

(Employer). The Duquesne UC 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, raising the issue of whether he was constructively discharged.

An evidentiary hearing was held before the Referee. Claimant and his attorney testified that Claimant tendered his resignation to avoid what he believed to be imminent discharge. Following the hearing, the Referee issued a decision in which he found that Claimant was ineligible for benefits under Section 402(b) of the Law because his separation was due to a voluntary leaving.² The Referee determined that Claimant's mere speculation of imminent discharge did not constitute a necessitous and compelling reason for leaving employment. Claimant appealed to the Board, which issued an order affirming the Referee's determination. The Referee and the Board made the following relevant findings:

1. The Claimant began working for Pittsburgh Board of Education on May 1, 2003 and last worked on January 30, 2009 as a full time teacher in the English as a Second Language Program at a final rate of pay of \$42,500.00 per year.
2. On January 31, 2009, the Claimant tendered his resignation effective January 31, 2009.
3. The Claimant's resignation checked the box resignation and did not check a box marked forced resignation.

² Although the Referee credits the testimony of Claimant and his attorney that there was a high likelihood that the school board would accept a recommendation for termination of Claimant's employment based on his work performance, the Referee noted that Pennsylvania courts have examined this issue and determined that this is not an imminent threat of discharge. The Referee, therefore, found that Claimant was not constructively discharged but voluntarily quit his teaching position.

4. On March 3, 2009, the Pittsburgh Board of Education notified the Claimant by mail that at its meeting held on February 24, 2009 it approved the Claimant's resignation as Teacher due to personal reasons effective January 31, 2009.
5. Shortly before the Claimant's resignation, the Claimant had received a non-passing performance evaluation with a recommendation to be forwarded to the Board for discharge.
6. The Claimant was non-tenured and subject to at will employment.
7. The Claimant speculated that there was an overwhelming probability that he would be discharged by the Board at its meeting on February 24, 2009 and resigned to avoid discharge.

(Reproduced Record (R.R.) 15a, 17a.)

Claimant now petitions this Court for review of the Board's order. On appeal,³ Claimant argues that the Board erred in concluding that Claimant voluntarily resigned his employment and is ineligible for benefits under Section 402(b) of the Law.

Section 402(b) of the Law provides, in part, that a claimant shall be ineligible for compensation for any week in which the claimant's unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. 43 P.S. § 802(b). A claimant who voluntarily quits his employment bears the burden of proving that necessitous and compelling reasons motivated that decision. *Fitzgerald v. Unemployment Comp. Bd. of Review*, 714 A.2d 1126 (Pa.

³ This Court's scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

Cmwlth. 1998), *allocator denied*, 568 Pa. 650, 794 A.2d 364 (1999). In order to establish cause of a necessitous and compelling nature, a claimant must establish that: 1) circumstances existed that produced real and substantial pressure to terminate employment; 2) like 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 her employment. *Id.* Uncertainty and speculation about the future existence of a job does not create necessitous and compelling cause for the voluntary termination of employment. *PECO Energy Co. v. Unemployment Comp. Bd. of Review*, 682 A.2d 49 (Pa. Cmwlth. 1996), *allocator denied*, 547 Pa. 739, 690 A.2d 238 (1997). This Court has previously held that a non-tenured teacher's decision to resign in order to avoid termination for unsatisfactory performance is without cause of a necessitous and compelling nature when made before any recommendation for termination has been made to the school board. *Fishel v. Unemployment Comp. Bd. of Review*, 674 A.2d 770 (Pa. Cmwlth. 1996).

Claimant testified that he was given an unsatisfactory rating on his performance evaluation by an administrator. (R.R. 6a.) Claimant met with a Pittsburgh Federation of Teachers union representative, who informed him that he had no recourse in keeping his job. (R.R. 7a.) Claimant's attorney testified that, based upon his thirty (30) years of experience as an attorney for the Pittsburgh Federation of Teachers, a non-tenured teacher who receives an unsatisfactory rating is invariably terminated by Employer. (R.R. 11a.) As a result, Claimant tendered his resignation to avoid what he believed to be an imminent discharge. (R.R. 16a.) Claimant's resignation indicates that he checked the "resignation" box on the form and not the box marked "forced resignation." (R.R. 17a.) The Board

found that there was no formal recommendation made to the school board that Claimant should be discharged at the time of Claimant's voluntary resignation. (R.R. 18a.) The Referee asked who had the authority to terminate employment, and Claimant's attorney responded that the school board had the final decision to accept or reject the resignation. (R.R. 12a.) Therefore, the Board, relying on *Fishel*, concluded that Claimant's discharge was not imminent, and Claimant resigned in order to avoid the mere possibility of being discharged by the school board.

Claimant asserts that the Board misinterpreted *Fishel* as establishing a rule that a teacher's resignation, after being notified by school administrators that her employment will be terminated, will be treated as a voluntary quit because only the school board has final authority to terminate a teacher's employment. Claimant maintains there was no evidence of record that *Fishel*'s termination by the school board was certain following an administrative recommendation to terminate her employment because of unsatisfactory performance reviews. Claimant suggests that *Fishel* should be interpreted to hold that a temporary professional employee's resignation to avoid termination may constitute a voluntary quit with cause of a necessitous and compelling nature when there is evidence that termination is inevitable and an appeal is futile.

Furthermore, if this Court does not agree with Claimant that the Board incorrectly interpreted *Fishel*, Claimant argues that the facts in *Fishel* are in direct contrast to the facts in the current case, because here Claimant had a reasonable belief that termination of his employment was imminent. Claimant met with the union representative who informed him that he had no recourse in keeping his job, and, based on Claimant's understanding that employment of every non-

tenured teacher who received an unsatisfactory rating was terminated,⁴ Claimant voluntarily resigned his teaching position.

The Board takes the position that the facts in *Fishel* are substantially similar to those in the present case. Both cases involved a non-tenured teacher who received an unsatisfactory performance evaluation, both teachers met with union officials regarding their evaluation, and both teachers were told that a recommendation would be made to the school board to terminate their employment. As a result, both teachers resigned to avoid the school board's termination process. Here, Claimant's conduct of quitting was premature, as was the case in *Fishel*. (R.R. 19a.) The Board argues that it appropriately applied the reasoning set forth in *Fishel* when it determined that Claimant voluntarily quit his employment with Employer in order to avoid the mere possibility of being discharged by the school board. (R.R. 18a.)

We agree with the Board and reject Claimant's interpretation of our opinion in *Fishel*. In *Fishel*, we explained:

Where the employee, without action by the employer, resigns, leaves, or quits employment, that action amounts to a voluntary termination. To be interpreted as a discharge, an employer's language must possess the immediacy and finality of firing. "The degree of certainty in an employer's language resulting in a termination has often been the difference between those cases in which the Courts have found that an employee's termination was voluntary and those in which the employer's ... act was deemed to effect the termination."

⁴ Despite Claimant's attorney's opinion, the Board found that there was insufficient credible evidence that all instances similar to Claimant's resulted in a discharge. (R.R. 19a.)

Fishel, 674 A.2d at 772 (citations omitted) (quoting *Sweigart v. Unemployment Comp. Bd. of Review*, 408 A.2d 561, 563 (Pa. Cmwlth. 1989)).

In *Fishel*, the Court acknowledged a long line of cases in which we held that an employee who quits work to avoid the possibility of being fired is not entitled to compensation, including instances in which an employee resigned after being informed that termination of her employment was being “recommended.” We noted that “[o]nly when a claimant resigns to avoid an ‘imminent’ discharge will the separation be treated as a discharge.” *Fishel*, 674 A.2d at 773, n.2. Moreover, “the existence of a right to appeal an employer’s determination that a claimant should be discharged renders the prospect of discharge less than a certainty.” *Fishel*, 674 A.2d at 773 (citing *Hill v. Unemployment Comp. Bd. of Review*, 385 A.2d 1032 (Pa. Cmwlth. 1978)).

The Court in *Fishel* focused on the fact that “moving to recommend” termination before the school board does not convey the “immediacy and finality” of a firing, and the procedure is not certain to result in discharge. Of significance to our determination that the outcome in *Fishel* was far from certain was the fact that public school teachers may be dismissed after a hearing and only by a majority vote of the school board.⁵ Simply put, we concluded that a recommendation to a school board that a teacher’s employment be terminated does not constitute an “imminent discharge” sufficient to establish cause of a necessitous and compelling nature that would qualify a claimant for benefits because the school board has the ultimate decision making authority in the matter.

⁵ See, e.g., Sections 508, 514 and 1108 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§ 5-508, 5-514 and 11-1108.

Our review of the record reveals that Claimant has not shown circumstances that produced real and substantial pressure, which would compel a reasonable person to act in the same manner and terminate his employment. Claimant speculated that there was an overwhelming probability he would be discharged by the school board as a result of his unsatisfactory rating on his performance evaluation, and Claimant resigned before finding out the final decision on what discipline the school board intended to take. Although Claimant may have reasonably believed that the school board would terminate his employment at the conclusion of the hearing process, his belief, even if supported by an attorney's opinion, does not translate into an imminent discharge. Only a school board has the authority to discharge a teacher, and a looming recommendation that the school board terminate Claimant's employment does not provide sufficient immediacy and finality to constitute cause of a necessitous and compelling nature.

Thus, because Claimant resigned before a recommendation was made to the school board to terminate Claimant's employment, we cannot conclude that the Board erred in determining that Claimant did not have a necessitous and compelling cause to voluntarily quit his employment. Claimant is, therefore, ineligible for benefits under Section 402(b) of the Law.

Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Harold A. Murock II,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1415 C.D. 2009
	:	
	:	
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 12th day of March, 2010, the order of the Unemployment Compensation Board of Review is affirmed.

P. KEVIN BROBSON, Judge