

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jennifer M. Ziegler, :
Petitioner :
v. :
Unemployment Compensation Board :
of Review, :
Respondent :

: No. 2167 C.D. 2009
: Submitted: May 28, 2010

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: June 29, 2010

Jennifer M. Ziegler (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) affirming a decision of the Unemployment Compensation Referee (Referee) finding her ineligible for benefits under Section 402(b) of the Unemployment Compensation Law¹ (Law) because she voluntarily left her employment. Finding no error in the Board's decision, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). That section provides in pertinent part:

An employe shall be ineligible for compensation for any week –

(Footnote continued on next page...)

Claimant was employed with Holiday Inn Express (Employer) in Harrisburg as a full-time desk clerk since May 22, 2008. On May 17, 2009, she called Employer and requested the next three days off to attend her grandmother's viewing and funeral in Clarion, Pennsylvania. Employer asked Claimant to attempt to find another employee to cover her shifts for those days and to call back acknowledging that she had obtained coverage. Claimant never called Employer back and did not return to work as scheduled. As a result, her employment was terminated as of May 23, 2009.

Claimant filed an unemployment compensation claim alleging that she was involuntarily discharged for absenteeism. The Unemployment Compensation Service Center determined that Claimant voluntarily left her employment and found her ineligible for benefits under Section 402(b) of the Law because she failed to meet her burden of proving a necessitous and compelling reason for quitting. Claimant appealed this decision.

Before the Referee, Claimant testified that she spoke to Jim Gordon (Mr. Gordon), Employer's General Manager, on May 17, 2009. At that time, she informed him that her grandmother had passed away and that she needed to take off work on May 18, 19 and 20, 2009, in order to attend the viewing and funeral.

(continued...)

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in "employment" as defined in this act.

Mr. Gordon allegedly instructed her to call other employees and attempt to find a replacement, and if she could not find a replacement, she should not come back to work. According to Claimant, she called one of her co-workers to see if he could take her shifts, but she could not reach him. Claimant admitted that she was supposed to call Mr. Gordon back but never did so because she was too upset. Claimant admitted that Employer made several attempts to contact her while she was out of town to find out how everything was, but she did not answer her phone or return the calls. When she finally did speak to Mr. Gordon on May 20, 2009, he told her Employer was going to allow her to return to work and she agreed to work from 7:00 a.m. to 3:00 p.m. on May 21, 22 and 23, 2009. Claimant did not report to work on any of those days as scheduled because she “was hurt by the way [Mr. Gordon] spoke with me saying I had to find my own replacement and then not to come back before I spoke with him.” (Hearing Transcript at 7.)

Christian Hannon (Mr. Hannon), Employer’s Chief Engineer, testified that he made numerous phone calls to Claimant while she was out of town and after she failed to report back to work. He spoke to Claimant on May 21, 2009, at which time Claimant allegedly stated that she did not want to lose her job. Mr. Hannon informed Claimant that Mr. Gordon was willing to work with her and that she just needed to call him or come into the office to discuss the situation. Claimant indicated she would do so. Employer’s Sales Manager, Michael Bretz, also testified that he attempted to contact Claimant to find out if she was returning to work. He left several messages but Claimant never returned his calls. In closing, Mr. Gordon stated that Claimant was never terminated, that Employer

wanted to bring her back, and that Employer went above and beyond to make contact with her and retain her employment.

The Referee found that continuing work was available to Claimant on May 21, 22 and 23, 2009, and that Claimant was aware of this fact because Employer contacted her several times about reporting to work on those days. Claimant's reason for not returning to work was that she was hurt by Employer's actions and attitude in regard to her request for time off to attend her grandmother's funeral. The Referee determined that this was insufficient to meet the burden of establishing cause of a necessitous and compelling nature² and denied benefits under Section 402(b) of the Law. Claimant appealed to the Board, which affirmed the Referee's decision. This appeal followed.³

² Section 402(b) of the Law covers "voluntary quit" situations and provides that a claimant shall be ineligible for unemployment benefits when she voluntarily leaves work "without cause of a necessitous and compelling nature." 43 P.S. §802(b). The burden of proof in such cases rests upon the claimant to prove necessitous and compelling reasons for quitting. *Procito v. Unemployment Compensation Board of Review*, 945 A.2d 261, 266 (Pa. Cmwlth. 2008). Pennsylvania courts have held that in order to establish cause of a necessitous and compelling nature, a claimant must demonstrate that "circumstances existed which produced real and substantial pressure to terminate the claimant's employment; like circumstances would compel a reasonable person to act in the same manner; the claimant acted with ordinary common sense; and the claimant made a reasonable effort to preserve his or her employment." *Id.* at 264 (citing *Beachem v. Unemployment Compensation Board of Review*, 760 A.2d 68 (Pa. Cmwlth. 2000)).

³ The Court's scope of review in this matter is limited to determining whether there was an error of law or constitutional violation, whether any practice or procedure of the Board was not followed, and whether the necessary findings of fact are supported by substantial evidence. *Procito*, 945 A.2d at 262 n.1 (Pa. Cmwlth. 2008).

The only issue properly preserved on appeal⁴ is whether Claimant was discharged from her employment or voluntarily quit. The burden of proving the precise nature of the separation falls on the claimant, *Pennsylvania Liquor Control Board v. Unemployment Compensation Board of Review*, 648 A.2d 124 (Pa. Cmwlth. 1994), and courts must consider the totality of the circumstances surrounding the incident when determining the intent to quit. *Monaco v. Unemployment Compensation Board of Review*, 523 Pa. 41, 565 A.2d 127 (1989). The employer does not have to actually use terms such as “fired or “discharged,” *Wise v. Unemployment Compensation Board of Review*, 700 A.2d 1071 (Pa. Cmwlth. 1997), but its language must contain both the immediacy and finality of a firing in order for an employee to be considered discharged. *Keast v. Unemployment Compensation Board of Review*, 503 A.2d 507 (Pa. Cmwlth. 1986).

While Claimant alleges that Mr. Gordon told her that if she did not find a replacement that she should not come back to work, this is merely her preferred version of the events, and the Board did not find this testimony credible. Rather, in finding that she had not been discharged, the Board found Employer’s witnesses credible stating that they attempted to contact Claimant numerous times

⁴ Based on her version of the events, found not credible by the Board, Claimant alleges in her brief that the death of her grandmother constituted cause of a necessitous and compelling nature for her to quit her employment; however, she failed to raise this issue in her petition for appeal to the Board. In her petition for review to this Court, Claimant alleges only that she was discharged, stating “I think it’s wrong to be fired over a death in the family.” We have repeatedly held that failure to raise an issue before the Board or in a petition for review, even by a *pro se* claimant, constitutes waiver of that issue. See *McDonough v. Unemployment Compensation Board of Review*, 670 A.2d 749, 750 (Pa. Cmwlth. 1996); *Reading Nursing Center v. Unemployment Compensation Board of Review*, 663 A.2d 270, 275 (Pa. Cmwlth. 1995) (citing *Tri-State Scientific v. Unemployment Compensation Board of Review*, 589 A.2d 305 (Pa. Cmwlth. 1991)). Therefore, this issue will not be considered by this Court.

about when she was going to return to work. Also, Claimant admitted that when she spoke with Mr. Gordon on May 20, 2009, she agreed to work her scheduled shifts on May 21, 22 and 23, 2009, but never returned to work. Because substantial evidence supports the finding that Claimant voluntarily left her employment, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

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ORDER

AND NOW, this 29th day of June, 2010, the order of the Unemployment Compensation Board of Review, dated September 28, 2009, is affirmed.

DAN PELLEGRINI, JUDGE