IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kelli J. Fritzley,	:	
Petitioner	:	
v.	:	No. 1696 C.D. 2010
	:	Submitted: April 8, 2011
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** August 3, 2011

Kelli J. Fritzley (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed a decision of an Unemployment Compensation Referee (Referee), denying her benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1] Claimant argues that the Board erred in concluding that Claimant did not have cause of a necessitous and compelling nature to voluntarily resign her position. For the reasons set forth below, we affirm the Board's order.

Claimant applied for unemployment compensation benefits after she voluntarily quit her position at Giant Eagle (Employer). The Indiana UC Service Center (Service Center) issued a determination finding Claimant ineligible for

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

benefits under Section 402(b) of the Law. Claimant appealed the Service Center's determination to the Referee. An initial hearing was held before the Referee, but the proceedings were continued due to time constraints.[2] (Certified Record (C.R.), Item 15.) A second hearing was then held on February 17, 2010, and the Referee issued a decision dated February 19, 2010, denying Claimant benefits under Section 402(b) of the Law. (*Id.*, Items 22 & 23.)

At the initial evidentiary hearing, Claimant testified to the circumstances surrounding her voluntary termination of employment. (*Id.*, Item 15.) Claimant testified that she was hired by Employer to work in the gourmet foods section for the daylight shift. (*Id.*) Claimant's employment began on November 10, 2008. (*Id.*) During the initial ten months of employment, Claimant worked three or four days per week, no later than 3:30 p.m., because she provided care for her children after school. (*Id.*) Claimant testified that she was mistreated by a new manager in her department, and, after reporting her complaints to Amy Smolnik (Store Manager), she was moved to a different department which resulted in a schedule change. (*Id.*) In the new department, Claimant was scheduled to work until 5:00 p.m., but she testified that she believed this change was only temporary. (*Id.*) After the schedule change, Claimant was able to make temporary childcare arrangements, but she could not find a long-term solution because daycare was too expensive and family members were unavailable to assist on a permanent basis. (*Id.*) Claimant testified that she repeatedly informed her manager that she could not work until 5:00 p.m. due to childcare issues. (*Id.*)

[2] Prior to the second hearing, the Referee issued a decision dated January 28, 2010, reversing the Service Center's determination and granting Claimant benefits under Section 402(b) of the Law. (*Id.*, Item 16.) Employer appealed this determination based on the Referee's failure to hold an additional hearing, and the Referee vacated her January 28, 2010 decision. (*Id.*, Item 17 & 18.)

Each time, the manager asked her to give it two more weeks to see if Employer could accommodate her schedule. (*Id.*) Employer accommodated Claimant's schedule change request for a thirty-day period after her home was burglarized; however, Claimant testified that after the thirty-day accommodation period ended, Employer returned to scheduling Claimant until 5:00 p.m., despite her continued childcare issues. (*Id.*) Thereafter, Claimant filed a grievance with her union because she wanted to return to her job in gourmet foods and return to her prior work hours. (*Id.*) Claimant testified that after the grievance hearing, the Store Manager informed her that Employer was unable to accommodate her schedule change request. (*Id.*) Claimant testified that she worked a few days after the grievance hearing, but that she could not work until 5:00 p.m. because she had no choice but to be at home when her children arrived home from school. (*Id.*) She was, therefore, forced to quit her job. (*Id.*) Claimant testified that she did not tell Employer that she was available to work until 5:00 or 6:00 p.m. (*Id.*)

At the initial hearing, Employer presented the testimony of Sherri Snedeker (Human Resources (HR) Manager) in support of its position. The HR Manager testified that, in response to Claimant's request, Claimant was transferred to a cashier position because she was having difficulty working with the new manager in gourmet foods, and that Claimant was never told the move was temporary. (*Id.*) She also testified that the availability that Claimant listed at hire was 8:00 a.m. to 7:00 p.m., and that prior to her move to the new department, Claimant advised the HR Manager that she was available to work until 5:00 p.m. (*Id.*) The HR Manager testified that about a week-and-a-half after Claimant transferred departments, she asked to change her availability, but Employer was not able to accommodate that change because the shifts were not available. (*Id.*)

The HR Manager testified that Claimant's last day of work was November 3, 2009, which was the day after the grievance hearing, and that Claimant left work early due to being sick. (*Id.*) She reported that Claimant called-off on November 6, 2009, and that she was a no call/no show for her scheduled shifts on November 7, 9, and 11th. (*Id.*) Finally, the HR Manager testified that a decision was never reached on the grievance issue because Claimant stopped coming to work. (*Id.*)

At the second hearing, Employer presented the testimony of Travis Coon (Front End Manager), the Store Manager, and Beth Harmon (Confidential Co-Manager) in support of its position. (*Id.*, Item 22.) The Front End Manager testified that Claimant spoke to him several times about her scheduling concerns and that she was accommodated for a thirty-day period. (*Id.*) The Front End Manager testified, however, that Employer could not accommodate Claimant's schedule permanently because the shifts Claimant requested were not available. (*Id.*) He testified that he did not tell Claimant that she was not permitted to call off or leave early unless she had good cause. (*Id.*)

The Store Manager testified that Claimant told her that she was available to work until 5:00 p.m. when she was initially transferred to the cashier position. (*Id.*) The Store Manager testified that she was present at the grievance proceeding which addressed Claimant's availability, and that a decision was never reached because Claimant voluntarily quit her job. (*Id.*) She testified that the Corporate Human Resources Manager informed the union that he would advise them of his decision and that this process normally takes about seven to ten days. (*Id.*) The Store Manager also testified that she did not tell Claimant that the result of the grievance proceeding was that Employer could not accommodate Claimant's schedule change. (*Id.*) To the contrary, the Store Manager testified that she did

not know the outcome of the grievance. (*Id.*) The Confidential Co-Manager testified that Claimant did not call and speak to her on the no call/no show days. (*Id.*) She testified that an employee cannot be stopped from leaving early, and that if an employee leaves early, she goes through a five-step progressive discipline process. (*Id.*) The Confidential Co-Manager testified that Claimant did not have any previous infractions in this process, and Claimant could have used this process to either leave early or call-off. (*Id.*)

The Referee ultimately determined that Claimant lacked necessitous and compelling cause for leaving her employment because she did not exhaust all options prior to quitting her employment. (*Id.*, Item 23.) Claimant appealed to the Board, which issued an order affirming the Referee's determination.[3] (*Id.*, Item 29.) The Board adopted the Referee's findings, as follows:

> 1. Claimant was employed part-time for Giant Eagle as a gourmet food preparer/cashier from November 10, 2008 through November 3, 2009, earning $7.55 per hour.
>
> 2. Claimant had been working in the prepared foods department from around 8:00am until approximately 2:00 or 3:00pm three or four days per week.
>
> 3. Around July 2009, Claimant began having issues with the new manager of her department.
>
> 4. After Claimant made several complaints regarding the new department manager, Claimant agreed to be transferred temporarily to work as a cashier at the front end of the store.
>
> 5. Effective September 8, 2009, Claimant started her new position where she was sometimes scheduled to work until 5:00pm.

[3] The Board adopted and incorporated the Referee's findings and conclusions, and it affirmed the Referee's decision with modifications.

6. Claimant worked scheduled shifts until 5:00pm for approximately four weeks.

7. During this time, Claimant was able to make temporary daycare arrangements for her eleven, seven, and five-year-old children, but was unable to find cost effective permanent care.

8. Claimant requested that she not be scheduled past 3:30pm due to childcare issues.

9. Claimant's request was initially denied due to operational needs and that the scheduling was based on Claimant's listed available hours at hire.

10. On or around October 1, 2009, Claimant's home was burglarized and Employer agreed to a 30-day accommodation of Claimant's requested scheduled work hours.

11. Claimant filed a grievance to change her available hours from 5:00pm to 3:30pm and a hearing was held on November 2, 2009.

12. Claimant was informed at the grievance hearing that a decision regarding her hours would be issued within seven to ten days.

13. On November 3, 2009, Claimant left work early due to being sick.

14. Claimant called off for her scheduled shift on November 6, 2009.

15. Claimant was a no call/no show for her scheduled shifts on November 7, 9, and 11, 2009.

16. The grievance issue was never resolved because Claimant stopped showing up to work.

17. Claimant voluntarily quit due to her change in scheduled hours.

(*Id.*, Item 23 & 29.)

Based upon those findings, the Board determined that Claimant failed to establish cause of a necessitous and compelling nature to voluntarily terminate her employment and is ineligible for benefits under Section 402(b) of the Law. (*Id.*) The Board found credible that the change in hours became onerous to Claimant and noted that Claimant made several reasonable efforts to preserve the employment, but the Board determined that Claimant did not exhaust all options as she quit prior to receiving an outcome from the grievance hearing. (*Id.*, Item 23.) The Board further explained that it found credible Employer's testimony that the Store Manager never told Claimant that her grievance was going to be denied. (*Id.*, Item 29.) The Board determined that Claimant was required to make a reasonable effort to preserve the employment relationship, and the Board also specifically concluded that good faith required that Claimant at least wait until the outcome of the grievance proceeding before she quit her position.[4] (*Id.*)

On appeal,[5] Claimant argues that (1) Claimant had necessitous and compelling reasons for quitting her employment, (2) the Board erred when it determined that Claimant did not act in good faith to preserve her employment, and

---

[4] The Board dismissed Claimant's due process concerns and determined that Claimant was not prejudiced by the Referee's reversal of her initial ruling and by the Referee holding a second hearing. Accordingly, the Board denied Claimant's request that the record be remanded for additional testimony. Although Claimant raised this issue in her petition for review, Claimant did not address the issue in her brief. Claimant, therefore, waived the issue before this Court. *Tyler v. Unemployment Comp. Bd. of Review*, 591 A.2d 1164 (Pa. Cmwlth. 1991) (holding when claimant appeals issue but fails to address issue in his brief, issue is waived).

[5] This Court's standard 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).

(3) the Board applied the wrong standard in evaluating childcare problems for purposes of 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. Whether a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to this Court's review. *Wasko v. Unemployment Comp. Bd. of Review*, 488 A.2d 388, 389 (Pa. Cmwlth. 1985). 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. Cmwlth. 1998), *appeal 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. *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

Claimant first argues that she had a necessitous and compelling reason to quit her employment because her work schedule conflicted with her childcare responsibilities. The inability of a parent to care for her child may constitute a necessitous and compelling reason for terminating employment. *Ganter v. Unemployment Comp. Bd. of Review*, 723 A.2d 272 (Pa. Cmwlth. 1999). Typically, "in order to prove a necessitous and compelling reason to quit, a claimant must establish that he or she *exhausted all other alternative* childcare

arrangements, such as a concerted effort to find another baby-sitter or find a suitable day care center." *Beachem v. Unemployment Comp. Bd. of Review*, 760 A.2d 68, 72 (Pa. Cmwlth. 2000) (emphasis added) (citing *Truitt v. Unemployment Comp. Bd. of Review*, 527 Pa. 138, 589 A.2d 209 (1991)). Claimant argues that because the Board found her childcare problems to be "onerous" and determined that she made several reasonable efforts to secure childcare, she met her burden to prove eligibility under Section 402(b) of the Law.[6] *Truitt* and its progeny established that a claimant must *exhaust all other alternative* childcare arrangements before cause to quit becomes necessitous and compelling. *Beachem*, 760 A.2d at 72; *Shaffer*, 928 A.2d at 394. In addition, these cases make clear that in connection with the employee's duty to seek alternative childcare arrangements, the employee also has a duty to attempt to arrange a different schedule with the

[6] Claimant relies heavily on *Truitt* in her brief for the proposition that she need only make reasonable efforts in finding childcare to preserve her employment. In *Truitt*, the claimant was a single mother raising two children ages thirteen and nine and working fluctuating shifts. Her regular babysitter, her mother, became unavailable after an injury. Before her next scheduled shift, the claimant conducted a search for a replacement, which was unsuccessful. She also informed the employer of her predicament and asked to have her schedule changed to daytime only, but the employer refused. She was not entitled to leave, vacation, or sick time. The Supreme Court reversed the prior order, thereby granting the claimant benefits. In so doing, the Supreme Court noted that the claimant attempted to find childcare and sought to arrange a different schedule with her employer, but to no avail. The Supreme Court reasoned that there was nothing more that we can or should ask of an employee before that employee terminates his or her employment.

Contrary to Claimant's argument, at least two cases since *Truitt* have articulated this standard as requiring a claimant to prove that he or she "exhausted all alternative childcare arrangements" before cause to quit becomes necessitous and compelling. *Beachem*, 760 A.2d at 72; *Shaffer v. Unemployment Comp. Bd. of Review*, 928 A.2d 391, 394 (Pa. Cmwlth. 2007). For this reason, we can also dispose of Claimant's third argument that the Board erred when it applied an "exhaust all options" standard as compared to a "reasonable efforts" standard with regard to childcare issues leading to a necessitous and compelling cause to quit. For the reasons discussed above, we discern no error.

employer. *Truitt*, 527 Pa. at 143, 589 A.2d at 210. Claimant initiated a formal process in an attempt to arrange a different schedule with Employer, but she failed to see this process through to its conclusion. Claimant failed to act with ordinary common sense or as a reasonable person would act under similar circumstances when she quit prior to receiving the results of the grievance hearing. If the results of the grievance hearing were favorable, Claimant's schedule would have been accommodated and her childcare issues would have been resolved. The Board, therefore, did not err when it determined that Claimant did not have a necessitous and compelling cause to quit because she did not exhaust all her options.

This brings us to Claimant's second, but related, argument that the Board erred when it determined that Claimant did not act in good faith to preserve her employment. Claimant contends that she demonstrated good faith by arranging for a temporary solution while searching for long-term childcare and by repeatedly raising her scheduling concerns with Employer. We find no error in the Board's conclusion that Claimant failed to make a good faith effort to preserve her employment. Employer and Claimant's union held a grievance hearing on Claimant's behalf in order to address Claimant's concern with her schedule change. Claimant then quit her position without waiting to learn the results of that grievance hearing. Good faith in preserving the employment relationship would have included waiting for the outcome of the grievance hearing.[7]

Claimant argues that during the seven to ten day time period that she had to wait for the hearing results, she still did not have childcare and was left with

[7] *See Craighead-Jenkins v. Unemployment Comp. Bd. of Review*, 796 A.2d 1031, 1033-34 (Pa. Cmwlth. 2002) (holding that claimant failed to make good faith effort to preserve employment because she resigned while employer was preparing to take action on claimant's concerns).

no other option but to quit her position. In an unemployment case, the Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 272, 501 A.2d 1383, 1386 (1985). The Board is the also empowered to resolve conflicts in the evidence. *DeRiggi v. Unemployment Comp. Bd. of Review*, 856 A.2d 253, 255 (Pa. Cmwlth. 2004). Here, the Board resolved any conflicts in testimony in favor of Employer. (C.R., Item 29.) Employer credibly testified that Claimant was never informed that she could not leave early or call off unless she had good cause. Consequently, Claimant could have left early or called off work if she was unable to make temporary childcare arrangement during those few days that she was scheduled to work between the hearing and when the results were due. Employer also credibly testified that Employer had a multistep disciplinary procedure for dealing with call offs which Claimant could have utilized in lieu of working until 5:00 p.m. on those days prior to the results of the grievance hearing.

Further, there is no merit to Claimant's argument that it would have been futile for Claimant to wait and learn the outcome of the grievance hearing because the grievance was to be decided by Employer, not a neutral arbitrator. While this Court has never required a claimant to perform a futile act, a reasonable effort to preserve employment is required. *Mauro v. Unemployment Comp. Bd. of Review*, 751 A.2d 276, 279 (Pa. Cmwlth. 2000). There is no evidence in the record to suggest that waiting for the results of the grievance proceeding would have been futile. The Board rejected Claimant's testimony and accepted Employer's testimony that the Store Manager did not tell Claimant that her grievance was going to be denied. There is no evidence to suggest that Employer was not fully

and fairly considering the grievance. Therefore, the Board did not error when it determined that Claimant did not make reasonable efforts to preserve the employment relationship and did not act in good faith when she quit prior to receiving the outcome of the grievance proceeding.

Accordingly, the order of the Board is affirmed.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kelli J. Fritzley,	:	
Petitioner	:	
v.	:	No. 1696 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 3rd day of August, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

P. KEVIN BROBSON, Judge