

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jean A. Fletcher,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2411 C.D. 2009
	:	Submitted: April 9, 2010
Unemployment Compensation Board	:	
of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: June 30, 2010

Petitioner Jean A. Fletcher (Claimant) petitions *pro se* for review of two orders of the Unemployment Compensation Board of Review (Board), which reversed two Referee’s decisions and denied Claimant unemployment benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ For the reasons set forth below, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802 (b). Section 402(b) of the Law provides, in pertinent part, that an employee 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.”

Claimant was employed with Dushore Grocery, Inc. (Employer) as a deli worker until September 4, 2008, at which time a separation from employment occurred. Claimant applied for unemployment benefits and the Scranton UC Service Center (Service Center) found Claimant was ineligible for unemployment benefits under Section 402(b) of the Law.

Claimant appealed. Following a hearing, a Referee reversed the Service Center determination that Claimant was discharged and eligible for benefits. Employer appealed to the Board, which reversed and thereby denied Claimant unemployment benefits and determined that there was a non-fault overpayment of benefits.

During the hearing before the Referee, Claimant testified to the circumstances surrounding her separation from employment. Claimant testified that she began working at the store in 2002, and continued to work there until February of 2008. (C.R., Item 10 at 8, 12-13.) She also worked at the store from June of 2008 through September 4, 2008, her last day of employment. (*Id.* at 8.) On that day, after Claimant finished working in the meat room, she had a conversation with Justin Haas, Employer's Vice President. (*Id.* at 9-12). Claimant contends that Mr. Haas told her that she was not working out and that customers and employees were complaining about her. (*Id.*) Claimant testified that she told him that if he did not think that it could be worked out, she would resign. (*Id.*) He then asked her to put it in writing, so she wrote a note of resignation. When she went downstairs to get her schedule for the remaining two weeks, the schedule was not there. She telephoned later that day to ask about the schedule, but it was not available. She then responded by saying "I guess you want this to be my last day," to which she contends that Employer (possibly Mr. Haas) responded "I guess so."

(*Id.*) Claimant further testified that she liked her job and had no intention of leaving prior to her discussion with Mr. Haas. (*Id.*)

Employer presented the testimony of Kristen Gutosky, Employer's President. Ms. Gutosky testified that prior to September 4, 2008, there were two occasions where Claimant came in late or left early due to an unexplained family emergency. (C.R., Item 10 at 8, 13.) Additionally, she received numerous personal phone calls and was distracted from the position in the meat room for which she was being trained. (*Id.*) Because of these issues, Mr. Haas met with Claimant to discuss her job performance. Ms. Gutosky was present during the discussion. Ms. Gutosky testified that Mr. Haas explained to her that she need to let Employer know in advance if she was not going to leave work or find someone to fill in for her shift because it leaves the meat room without a person. Mr. Haas also stated that some of the employees, not customers, had complained about the number of telephone calls that Claimant received and that she was sometimes not in the meat room when she was supposed to be there. Ms. Gutosky testified that Claimant:

became upset with that and said well then I guess you just want me to quit. And we explained to her that no that wasn't the reason that we brought her up. It was just to straighten out and we had only been in business for a month so we were trying to make sure that we addressed all the issues. So she wasn't – she didn't want to stay at that point and Justin told her to please put it in writing. So Justin wrote the two-week notice part and she wrote my two-week notice is voluntary and signed it. The part that's added that she has not seen was after she called back he wrote that she called at 4:30 and said she wouldn't be back. I was working on the schedule at that particular time. It wasn't taken down for any other

reason other than to do the schedule and I don't have one with me but she was put on the following week's.

(*Id.* at 14).

Employer also presented the testimony of Mr. Haas, whose testimony was similarly to that of Ms. Gutosky. (*Id.* at 17-19.)

The Board made the following relevant findings of fact:

1. The claimant was last employed as a deli worker by the Dushore Grocery, Inc. from May 12, 2002 at a final rate of \$9.21 an hour and her last day of work was September 8, 2008.
2. The claimant was given a reprimand because of poor job performance related to absenteeism.
3. The claimant resented the reprimand.
4. The claimant quit her employment with two week [sic] notice.
5. The claimant then called the employer and asked where the schedule was for the next two weeks.
6. The employer told the claimant that the employer was still working on the schedule.
7. The claimant stated that things were not working out and then quit her employment immediately.
8. The claimant received benefits to which she was not entitled through no fault of her own.

(C.R., Item No. 13.)

Based upon these facts, the Board concluded that Claimant was ineligible for unemployment benefits because she voluntarily left her employment without establishing cause of a necessitous and compelling nature under Section 402(b) of the Law.

Claimant now appeals to this Court.² Claimant essentially argues that the Board erred when it determined that she was ineligible for unemployment benefits under Section 402(b) of the Law.³ Claimant initially contends that there was an involuntary separation from employment. Alternatively, Claimant argues that if this Court determines there was not an involuntary separation from her employment, then there was cause of a necessitous and compelling nature for her to quit her employment under Section 402(b) of the Law.⁴

² 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. 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 Section 804(b)(1) of the Law addresses "non-fault overpayment" and provides, in part, that "[a]ny person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year." 43 P.S. § 874(b)(1). Our review, however, reveals that Claimant does challenge, in her statement of questions involved, the Board's finding that she has a non-fault overpayment. The determination of non-fault overpayment, however, was favorable to Claimant. Moreover, that determination would be inapplicable if the Court were to determine that she is entitled to unemployment compensation benefits.

⁴ In her petition for review, Claimant challenges findings of fact numbers 1, 2, 3, 4, 6, 7, and 8, as being inaccurate and not supported by substantial evidence; yet, in her statement of the questions involved, Claimant raises only the issue of whether the Board erred in concluding that she was ineligible for unemployment benefits under Section 402(b) of the Law. Employer argues that because Claimant has not specifically challenged any of the Board's findings of fact in her statement of the questions involved that she has waived the right to challenge the findings of fact pursuant to Pa. R.A.P. 2116(a), thereby making the findings of fact conclusive on appeal. *Platz v. Unemployment Comp. Bd. of Review*, 709 A.2d 450, 452 (Pa. Cmwlth.), *allocatur denied*, 556 Pa. 699, 727 A.2d 1125 (1998). Although we agree that Claimant waived her challenge to the above findings of fact, we note that our review of the record reveals that the Board's findings of fact are supported by substantial evidence of the record as summarized above. Similarly, Claimant has waived any issue relating to the determination of a non-fault overpayment by failing to address this issue or provide any legal authority for her position in the **(Footnote continued on next page...)**

The Board is the ultimate finder of facts and has “the power to substitute its judgment for that of its referee on disputed facts.” *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 270, 501 A.2d 1383, 1385 (1985). Findings made by the Board are conclusive on appeal where the findings are supported by substantial evidence of record. *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 (Pa. Cmwlth. 2001). On appellate review, we must “examine the testimony in the light most favorable to the party in whose favor the Board has rendered its decision, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony, to see if substantial evidence for the Board’s conclusion exists.” *Taylor v. Unemployment Comp. Bd. of Review*, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

In this case, the record reveals that the Board resolved the conflicts in the testimony, in relevant part, in favor of Employer and found the testimony of Employer to be credible. (C.R., Item No. 13.) The law is clear that the Board is empowered to determine matters of witness credibility and evidentiary weight, and this Court is bound by such determinations on appeal. *Peak*, 509 Pa. at 272, 501 A.2d at 1386.

A claimant seeking unemployment benefits bears the burden of establishing either that (1) her separation from employment was involuntary or (2) her separation was voluntary but she had a cause of a necessitous or compelling nature that led her to discontinue the relationship. *Spadaro v. Unemployment Comp. Bd. of Review*, 850 A.2d 855 (Pa. Cmwlth. 2004). The conscious intention

(continued...)

argument section of her brief. Pa. R.A.P. 2119. Regardless, we note that Claimant is only aggrieved by that determination if the Board erred in denying benefits.

of a claimant to leave employment generally forecloses any question of whether the separation was involuntary. *Spadaro*, 850 A.2d at 859. “An employee who resigns, leaves or quits employment without action by the employer is considered to have voluntarily terminated his employment.” *Nolan v. Unemployment Comp. Bd. of Review*, 797 A.2d 1042, 1045 (Pa. Cmwlth. 2002). “Whether a claimant has voluntarily terminated his employment is a question of law, fully reviewable by this court, resolution of which depends on the Board's underlying findings of fact.” *Mastroianni v. Unemployment Comp. Bd. of Review*, 473 A.2d 746, 747 (Pa. Cmwlth. 1984).

Here, the Board found the testimony offered by Employer’s witnesses to be credible and, based upon that testimony, further found that Claimant quit her employment. Under these circumstances, the Board’s underlying findings compel us to conclude that Claimant voluntarily quit her employment.

We now consider Claimant’s alternative argument that she had a cause of a necessitous and compelling nature which justified her decision to terminate the employment relationship. Although the law does not define what constitutes “cause of a necessitous and compelling nature,” our Supreme Court has described it as follows:

[G]ood cause for voluntarily leaving one’s employment (i.e. that cause which is necessitous and compelling) results from circumstance which produces 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, 474 Pa. at 358-59, 378 A.2d at 832-33.

In order for a claimant to establish cause of a necessitous and compelling nature, she must show: (1) the existence of circumstances that created real and substantial pressure to leave employment; (2) that such circumstances would compel a reasonable person to leave employment; (3) that she acted with common sense; and (4) that she made a reasonable attempt to continue her employment. *Comitalo v. Unemployment Comp. Bd. of Review*, 737 A.2d 342, 344 (Pa. Cmwlth. 1999). If a claimant does not take all necessary and reasonable steps to preserve her employment, she has failed to meet the burden demonstrating necessitous and compelling cause. *Peco Energy Co. v. Unemployment Comp. Bd. of Review*, 682 A.2d 58, 61 (Pa. Cmwlth. 1996).

Here, considering the totality of the circumstances, we cannot conclude that real and substantial pressure to leave employment existed that would compel a reasonable person in this case to leave employment. Claimant's argument that the language used by Employer that she was not working out combined with the unavailability of the requested work schedule demonstrates a necessitous and compelling cause for voluntarily quitting her employment is without merit. We agree with the Board's conclusion that resentment of a reprimand is not good cause to quit. Resentment of a reprimand, absent unjust accusations, abusive conduct or profane language, does not constitute necessitous and compelling reason for termination. *Rooney v. Unemployment Comp. Bd. of Review*, 380 A.2d 957 (Pa. Cmwlth. 1977). In contrast, this Court has held that necessitous and compelling reasons for voluntary terminating employment may exist in instances involving jeopardy to an employee's health or safety, the use of dangerously unsafe equipment or the direction of an employer to perform an illegal act. *Krieger v. Unemployment Comp. Bd. of Review*, 415 A.2d 160, 161 (Pa.

Cmwlth. 1980). Such compelling and necessitous circumstances do not exist in this case.

Moreover, by resigning in response to a discussion of poor job performance, Claimant did not make a reasonable attempt to continue her employment. We, therefore, conclude that the Board did not err when it determined that Claimant did not have cause of a necessitous and compelling nature to quit her employment.

Accordingly, we affirm the order of the Board.

P. KEVIN BROBSON, Judge

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	:	
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ORDER

AND NOW, this 30th day of June, 2010, the Order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

P. KEVIN BROBSON, Judge