

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maureen Lynch,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 175 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: June 4, 2010
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: September 1, 2010

Maureen Lynch (Claimant), pro se, petitions for review of the order of the Unemployment Compensation Board of Review (Board), which reversed a Referee’s determination finding Claimant not disqualified from receiving benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ The Board found Claimant ineligible for benefits because it concluded that she voluntarily terminated

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(b). Section 402(b) provides, in relevant part, that an employee will be ineligible for benefits for any week “[i]n which [her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” Id.

her employment with Swineford Bank (Employer) without having cause of a necessitous and compelling nature. On appeal, Claimant asserts that the Board erred in denying her benefits on those grounds. For the reasons set forth below, we affirm.

Claimant was employed as a part-time bank teller for Employer from April 7, 2008 until June 8, 2009, the date she resigned from her position. Claimant applied for unemployment compensation benefits, which the Unemployment Compensation Service Center (Service Center) denied on the grounds that Claimant voluntarily quit her employment without cause of a necessitous and compelling nature. Claimant appealed, and the Referee held a hearing on September 11, 2009, attended by both Claimant and representatives of Employer.

Claimant testified and presented documentary evidence² in support of her entitlement to benefits. Claimant stated that she resigned her employment because she felt she was being harassed, targeted, and discriminated against, feelings she discussed with Employer before resigning. (Hr'g Tr. at 5, 7.) She indicated that she had filed a complaint with the Pennsylvania Human Relations Commission (Commission). (Hr'g Tr. at 7.) Claimant described the multiple meetings she had with Employer's representatives regarding the overall work performance of the employees of the bank branch where Claimant worked, as well as meetings about

² Claimant's documentary evidence consisted, in relevant part, of: (1) a typed complaint, dated August 15, 2009, which she purportedly filed with the Pennsylvania Human Relations Commission (Commission), setting forth allegations of disparate treatment and retaliation, (Claimant Ex. C1); (2) copies of the various warnings she received from Employer and her rebuttal statements to those warnings, (Claimant Examples 1, 4, 6, and Exs. C2-C3); (3) Claimant's yearly evaluation, revealing a score of 2.23 out of 5.00, which constitutes a "Fair" job performance rating, (Claimant Example 7); and (4) a copy of Employer's check cashing policy, (Claimant's Example 2).

specific complaints and verbal warnings Claimant received about her own work performance. (Hr’g Tr. at 8-13.) She claimed that, at a May 22, 2009 meeting with assistant branch manager Nicole Sovic, she asked if she was being targeted, and Ms. Sovic advised her that her circumstance with Employer was “very special.” (Hr’g Tr. at 12.) Claimant testified that, at a May 26, 2009 meeting with Employer’s vice-president of Human Resources James K. Fahs, she asked if she was going to be discharged, and Mr. Fahs responded that “[i]t definitely appears to be in that direction.” (Hr’g Tr. at 12.) Claimant stated that: she told Mr. Fahs that she did not want a discharge on her employment record; she and Mr. Fahs agreed that she would resign; and Mr. Fahs had her sign a resignation form.³ (Hr’g Tr. at 12-13.)

Employer offered the testimony of Mr. Fahs and Ms. Sovic. Mr. Fahs recalled the May 26, 2009 meeting, stating that Claimant and her husband arrived unannounced and indicated that Claimant would resign if Employer would not give her a negative reference. (Hr’g Tr. at 15.) Mr. Fahs stated that he advised Claimant that Employer only gave out very basic information when contacted for a reference, i.e., it confirms that the person worked there, the position the person held, and the dates the person worked for Employer. (Hr’g Tr. at 15.) With regard to Claimant’s assertions that she was being singled out or harassed, and that she was unsure whether she was going to be discharged, Mr. Fahs testified that Employer had concerns regarding Claimant’s job performance based on customer complaints and work errors and that, “while [Claimant] fe[lt] that she might have been targeted,

³ Claimant’s husband, who was present at the May 26, 2009 meeting, testified, *inter alia*, that Claimant’s resignation was mutually agreed upon and that Claimant was to receive a positive reference. (Hr’g Tr. at 14.)

[there were] factual problems, errors that we have found in her work that were presented to her.” (Hr’g Tr. at 16.) He further testified that Claimant was on “final warning” status and, therefore, her employment was in jeopardy. (Hr’g Tr. at 15-16.) However, he indicated that Employer gave Claimant thirty days from a May 14, 2009 final warning meeting to respond to Employer’s concerns and improve her work performance. (Hr’g Tr. at 15-16.) Mr. Fahs stated that Claimant resigned before the expiration of that period and that Employer did not solicit Claimant’s resignation. (Hr’g Tr. at 16, 29.)

Ms. Sovic acknowledged that Claimant had complained to her about being singled out, but she explained to Claimant that all the tellers were being treated the same way. (Hr’g Tr. at 17.) Ms. Sovic explained that it may have appeared to Claimant that she was being singled out because she was not aware of the counseling that other tellers were receiving. (Hr’g Tr. at 17.) Moreover, she stated that there were situations where the entire staff was formally reprimanded for work performance issues. (Hr’g Tr. at 24.) Ms. Sovic agreed with Mr. Fahs that, in addition to customer complaints, there were several mistakes in, and performance issues with, Claimant’s work and that Claimant was made aware of these mistakes and performance issues. (Hr’g Tr. at 18.) Ms. Sovic testified that she discussed the mistakes, performance issues, and customer complaints with Claimant personally. (Hr’g Tr. at 18.) Ms. Sovic reiterated that she disagreed with Claimant’s allegations that Claimant was being targeted. (Hr’g Tr. at 18.) Ms. Sovic testified that, with regard to Claimant’s harassment claims, there were customer complaints of being harassed by Claimant and that she counseled Claimant on the issue, but did not take disciplinary action. (Hr’g Tr. at 21-22.)

Following the hearing, the Referee issued findings of fact and concluded that, because Claimant reasonably believed that her job was in jeopardy and because Employer influenced Claimant's decision to resign from her position, Claimant was not ineligible for benefits under Section 402(b) of the Law. (Referee Decision and Order at 2.) Accordingly, the Referee reversed the Service Center's denial of benefits in a decision and order dated September 22, 2009. Employer appealed that decision to the Board on September 28, 2009. After considering the record developed before the Referee, the Board issued the following findings of fact.

1. [Claimant] was last employed as a part-time teller by [Employer] from April 7, 2008, at a final rate of \$9.67 per hour and her last day of work was June 8, 2009.
2. In October of 2008, [Employer] had a meeting with all employees about improving performance and complying with procedures.
3. On March 9, 2009, [Claimant] received her annual evaluation with a rating of meets minimum job requirements and suggestions for improvement.
4. On April 3, 2009, [Employer] again had a meeting with all the employees about improving performance.
5. On April 15, 2009, a customer complained about [Claimant] and [Claimant] was verbally counseled about the complaint.
6. On May 14, 2009, [Claimant] received a final warning and an action plan for improvement with a follow up date of June 14, 2009.
7. On May 22, 2009, Claimant received another counseling session regarding her performance.
8. On May 26, 2009, [Claimant] met with [Mr. Fahs] about her employment situation.
9. [Mr. Fahs] confirmed that [Employer] had concerns about [Claimant's] work and acknowledged that it could result in termination.

10. [Claimant] asked if she would receive a good recommendation if she resigned.

11. [Mr. Fahs] stated that upon request from potential employers, [Employer] confirms that the employee worked there and the dates that the employee worked [for Employer].

12. On May 26, 2009, [Claimant] submitted her letter of resignation and voluntarily terminated her employment effective June 8, 2009.

(Board Decision, Findings of Fact (FOF), ¶¶ 1-12.) The Board noted that there were conflicts between Claimant's testimony and the testimony of the witnesses for Employer, and it resolved those conflicts, in relevant part, in Employer's favor, finding Employer's witnesses credible. (Board Decision at 2.) Based on these findings of fact and credibility determinations, the Board held that Claimant voluntarily resigned her position with Employer and, therefore, bore the burden of proving that she had necessitous and compelling cause for doing so. The Board noted that, where an employee resigns to avoid the mere possibility of dismissal, the separation will be considered voluntary.⁴ Pointing out factors such as: the various counseling sessions Claimant underwent regarding her job performance, as did other employees; Employer's position that Claimant could have been discharged if its concerns about Claimant's work performance went unaddressed; Claimant's resignation submitted three weeks before her performance was to be reassessed; and Claimant voluntarily resigning after learning that Employer would confirm only basic

⁴ In contrast, where an employee resigns in the face of *imminent* dismissal, the employee's discharge will be considered involuntary, which requires the employee's entitlement to unemployment compensation benefits to be determined under Section 402(e) of the Law, 43 P.S. § 402(e). Fishel v. Unemployment Compensation Board of Review, 674 A.2d 770, 772-73 n.2 (Pa. Cmwlth. 1996).

facts of Claimant's employment with potential new employers, the Board concluded that there was insufficient evidence that Claimant's discharge was imminent and that Claimant voluntarily resigned her position without cause of a necessitous and compelling nature. (Board Decision at 2-3.) Accordingly, the Board reversed the Referee's determination and concluded that Claimant was disqualified from receiving benefits. Claimant now petitions this Court for review.⁵

On appeal, Claimant basically argues that the Board erred in: (1) reversing the findings of fact of the Referee; and (2) holding that she did not have cause of a necessitous and compelling nature to resign where she was forced to resign because Employer was harassing her, singling her out, and discriminating against her because of her age.⁶

⁵ In unemployment compensation proceedings, our review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether an error of law was committed. Fishel, 674 A.2d at 772.

⁶ Specifically, Claimant sets forth her issues as follows:

1.) On 1/19/2010, why did the [Board] reverse the previous referee decision, which was supported by documentation and submitted by the Claimant? Hearing of 9/11/2009, Referee Decision agreed documentation submitted, combined with Respondent statements, supported Claimant complaints of discrimination/harassment/influential practices, Unemployment Compensation awarded.

2.) How did the [Board] not concur with the PA Human Relations Commission findings for Discrimination practiced in the workplace, based on exact same documentation submitted by Claimant. Documentation submitted and received by all agencies. Statement made at Hearing, 9/11/2009.

(Continued...)

Claimant first asserts that the Board erred in reversing the Referee's findings of fact and decision when it held in Employer's favor. However, it is well settled that the Board, not the Referee, is the ultimate fact finder in unemployment compensation proceedings. Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). As the fact finder, the Board resolves questions of credibility and the evidentiary weight to be given to conflicting testimony, and those determinations are not subject to appellate review. Id. We recognize that, where the Board's findings of fact and credibility determinations differ from the Referee's, the Board must offer an explanation for its reasoning. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 273-74, 501 A.2d 1383, 1387 (1985). However, where, as here, there is conflicting testimony in the record, the reason for the Board's rejection of a referee's findings is clear from the record, i.e., they are based on the Board's own credibility determination. Id. That is precisely what

3.) How did the latest decision by the [Board] not concur with the dual charges of Discrimination and Harassment Complaints, filed by the PA Human Relations Commission, against Swineford National Bank, LLC?

4.) Why is Swineford Bank acting in a retaliatory manner?

1/12/2010: Discrimination/Harassment Complaints withdrawn with a Confidential Settlement, offered by retained counsel for Swineford National Bank, accepted by Claimant, and understood to be closed.

1/19/2010 Swineford Bank initiated another appeal against unemployment decision.

(Claimant's Br. at Statement of Questions Involved.) With regard to the fourth issue, we note that Employer filed its appeal from the Referee's decision on September 28, 2009, not on January 19, 2010. In fact, the latter date is when the Board issued its decision reversing the Referee's determination. As pointed out by the Board in its brief, "Employer had no control over the timing of the Board's decision." (Board's Br. at 2.) Thus, we conclude that Claimant's fourth argument is without merit. Moreover, to the extent that Claimant asserts that Employer retaliated against her simply by appealing the Referee's determination, that argument likewise is without merit. As the party aggrieved by the Referee's determination granting Claimant benefits, Employer had the right under the Law to appeal that determination to the Board.

happened here. The Referee chose to believe Claimant and her version of the events, but the Board chose to credit Employer's evidence. This is not error, id.; Stringent, 703 A.2d at 1087, and we will not reverse the Board's determination on these grounds.

Moreover, the Board's findings of fact are conclusive on appeal as long as they are supported by substantial evidence⁷ in the record. Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 599, 827 A.2d 422, 425 (2003). In making this determination, we "must view the record in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Stringent, 703 A.2d at 1087. Our review of the record reveals that the Board's findings are supported by substantial evidence in the form of Mr. Fahs' and Ms. Sovic's credited testimony as set forth above and in Claimant's own documentary evidence, which supports the dates of the meetings and warnings Claimant received from Employer's representatives. (See Claimant Examples 1, 4, 6, and Exs. C2-C3.) Accordingly, the Board's findings of fact are supported by substantial evidence in the record and are binding on this Court. Grieb, 573 Pa. at 599, 827 A.2d at 425.

We next address Claimant's contention that the Board erred in holding that she was ineligible for benefits because she did not establish that she had cause of a necessitous and compelling nature to resign. Claimant asserts that she had cause of a

⁷ Substantial evidence is defined "as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Peak, 509 Pa. at 275, 501 A.2d at 1387 (quoting Murphy v. Department of Public Welfare, 480 A.2d 382, 386 (Pa. Cmwlth. 1984)).

necessitous and compelling nature to resign because she was being singled out and was subjected to ongoing harassment and age discrimination, as found by the Referee. In support of her argument, Claimant attaches numerous documents to her brief, which were not part of the record before the Board.

Initially, we note that the Referee concluded that Claimant resigned believing that her job was *in jeopardy* and, therefore, was not ineligible for benefits under Section 402(b) of the Law. However, a claimant's belief that her job was "in jeopardy" is not the correct legal standard to use to determine whether she is eligible for benefits. Rather, if she quits in the face of "imminent discharge," she is considered to have been terminated and, thus, eligible for benefits. Fishel v. Unemployment Compensation Board of Review, 674 A.2d 770, 772-73 n.2 (Pa. Cmwlth. 1996).⁸ "To be interpreted as a discharge, an employer's language must possess the immediacy and finality of firing." Id. at 772. Moreover, a claimant who resigns to avoid the mere possibility of discharge is considered to have voluntarily quit her employment and is, thus, not eligible for benefits. Id. Applying the proper

⁸ In Fishel, this Court affirmed the Board's denial of benefits where the claimant, a teacher, was advised by a school administrator that he was recommending to the school board that she be dismissed from her employment based on her unsatisfactory performance. Id. at 771-72. According to the claimant, that administrator indicated "that she should submit her resignation or face formal termination"; the teacher resigned. Id. at 772. Concluding that it was the school board, not the administrator, that had the authority to discharge an employee after a formal hearing was held, the Board reversed a referee's grant of benefits. Id. On appeal, this Court agreed with the Board's denial of benefits, reasoning that "the outcome of [the administrator's] recommendation [to the school board] was far from certain" given that a formal hearing had to be held, a majority of the members of the school board had to vote to dismiss the claimant, and the claimant had the right to appeal her discharge. Id. at 773. Thus, we held that the claimant did not resign in the face of *imminent* discharge and, therefore, she voluntarily resigned without cause of a necessitous and compelling nature. Id.

standard, the Board held that Claimant was not in danger of imminent discharge when she resigned. We agree with the Board.

Here, the Board's findings of fact and the record evidence establish that Claimant, after being counseled on her work performance on multiple occasions, received a final warning on May 14, 2009 and was given thirty days to improve her performance or risk discharge. (FOF ¶¶ 2-7; Hr'g Tr. 8, 16; Ex. C-2, Example 4.) Subsequently, on May 26, 2009, Claimant met with Mr. Fahs to inquire about whether she was going to be terminated, and Mr. Fahs acknowledged that Claimant had received her final warning, that her job was in jeopardy pending her next performance review, but that Employer had not come to a conclusion as to her employment. (Hr'g Tr. at 15-16.) Before the expiration of the thirty days Employer gave Claimant to improve her work performance, however, Claimant resigned. We conclude that neither the May 14, 2009 final warning nor Mr. Fahs' comments to Claimant on May 26, 2009 had "immediacy and finality of firing" and, therefore, Claimant's discharge was not imminent in that she faced no more than the possibility of being fired. Accordingly, we conclude that the Board properly placed the burden on Claimant to establish her entitlement to benefits pursuant to Section 402(b) of the Law. Fishel, 674 A.2d at 722-23.

A claimant who voluntarily leaves her job will be ineligible for benefits unless she had cause of a necessitous and compelling nature for doing so. 43 P.S. § 802(b). It is the claimant's burden to prove the existence of such cause. Uniontown Newspapers, Inc. v. Unemployment Compensation Board of Review, 558 A.2d 627, 629 (Pa. Cmwlth. 1989). Cause of a necessitous and compelling nature is defined as:

“circumstances that produce pressure to terminate the employment which is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.” Empire Intimates v. Unemployment Compensation Board of Review, 655 A.2d 662, 664 (Pa. Cmwlth. 1995). The claimant must show that “she acted with ordinary common sense in quitting her job, that she made a reasonable effort to preserve her employment, and that she had no other real choice than to leave her employment.” Id.

Claimant argues that she is entitled to benefits because she was forced to quit where she was being harassed and singled out by Employer. Essentially, Claimant denies all allegations of poor work performance and contends that the warnings and discipline purporting to address those issues were made to harass her and single her out. However, the Board rejected Claimant’s assertion that she was singled out, noting that there were conflicts in the testimony which it resolved in Employer’s favor. (Board Decision at 2.) Claimant testified that she was being singled out and harassed, but Ms. Sovic indicated that several of the work performance meetings involved the whole bank branch and that other employees were also being counseled on their work performance. (Hr’g Tr. at 17-19, 22-23.) Furthermore, Ms. Sovic and Mr. Fahs both testified that Claimant was disciplined and counseled because of customer complaints and her poor work performance. (Hr’g Tr. at 16-18, 21-22.) Although the Board did not make a specific finding of fact that Employer did not single Claimant out, it did state that “Claimant was being counseled on her work performance, *as were other employees.*” (Board Decision at 2.) Additionally, the Board made several findings of fact reciting the multiple warnings and counseling sessions Claimant received due to work performance issues or complaints made

against her. (FOF ¶¶ 3-7.) Faced with conflicting testimony, the Board, as fact finder, credited Employer's version of the events that led up to Claimant's resignation rather than Claimant's version of the events. Accordingly, we are compelled to reject Claimant's contention that she had cause of a necessitous and compelling nature to quit her job because she was being harassed and singled out.

Finally, we note that Claimant's brief and arguments are largely focused on documents she has attached to her brief and statements about what purportedly occurred before the Commission, none of which are contained in the record that was before the Board. As an appellate Court, we are bound by the rules of appellate procedure, which prohibit us from considering documents and statements that were not presented to the Board. Pa. R.A.P. 1551 (stating that this Court's review shall be conducted on the record made before the governmental agency); Tener v. Unemployment Compensation Board of Review, 568 A.2d 733, 738 (Pa. Cmwlth. 1990). Therefore, we cannot consider these documents or statements. Moreover, even if we were to consider this improperly submitted information, those documents contain no Commission findings or determinations of discrimination on Employer's part.

Accordingly, we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Maureen Lynch,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 175 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, September 1, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge