

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Rosemary A. McIltrout,	:	
Petitioner	:	
	:	
v.	:	No. 2463 C.D. 2009
	:	SUBMITTED: April 1, 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
PRESIDENT JUDGE LEADBETTER**

FILED: June 11, 2010

Rosemary A. McIltrout (Claimant), *pro se*, petitions this court for review of the order of the Unemployment Board of Review (Board) determining that Claimant was ineligible for unemployment compensation benefits because she voluntarily left her part-time employment without a necessitous and compelling reason pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ After review, 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) provides that an employee shall be ineligible for compensation for any week “in which his [or her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature”

Claimant was last employed by Giant Eagle (Employer) in its pharmacy department as a part-time pharmacy technician at a final rate of \$7.15 per hour. Claimant worked for Employer approximately twelve hours per week for three weeks while in training. Claimant's last day of work was October 19, 2007. On that day, Claimant called in to get her schedule for the following week and was told that there were no hours available for that week. Claimant then spoke with Employer's Human Resources Manager, who told her that she was not on the schedule because the employee who was training her was on vacation. Claimant was also told that when the trainer returned the following week, she would be put on the schedule for work. Claimant then became upset that she would not be working that next week and quit her job. Claimant appealed the denial of benefits, and a hearing was ultimately scheduled before a referee.²

² Claimant had an existing claim for unemployment compensation benefits based on a prior separation from employment. Claimant's subsequent claim for benefits following her separation from employment with Giant Eagle was denied by the Department, which denial was limited to the extent of her part-time earnings. Claimant appealed the determination and at the hearing she was advised by the referee that she could withdraw her appeal without any negative impact on her benefits. Claimant then requested withdrawal of her appeal and the referee granted her request on January 22, 2008. Because Claimant had no other part-time earnings exceeding her partial benefit credit, the limited denial of benefits from the determination had no impact on the amount of benefits she received from her prior separation from employment. Subsequently, in November 2008, Claimant secured a part-time position, and in December 2008, she became eligible for emergency unemployment benefits. As a result, Claimant's weekly benefit rate was reduced by the amount of her part-time wages.

On December 11, 2008, Claimant filed an appeal from the referee's January 22, 2008 order, arguing that she would not have withdrawn her original appeal if she had known that her benefit amount would be reduced when she got a part-time job. On February 10, 2009, the Board ordered that a hearing be scheduled before the referee, to determine the sole issue of whether Claimant's appeal was timely filed within fifteen days of the decision in accordance with Section 502 of the Law, 43 P.S. § 822. After a hearing at which Claimant testified, the Board dismissed Claimant's appeal as untimely by Decision and Order dated March 20, 2009. Claimant's request for reconsideration was denied, after which she filed an appeal with this court. Subsequently, the Board filed An Application for Remission of the Record, requesting **(Footnote continued on next page...)**

At the hearing, Claimant appeared and testified as did Employer's Human Resource Manager, Ann Galmarini, and its Pharmacy Manager, Janet Clark. Claimant testified that she thought she would be getting 20 to 30 hours per week in the part-time position, but she never got more than 12 hours per week. Claimant stated that she had to call Employer to find out her hours for the next week and that she was told when she was hired that if she needed a day off, she was supposed to let Employer know ahead of time so that Employer could schedule accordingly. Claimant testified that when she called to get her hours for the week of October 21 – 27, 2007, she was told that she was not on the schedule. Claimant testified that she believed the real reason she was not on the schedule was because she told the Pharmacy Manager, Janet Clark, that she needed the next two weekends off to care for her aunt. Claimant stated that when she asked Employer's Human Resource Manager, Ann Galmarini, why she was not given any hours, she was told it was because Janet Clark had said Claimant needed to be available to work seven days a week. Claimant also stated that she was told by other employees that if she was not put on the schedule, it means she was fired. On cross-examination, Claimant agreed that she had been hired to work variable hours and that she was never told that she was fired. Claimant denied receiving any training at work and denied being told by Galmarini that the reason she was not put on the schedule for the week in question was because her trainer was on vacation. Finally, Claimant denied that she told Galmarini that she quit. Claimant testified

(continued...)

that the court remand the matter for further consideration and appropriate action. By order of this court dated August 31, 2009, the matter was remanded and the Board then scheduled another hearing on the merits of Claimant's separation from employment. Thus, only the merits of Ms. McIltrout's claim is before us in this appeal.

that she told Galmarini that, “I need to find some other work, so I start[ed] looking for other work.” Hearing of October 6, 2009, Notes of Testimony (N.T.), at 10.

Ann Galmarini testified that when she and Janet Clark hired Claimant, they told her that the work was part-time, variable days and hours. Galmarini testified that when she spoke with Claimant on her last day of work, Claimant was upset about not being on the schedule for the next week and that she explained to Claimant it was because there was no trainer available. When Claimant told Galmarini that she was quitting, Galmarini asked her if she was sure. Claimant responded yes. Galmarini testified that during training, a trainee could be scheduled anywhere between 4 and 11 hours up to 18 hours, but that without a trainer, the trainee would not be scheduled. Employer’s Pharmacy Manager, Clark, reiterated that Claimant was told when she was hired that a part-time employee of the pharmacy department had to work variable hours and days and that Claimant did not state that she had any restrictions on her availability to work. Clark also testified that no employee who is in training is scheduled to work weekends. Clark testified that on her last day of work, Claimant had worked from 9 a.m. until 3 p.m. and left a note for her in which she stated that she could not work weekends due to caring for her mother. Clark testified that when Claimant called her later that day, she told Claimant that she had no hours for the next week because her trainer was on vacation and that she could not work without one. When Claimant continued to be upset, Clark referred her to Galmarini. Clark stated that she did not terminate Claimant during this conversation.

The Board made the following relevant findings of fact:

2. The claimant was aware when she accepted the job that the hours would fluctuate and no specific hours were guaranteed.
3. On October 19, 2007, the claimant called to obtain her schedule and was told that no hours were available for the next week.
4. The claimant spoke to the employer's human resources manager who told the claimant that she was not scheduled the next week because the claimant's trainer was on vacation for a week.
5. The claimant had only been employed for three weeks, 12 hours each week, and was still required to work with a trainer.
6. The human resources manager advised the claimant that she would be back on the schedule the following week.
7. The claimant became upset that she would not be working the next week and quit.

Board's Decision and Order, dated November 12, 2009, at 1-2. In its discussion, the Board concluded that Claimant voluntarily left her employment without cause of a necessitous and compelling nature. The Board determined that because Claimant quit her part-time employment without a necessitous and compelling reason, she was ineligible to receive unemployment compensation benefits only to the extent that her part-time wages exceeded the partial benefit credit, citing this court's decision in *Unemployment Compensation Board of Review v. Fabric*, 354 A.2d 905 (Pa. Cmwlth. 1976).

On appeal,³ Claimant raises the following issues for our review: whether the Board erred in reducing her benefits by \$98 on the basis that she voluntarily quit her employment with Giant Eagle,⁴ and by finding (1) that Employer told her the reason she was not scheduled to work the week of October 21 – 27, 2007 was because her trainer was on vacation; (2) that she worked for three weeks, twelve hours per week with a trainer, as required; (3) that Employer told Claimant she would be back on the schedule once her trainer returned from vacation; (4) that there were no hours available for her the week of October 21-27, 2007; and (5) that Claimant told Employer she quit.

It is well-settled that “[a]n employee who resigns, leaves, or quits [her] employment without action by the employer has voluntarily terminated [her] employment.” *Nolan v. Unemployment Comp. Bd. of Review*, 797 A.2d 1042, 1045 (Pa. Cmwlth. 2002). Once it is established that a claimant has voluntarily quit her employment, the claimant bears the burden of proving that she left her employment for necessitous and compelling reasons. *Id.* at 1046. The claimant must prove that she acted “with ordinary common sense in quitting [her] job and that [she] had made a reasonable effort to preserve [her] employment.” *Spadaro v. Unemployment Comp. Bd. of Review*, 850 A.2d 855, 860 (Pa. Cmwlth. 2004). Furthermore, by accepting a job, the “employee admits to the initial suitability of the job with respect to wages and conditions of employment.” *Stiffler v. Unemployment Comp. Bd. of Review*, 438 A.2d 1058, 1060 (Pa. Cmwlth. 1982).

³ Based on the issues raised, the scope of our review is limited to determining whether the necessary findings of fact are supported by substantial evidence. *Kirkwood v. Unemployment Comp. Bd. of Review*, 525 A.2d 841 (Pa. Cmwlth. 1987).

⁴ As noted above, she continued to receive benefits from her prior claim for termination of her job with a previous employer.

Unsuitability of work constitutes necessitous and compelling reason to quit only if the employee proves that she was deceived as to the working conditions or that such conditions subsequently changed. *Id.*

In the present matter, the Board's findings supported by the record establish that Claimant was unhappy with the number of hours she was receiving and with what she perceived as unfair restrictions on her ability to procure another part-time job if she had to remain available to Employer seven days a week. However, mere dissatisfaction with an employee's working conditions does not constitute necessitous and compelling reason to voluntarily resign one's employment. *Spadaro*.

All the issues raised by Claimant essentially boil down to her disagreement with the testimony of Employer's witnesses. Specifically, Claimant reiterates her version of the facts and avers that Employer's witnesses lied under oath. Therefore, she believes that she was treated unjustly. However, the Board's findings are based on its credibility determinations in favor of the testimony of the pharmacy manager, Clark, and the Human Resource Manager, Galmarini. The Board is the ultimate fact-finder, empowered to resolve conflicts in the evidence and to determine the credibility of the witnesses. *Schnitzer v. Unemployment Comp. Bd. of Review*, 880 A.2d 728 (Pa. Cmwlth. 2005). If the Board's findings are supported in the record, we have no power to find contrary facts on appeal. Here, the testimony of Employer's witnesses fully supported the Board's findings. While Claimant believes they should have been discredited, the Board believed them and that is the Board's province.

Based upon its findings, the Board properly concluded that Claimant voluntarily quit her employment without a necessitous and compelling cause, and

is therefore ineligible for benefits to the extent of her part-time earnings pursuant to Section 402(b)⁵ of the Law. The order of the Board is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁵ 43 P.S. § 802(b).

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Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

ORDER

AND NOW, this 11th day of June, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge