

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keith F. Barnaby, :
Petitioner :
 :
v. : No. 2387 C.D. 2010
 : Submitted: February 25, 2011
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: August 26, 2011

Keith Barnaby (Claimant), *pro se*, petitions for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying his claim for benefits. In doing so, the Board affirmed the Referee’s determination that Claimant voluntarily quit his job without cause of a necessitous and compelling nature, which rendered him ineligible under Section 402(b) of the Unemployment Compensation Law (Law).¹ Finding no error, we affirm.

Claimant was employed as a litigation support specialist by Karasch Enterprises (Employer) from September 8, 2009, until April 30, 2010. After his

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). It provides, in relevant part, that “[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” 43 P.S. §802(b).

employment ended, Claimant sought unemployment compensation benefits. The Erie UC Service Center determined that Claimant was eligible for unemployment compensation benefits, and Employer appealed because Claimant quit his job voluntarily. Claimant asserted that he had necessitous and compelling reasons to quit because of Employer's failure to pay him commissions it owed, failure to give him earned vacation time and Employer's unethical conduct. A hearing was held before a Referee, at which both parties appeared and presented testimony.

Claimant testified that as a litigation support specialist, he was paid a salary plus a one percent commission each month on all litigation support sales. Claimant testified that Employer was taking deductions, improperly, from his gross sales figures, thereby reducing his commission. In January 2010, Employer agreed to stop those deductions. Claimant then asked the General Manager and Vice President for documentation on all his commissions, and he asked to be paid the commission that had been improperly reduced by the deductions. Claimant estimated that Employer had deducted \$11,000 or \$12,000 from his total sales, which meant that he was owed commissions in the amount of \$110 to \$120. The General Manager and Vice President promised to take up the matter with the CEO, but it was not resolved. Claimant explained that he did not speak directly to the CEO because he was following the "chain of command." Notes of Testimony, July 1, 2010, at 15 (N.T. ___).

The second reason for Claimant's resignation was Employer's refusal to give him vacation time that he had earned. However, Claimant was unable to state exactly how much vacation time he believed he was entitled to or how much time he had taken off while working for Employer.

Claimant's third reason for quitting was that Employer had acted unethically on two different occasions. In early March 2010, Employer told one of its employees, Laura, to stay out of sight when agents of the employment agency Employer used to hire Laura appeared at the workplace. Claimant inferred that Employer planned to tell the agency that Laura was no longer with Employer so that Employer would not have to pay the agency a placement fee. Claimant testified that he expressed this concern to the General Manager, who told him not to worry about it.

Then, in April 2010, Claimant prepared a memo for a pilot litigation support program to be undertaken for a potential client. In late April, the Vice President asked Claimant to turn the memo into a contract. Claimant refused because he believed Employer was attempting to create a phony contract. Three days later, the CEO instructed Claimant to insert contract language and sales figures into the memo. When Claimant asked why, the CEO responded that it was for the bank. Claimant again refused. Claimant believed Employer was going to submit the document to the bank as evidence of business volume that did not exist.

On Friday, April 30, 2010, Claimant e-mailed the CEO a letter of resignation, a copy of which Claimant offered as evidence. The letter gave no explanation for the resignation although it expressed a willingness to work two more weeks if Employer agreed to pay the commissions he was owed. Claimant also demanded a formal accounting and signed statement from the CEO showing how his commissions had been calculated. The letter stated that Employer had improperly deducted \$11,725 from Claimant's gross sales.

Claimant testified that the CEO responded with an e-mail stating that she would look into the matter on Monday morning and would like to meet with

him then. Claimant did not respond because the CEO had not agreed to pay commissions owed to him before he started his final two weeks.

Employer presented the testimony of its CEO, Linda Karasch. Karasch explained that she was the one who calculated commissions; therefore, any commission question had to be addressed to her. Karasch acknowledged that in January 2010, the General Manager and Vice President told her that Claimant was unhappy with the deductions being taken from his gross sales figures and, thus, she agreed, going forward, to stop the deductions. Karasch believed that the situation was resolved. Claimant did not tell her that he was dissatisfied with his vacation time, and Karasch believed that Claimant was given all vacation that he had earned. Karasch denied that Claimant was not able to bring complaints to her, explaining that she has an “open door policy.” N.T. 31. Karasch stated that she was pleased with Claimant’s work and would have addressed his problems had she known of them.

Karasch was completely surprised by Claimant’s resignation letter and claim that he had not been paid the proper amount of commission. Karasch could not tell from the letter whether Claimant believed Employer owed him over \$11,000 or one percent commission on that amount. Karasch responded to Claimant’s letter by asking him to meet with her to try to work things out, but Claimant refused. Karasch also pulled together a report detailing his monthly commissions and how they were calculated, and a chart showing how much paid time off Claimant earned and how much he used. Karasch sent Claimant the documentation and a check for \$50 in commission for sales he had made from September through December 2009. Claimant never responded. Karasch did not

believe Employer owed Claimant any commission, but she did not want Claimant to leave feeling mistreated.

Employer next presented the testimony of the Vice President, Audrey Greco, who was Claimant's direct supervisor. Greco testified that Claimant mentioned to her in February 2010 that he believed there was a problem with his commissions. Greco spoke with Karasch and thought the problem was resolved because she never heard anything further from Claimant. Claimant never said anything to Greco about problems with his vacation time. Greco recalled asking Claimant to draft an informal agreement, but Claimant refused because he believed she was asking him to draft an actual contract. Greco stated that after Claimant refused, she simply drew up the document herself and that was the end of it. Greco denied telling Claimant that he could not speak directly with Karasch about any problems. Like Karasch, Greco was surprised when Claimant abruptly left his employment.

Finally, Employer presented testimony from the General Manager, Dawn Simpson. Simpson testified that when Claimant complained to her about his commissions, she offered to set up a meeting with Karasch and Greco. Claimant declined, saying he would arrange a meeting with Karasch himself. Simpson testified that Claimant complained that he was not being credited with the proper amount of vacation time. Simpson advised Claimant that she believed he had been given the full amount of vacation time to which he was entitled.

After considering the evidence, the Referee found as follows. Claimant told Employer in January 2010 that he thought the deductions from his gross sales figures were unfair, and Employer agreed to stop making these deductions. However, at the time Claimant did not also request a recalculation of

his September to December 2009 commissions. When Claimant voiced concerns about his commissions to the Vice President and General Manager, he was told to talk to the CEO. Claimant did not do so. By April 16, 2010, Claimant had exhausted all paid leave he had earned, and was not entitled to any more. Although Claimant believed Employer was unethical in directing him to draft a contract, he did not address this concern to anyone. On April 30, 2010, Claimant resigned. He agreed to work through May 14, 2010, but only if Employer reimbursed him on Monday, May 3rd the past due commissions he felt were owed him and gave him a commission accounting. The letter did not mention an ethical issue or a vacation time issue. The CEO asked Claimant to meet with her to resolve Claimant's concerns, but he refused. Simply, because Employer would not pay the commission demanded up front without an investigation, Claimant did not return to work.

Based on these findings, the Referee denied benefits. The Referee concluded that Claimant quit because of job dissatisfaction, which is not a necessitous and compelling reason for leaving employment. The Referee further concluded that Claimant did not make a reasonable attempt to preserve his employment because Claimant resigned without ever trying to talk to the CEO, the one person who could properly resolve the commissions. Even when the CEO offered to meet with him, Claimant declined. Thus, the Referee ruled Claimant ineligible for benefits under Section 402(b).

Claimant appealed to the Board. The Board adopted the Referee's findings of fact and conclusions of law and affirmed the decision of the Referee. Claimant now petitions this Court for review.²

On appeal, Claimant essentially presents two issues for our consideration.³ First, Claimant asserts that Employer's witnesses were not believable and that the Board should not have based any findings of fact on their testimony. Second, Claimant argues that he had a necessitous and compelling reason to terminate his employment.

Turning to the first argument, Claimant contends that much of the testimony given by Employer's witnesses was "not credible," "implausible," and "illogical," while Claimant's testimony was "more reasonable." Claimant's Brief at 15, 20. Much of Claimant's brief points to evidence he submitted and argues his preferred version of events, not the facts found by the Board.

However, the Board is the ultimate fact finder and is entitled to make determinations regarding witness credibility and evidentiary weight. *Dumberth v. Unemployment Compensation Board of Review*, 837 A.2d 678, 681 (Pa. Cmwlth. 2003). Any conflict in testimony between an employer and a claimant is properly resolved by the Board. *Duquesne Light Company v. Unemployment Compensation Board of Review*, 648 A.2d 1318, 1320 (Pa. Cmwlth. 1994). Further, it is irrelevant whether the record contains evidence to support findings other than those made by the Board. *Ductmate Industries, Inc. v. Unemployment Compensation Board of Review*, 949 A.2d 338, 342 (Pa. Cmwlth. 2008). The critical inquiry is

² In unemployment compensation appeals, our scope of review is limited to determining whether the Board's adjudication is in violation of constitutional rights, whether errors of law were committed, or whether findings of fact are supported by substantial evidence. *Kirkwood v. Unemployment Compensation Board of Review*, 525 A.2d 841, 843 (Pa. Cmwlth. 1987).

³ Claimant lists three issues, but we have rephrased them for organizational purposes.

whether substantial evidence of record exists to support the findings that the Board actually made, which is such evidence as a reasonable mind might accept as adequate to support a conclusion. *Korpics v. Unemployment Compensation Board of Review*, 833 A.2d 1217, 1219 n.1 (Pa. Cmwlth. 2003). Where the record contains substantial evidence to support the Board's findings of fact, they are conclusive on appeal. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999).

It was solely within the Board's province to rely on the testimony of Employer's witnesses in making its findings of fact and, thus, the Board's findings are supported by substantial evidence. Despite the fact that Claimant would have liked the Board to make different factual findings, the findings that the Board actually made are binding on this Court.

Claimant's second argument is that the Board erred in concluding he did not have a necessitous and compelling reason to terminate his employment. Under Section 402(b) of the Law, a claimant who voluntarily terminates his employment without a necessitous and compelling reason is not entitled to unemployment compensation benefits. 43 P.S. §802(b). "Cause of a necessitous and compelling nature" is a broad term that has been defined as "circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner." *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 359, 378 A.2d 829, 832-33 (1977). In addition, the claimant must establish that he attempted to preserve the employment relationship by exhausting all reasonable alternatives before resigning. *Porco v. Unemployment Compensation Board of Review*, 828 A.2d 426, 429 (Pa. Cmwlth. 2003).

Claimant asserts three reasons why he had a necessitous and compelling reason to terminate his employment: the withholding of commissions owed to him, refusal to pay him vacation time earned, and the unethical conduct of other employees. The Board rejected the notion that Claimant quit because of vacation or ethical issues, pointing out that Claimant did not mention them in his resignation letter. Instead, the Board determined that Claimant quit for one reason: dissatisfaction with his commission statements. Therefore, Claimant's argument on commissions is the one we address.

Claimant contends that Employer's failure to pay commissions it owed him gave him a necessitous and compelling reason to quit. In support, Claimant cites to this Court's precedent wherein we held that an employee has a necessitous and compelling reason to terminate employment when an employer underpays or withholds wages from the employee, even if it is just one time. *See Emgee Engineering Company v. Unemployment Compensation Board of Review*, 373 A.2d 779 (Pa. Cmwlth. 1977) (claimants had a necessitous and compelling reason to quit where they were paid late on several occasions and the employer refused the claimants' request to guarantee timely payment of wages); *LaTruffe v. Unemployment Compensation Board of Review*, 453 A.2d 47 (Pa. Cmwlth. 1982) (claimant had a necessitous and compelling reason to quit where the employer wrongfully refused to pay a day's wages).

Claimant is correct that chronic late payment of wages or refusal to pay wages even one time can, in certain circumstances, constitute a necessitous and compelling reason to resign. However, in those late payment or non-payment cases, it was the employer's refusal to pay *after a request from the claimant* that

this Court found to constitute a necessitous and compelling reason to terminate employment.

Claimant brought his commission issue to the attention of the Vice President and General Manager. This may constitute an effort to preserve employment, but it is not a reasonable one because Claimant did not present the matter to the CEO. It was incumbent upon Claimant to do so because the CEO was the one individual who could have rectified the situation, as found by the Board. Claimant did not present the issue of commissions to the CEO until he resigned. The CEO requested a meeting with Claimant to resolve the commission issue, but Claimant refused to meet. By refusing to meet the CEO, Claimant failed to make a reasonable effort to preserve his employment. Therefore, the Board did not err in concluding that Claimant is ineligible for unemployment compensation benefits.⁴

Accordingly, we affirm the decision of the Board.

MARY HANNAH LEAVITT, Judge

⁴ Claimant also argues that the Referee erred in allowing Employer's Exhibit 2 into evidence at the hearing over Claimant's objection. Exhibit 2 is a lengthy printout of figures that CEO Karasch used to calculate Claimant's monthly commission. Exhibit 2 is irrelevant in light of our conclusion that Claimant failed to make a reasonable effort to preserve his employment.

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ORDER

AND NOW, this 26th day of August, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated September 27, 2010, is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge