmwlth. 2008), the claimant was subjected to unwarranted criticism and ridicule from her senior vice president. The claimant voiced her concerns regarding the senior vice president's behavior to senior management, and this Court concluded that by doing so, the claimant made a reasonable effort to maintain her employment. In this case, Claimant similarly reported the abusive conduct to a supervisor.

However, Employer argues that the Board erred in disregarding Don Rinaldi's testimony that Claimant refused Employer's offer of a job at a different dealership and, therefore, Claimant failed to make the proper attempt to preserve the employment relationship before quitting. We agree that the Board should have made a finding as to whether or not Employer made an offer to Claimant on August 25, 2011.

The Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Thus, issues of credibility are reserved for the Board, which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). The Board's findings of fact are conclusive upon review provided that the record, when taken as a whole, contains substantial evidence to support them. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). In addition, we must examine the evidence in the light most favorable to the party that prevailed before the Board and give that party the benefit of all inferences that can logically and reasonably be drawn therefrom. Id. However, as an appellate court we may not infer findings of fact not actually made by the Board. Miller v. Unemployment Compensation Board of Review, 415 A.2d 454 (Pa. Cmwlth. 1980). Where the Board's findings are inadequate for purposes of appellate review, this court must remand the matter to the Board. Dorn v. Unemployment Compensation Board of Review, 866 A.2d 497 (Pa. Cmwlth. 2005).

Because the Board failed to issue a finding addressing whether or not Employer offered Claimant a job before Claimant voluntarily terminated his employment, this Court cannot determine whether Claimant took sufficient steps to preserve his employment as required under section 402(b) of the Law.

Accordingly, we vacate the Board's order and remand the case to the Board for further findings of fact.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 16th day of August, 2012, the January 27, 2012 order of the Unemployment Compensation Board of Review is hereby vacated and the matter is remanded for further findings of fact consistent with this opinion.

Jurisdiction relinquished.

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PATRICIA A. McCULLOUGH, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Vito Rinaldi Chevrolet, Inc.,	:	
	:	
Petitioner	:	No. 139 C.D. 2012
	:	Submitted: June 22, 2012
v.	:	
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Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: August 16, 2012

I respectfully dissent. I believe that Richard K. Monberger (Claimant) demonstrated a necessitous and compelling reason to terminate his employment with Vito Rinaldi Chevrolet, Inc. (Employer) and, therefore, I would affirm the Unemployment Compensation Board of Review's (UCBR) award of benefits.

"[P]rofanity in the workplace [and] abusive conduct . . . represent adequate justification to terminate one's employment"; "the claimant need not be subjected to such conduct or language indefinitely." *Porco v. Unemployment Compensation Board of Review*, 828 A.2d 426, 428 (Pa. Cmwlth. 2003). A claimant must exercise ordinary common sense to correct the problem so that he does not have to terminate employment. *Id.* This is accomplished by notifying upper level management of the abusive conduct. *Id.*

Ultimately, we found against the claimant in *Porco*. *Id.* at 430. Although the claimant had established that he was "routinely subjected to abusive conduct and profanity" from his manager, we concluded that the claimant failed to fulfill his burden of attempting to resolve issues with the employer before quitting. *Id.* at 429. Such is not the case here.

In this case, on two separate occasions, Claimant's sales manager subjected Claimant to abusive conduct by yelling and swearing at Claimant. After the first incident, Claimant notified Employer's owner about the sales manager's abusive conduct. Employer's owner "placated the parties, but issued no discipline." (UCBR's Findings of Fact, No. 3.) Claimant and the sales manager reconciled, but, approximately ten months later, the sales manager repeated the abusive conduct. After the second incident, Claimant quit. By notifying Employer of the past instance of the sales manager's abusive conduct, Claimant exercised common sense to correct the problem and made a reasonable effort to preserve the employment relationship. When the sales manager again subjected Claimant to abusive conduct, Claimant was left with no other choice than to terminate employment. Claimant met his burden of proof under *Porco*. Claimant was not obligated to take additional steps to preserve the employment relationship. Therefore, it is irrelevant whether Employer offered Claimant another position.

For these reasons, I would affirm the order of the UCBR.

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ROCHELLE S. FRIEDMAN, Senior Judge