IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charlene B. Flick,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 31 C.D. 2011
	:	
Unemployment Compensation Board of Review,	:	Submitted: June 3, 2011
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: October 26, 2011**

Charlene B. Flick (Claimant) petitions for review of the Order of the Unemployment Compensation Board of Review (Board), affirming the decision of an Unemployment Compensation Referee (Referee), denying Claimant unemployment compensation (UC) benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law)[1] because Claimant voluntarily quit her

[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 that a claimant is ineligible for benefits for any week in which her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

employment without cause of a necessitous and compelling nature. On appeal, Claimant challenges the Board's determination, arguing that: (1) she was constructively discharged; or, in the alternative, (2) she had cause of a necessitous and compelling nature to voluntarily leave her employment with Aspen Dental (Employer) when Employer unilaterally and substantially changed the terms and conditions of Claimant's employment, and/or unjustifiably demoted Claimant.

Claimant, Office Manager at Employer's Monaca office, became separated from her position and applied for UC benefits, which the Duquesne UC Service Center denied under Section 402(b). Claimant appealed, and the matter was assigned to a Referee for a hearing. A hearing was held on September 10, 2010, during which Claimant and Employer's representative, Tara Selders, testified. After the hearing, the Referee made the following findings of fact (FOF):

1. The Claimant worked full time for Aspen Dental as an Office Manager from July 27, 2009 through June 15, 2010, earning $38,000.00 per year.

2. The Claimant was hired to perform her work at the Monaca Office.

3. The Employer believed that the Claimant was performing work well with regards to office production, but was lacking with regards to managing employees and reports.

4. On June 15, 2010, the Employer explained to the Claimant [its] concerns regarding her work performance and offered two choices[:] 1). To remain at the Monaca office as a front office staff person, where her pay would be decreased to $11.00 per hour[;] 2). Or to continue to work as a Floating Office Manager with no decrease in pay with travel reimbursements.

5. Prior to the above date, the Employer did not provide the Claimant with actual warnings regarding her performance, but

would provide positive suggestions on how the Claimant could perform her work better.

6. The Claimant's travel would occur mostly throughout the Pittsburgh area, but sometimes [Claimant] would be required to travel across the state.

7. The Claimant was to respond with a decision as to which position she would accept by the end of the [d]ay.

8. The Claimant refused both positions.

9. On June 16, 2010, the Claimant reported to work at the Monaca office.

10. The Claimant was instructed to report to work at the North Hills office.

11. The Claimant refused to report to the North Hills office indicating that it was too far and she has to watch her vehicle miles because it is on a lease.

12. The Claimant voluntarily quit due to changes in the work conditions.

(Referee Decision/Order at 1-2, FOF ¶¶ 1-12.) The Referee reasoned that Claimant voluntarily quit, explaining that Employer offered Claimant a choice between a demotion or a change of position. The Referee determined that Claimant had some issues regarding performance and, rather than use formal disciplinary actions, Employer merely offered Claimant alternative work in which Employer believed she could excel, such as the floater position. The Referee noted that Claimant did not attempt the work offered or exhaust other options before leaving her employment. For these reasons, the Referee concluded that Claimant did not meet her burden pursuant to Section 402(b) of the Law and denied benefits.

Claimant appealed to the Board, which adopted and incorporated the Referee's findings of fact and conclusions of law.

On appeal, Claimant argues[2] that: (1) the Board erred in denying UC benefits to Claimant because she was constructively terminated; and, in the alternative, (2) she had a necessitous and compelling reason to leave her employment pursuant to Section 402(b) of the Law when Employer: (a) unilaterally and substantially changed Claimant's terms and conditions of employment when it replaced Claimant as Office Manager of the Monaca office and assigned her as a statewide Floating Manager; or (b) unjustifiably demoted Claimant when it offered Claimant the option to remain at the Monaca office as a Patient Service Representative, with a substantial reduction in pay and a change from a salaried position to an hourly rate.[3]

We first address Claimant's argument that she was constructively terminated when Employer locked Claimant out of her computer and replaced her with a new Office Manager on the morning after Employer notified Claimant that she was being removed as Office Manager at the Monaca office. Claimant contends that Employer's action had the immediacy and finality of a firing. (Claimant's Br. at 17.)

[2] We have reordered Claimant's arguments for ease of resolution.

[3] Claimant's position as Office Manager at the Monaca office paid a salary of $38,000 per year. Employer's Tax Consultant testified that he was not quite sure "offhand," but "[i]t would be $17[.00]" per hour on an hourly basis. The position as Patient Service Representative was not salaried and paid $11.00 per hour. (Hr'g Tr. at 8, R.R. at 53a.)

The Board relies upon Bell v. Unemployment Compensation Board of Review, 921 A.2d 23, 26 (Pa. Cmwlth. 2007), for support that whether a claimant's separation from employment is involuntary is a question of law to be determined from the totality of the record. "[T]he claimant must demonstrate that the employer's actions had the immediacy and finality of a 'firing,' but the employer need not specifically use words such as "fired" or "discharged." Id. In making this determination, we must examine the testimony in the light most favorable to the party in whose favor the Board rendered its decision. Helsel v. Unemployment Compensation Board of Review, 421 A.2d 496 (Pa. Cmwlth. 1980).

Pursuant to Bell, we now examine the totality of the record and the testimony therein. On June 15, 2010, Ms. Selders, Employer's Regional Manager, explained to Claimant that she was being replaced as Office Manager at the Monaca office, but simultaneously offered Claimant two choices: (1) to remain at the Monaca office as a front office staff person, where her pay would be decreased to $11.00 per hour; or (2) to work as a Floating Office Manager with no decrease in pay and with travel reimbursements. (Hr'g Tr. at 7, R.R. at 52a.) Ms. Selders asked Claimant to report, after lunch, which option she was choosing. (Referee Hr'g Tr. at 7, R.R. at 52a.) When Claimant was unable to make a decision that day, Ms. Selders said she would speak with her the following day. (Referee Hr'g Tr. at 7, R.R. at 52a.) Claimant reported to the Monaca office the next day, June 16, 2010. Ms. Selders asked whether Claimant had received Employer's e-mail. (Referee Hr'g Tr. at 8, R.R. at 53a.) Ms. Selders testified that Claimant said she was unable to log on to her computer, (Referee Hr'g Tr. at 8, R.R. at 53a), and that Ms. Selders then showed Claimant Employer's e-mail. (Referee Hr'g Tr. at 8,

R.R. at 53a.) The e-mail provided that Employer would "have a new O[ffice] M[anager] starting today in Monaca" and that the only two options available to Claimant were to "float the Pittsburgh market" or "take a step down to P[atient] S[ervice] R[epresentative]," stating that "[w]e would like to retain you and use your abilities in a different way." (Employer's Ex. 1.)

The Board credited Ms. Selders' testimony that modified employment options were presented to Claimant. (Board Order at 1.) The Law is clear that the Board is the ultimate finder of fact, and "questions of credibility and evidentiary weight" are matters for the Board as fact finder and not for a reviewing court. Freedom Valley Federal Savings & Loan Association v. Unemployment Compensation Board of Review, 436 A.2d 1054, 1055 (Pa. Cmwlth. 1981). Because Employer presented Claimant with two options for continued employment, we agree with the Board that these options "in no way served as a constructive discharge," (Board Order at 1), but that "Claimant voluntarily quit." (FOF ¶ 12.)

The fact that Claimant voluntarily quit does not, alone, act as a bar to receiving UC benefits if, pursuant to Section 402(b) of the Law, Claimant had necessitous and compelling reasons for voluntarily terminating her employment. Allegheny Valley School v. Pennsylvania Unemployment Compensation Board of Review, 548 Pa. 355, 361, 697 A.2d 243, 246 (1997). Hence, Claimant next argues that Employer's unilateral change in her job as Office Manager of the Monaca office to Floating Manager is a substantial, unilateral change providing a necessitous and compelling reason to quit. Claimant contends that she was not

hired to work "at a different Aspen office every[ ]day with commutes in excess of 400 miles round trip and little advanced notice," but that she "was hired to work at one Aspen office in Monaca [] within a convenient distance from her home." (Claimant's Br. at 16.)

It is well-settled that an employee who claims to have left work for a necessitous and compelling reason must prove that: (1) circumstances existed which produced real and substantial pressure to terminate employment; (2) such circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and (4) the claimant made a reasonable effort to preserve his employment. Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). The circumstances producing pressure to leave must be *both* real and substantial. PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 49, 51 n.1 (Pa. Cmwlth 1996) (quoting Taylor v. Unemployment Board of Review, 474 Pa. 351, 358-59, 378 A.2d 829, 832-33 (1977)), petition for allowance of appeal denied, 547 Pa. 739, 690 A.2d 238 (1997). An employer's unilateral imposition of a real and substantial change in the terms and conditions of employment provides a necessitous and compelling reason for an employee to leave work. McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266, 1270 (Pa. Cmwlth. 2003). Whether an employee has a necessitous and compelling reason to voluntarily quit employment is a question of law fully reviewable by this Court. Pacini v. Unemployment Compensation Board of Review, 518 A.2d 606, 607 (Pa. Cmwlth. 1986). The claimant who voluntarily terminates his employment has the burden of proving that

a necessitous and compelling cause existed. Petrill v. Unemployment Compensation Board of Review, 883 A.2d 714, 716 (Pa. Cmwlth. 2005).

Here, the Board determined that "Claimant's travel would occur mostly throughout the Pittsburgh area, but sometimes [Claimant] would be required to travel across the state." (FOF ¶ 6.) On the day after Employer notified claimant of the change in her job and directed Claimant to report to the North Hills office, "Claimant refused to report to the North Hills office indicating that it was too far and she has to watch her vehicle miles because it is on a lease." (FOF ¶ 11.) If the Board's findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). Substantial evidence is defined as "such relevant evidence which a reasonable mind would accept as adequate to support a conclusion." Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Additionally, 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 v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994).

In reviewing the record, there is no dispute that Employer, through Ms. Selders, replaced Claimant as Office Manager at the Monaca office when she reported to work on the morning of June 16, 2010, and Ms. Selders requested that Claimant report to a different office location in the Pittsburgh region. Ms. Selders testified that she directed Claimant to report to the North Hills office that day, and that Claimant responded that this was not an option. (Referee Hr'g Tr. at 10, R.R. at 55a.) Ms. Selders then dismissed Claimant for the day, saying that she would give Claimant another direction the following day. (Referee Hr'g Tr. at 10, R.R. at 55a.) Ms. Selders testified that there would be no decrease in pay for the position as Floating Manager and Claimant would be reimbursed for mileage. (Referee Hr'g Tr. at 7, R.R. at 52a.) Ms. Selders further testified that

> She would have to travel on a daily basis, but not necessarily out east all the time. If she was out east, they would put her up in a room. They would pay mileage expenses. They would pay meal expenses. And they would pay the hotel expenses. Basically, it was going to be more or less in the Pittsburgh area.

(Referee Hr'g Tr. at 17, R.R. at 62a.) Ms. Selders explained that she had given Claimant a list of Employer's offices that included nine Pittsburgh area offices and seventeen statewide offices, (Referee Hr'g Tr. at 17, R.R. at 62a; Claimant's Ex. 1), stating that those were the offices to which Claimant may have to go, "not that she was necessarily going to have to." (Hr'g Tr. at 14, R.R. at 59a.)

We note that Claimant quit without ever attempting the new position as Floating Manager or otherwise attempting to preserve her employment. Because Claimant voluntarily quit, she has the burden of proving that she had necessitous and compelling circumstances justifying such an action. Petrill, 883 A.2d at 716.

"[T]he claimant must prove 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." Empire Intimates v. Unemployment Compensation Board of Review 655 A.2d 662, 664 (Pa. Cmwlth. 1995). Claimant testified that she needed to have an office in close proximity to her home because of her limited mileage on her leased vehicle; however, "before transportation problems can constitute justification for quitting, those problems must be so serious and unreasonable that they present a 'virtually insurmountable problem.'" Reagan v. Commonwealth of Pennsylvania, Unemployment Compensation Board of Review, 397 A.2d 873, 874 (Pa. Cmwlth. 1979) (quoting Correa v. Unemployment Compensation Board of Review, 374 A.2d 1017, 1020 (Pa. Cmwlth. 1977)). Additionally, the burden of proof regarding insurmountable transportation issues "lies with the claimant." Id. A claimant's unwillingness to have a somewhat longer and more distant commute, within reason, does not provide necessitous and compelling cause to voluntarily quit employment. McCann v. Unemployment Compensation Board of Review, 386 A.2d 1086 (Pa. Cmwlth. 1978) (holding that claimant was not entitled to UC benefits when employer moved 36 miles farther from claimant); see also Lee v. Unemployment Compensation Board of Review, 401 A.2d 12, 13 (Pa. Cmwlth. 1979) (holding that claimant was not entitled to UC benefits when the employer's plant moved 11 miles farther); Reagan, 397 A.2d at 874 (holding that claimant was not entitled to UC benefits when employer's location was moved from Philadelphia to Fort Washington). This Court has concluded that some added inconvenience and greater expense in commuting do not justify a voluntary quit. Reagan, 397 A.2d at 874.

Despite Claimant's argument that she was not hired to work "at a different Aspen office every day with commutes in excess of 400 miles round trip," the record does not support that Claimant would be reporting to a different office or commuting in excess of 400 miles *every* day or even frequently. On the contrary, Ms. Selders testified that Claimant's travel would be "more or less in the Pittsburgh area." (Referee Hr'g Tr. at 17, R.R. at 62a.) The Board credited this testimony. Viewing Ms. Selder's credited testimony in the light most favorable to the Employer as the prevailing party, we conclude that this constitutes substantial evidence supporting the Board's finding that "Claimant's travel would occur mostly throughout the Pittsburgh area." (FOF ¶ 6.) Therefore, Claimant did not meet her burden of proof to show that the transportation problems were "so serious and unreasonable that they present[ed] a virtually insurmountable problem." Reagan, 397 A.2d at 874. Moreover, Claimant did not take reasonable steps to preserve her employment when she never reported to the North Hills office, as directed by Employer, and never learned whether the amount of travel required for the new position would be as represented by Employer.

Claimant additionally asserts that she should receive UC benefits because her case is nearly identical to Shingles v. Unemployment Compensation Board of Review, 513 A.2d 575 (Pa. Cmwlth. 1986). In that case, the claimant, a pharmacist, was transferred to a pharmacy that involved a 95-mile round trip commute from his home. Notably, however, the pharmacist *first made an attempt* to accommodate the transfer and actually took the new position involving a longer commute. Id. at 575. Only after the claimant's subsequent complaints about the commuting distance did the employer offer him a position as a floater in his home

area, where he would be responsible for twelve to fifteen pharmacies. When he refused the second transfer as a floater in his home area among such a large number of pharmacies, he quit. In litigating his claim for UC benefits, he *sustained his burden of proof* that he would work at different locations every day with commutes up to eighty miles round trip and little advance notice of each new assignment. Id. at 576. (Emphasis added.) However, the present case is distinguishable because, unlike the pharmacist in Shingles, Claimant neither attempted the new position, learned what it actually entailed nor discovered whether the new position would present transportation problems that were "so serious and unreasonable that they present[ed] 'a virtually insurmountable problem.'" Reagan, 397 A.2d at 874. Therefore, we must conclude that Claimant did not take reasonable steps to ascertain the information necessary for us to determine whether the new position would have entailed such a serious inconvenience that it would have been an insurmountable problem to her, and "[i]t can hardly be said on this record that [Claimant] took reasonable steps to maintain h[er] employment or evidenced a genuine desire to do so. [Claimant] simply failed to meet [her] burden." Correa, 374 A.2d at 1020-21.

Having concluded that Claimant is not entitled to UC benefits because she did not meet her burden of proof that being transferred to Floating Manager was a substantial change creating a necessitous and compelling reason to quit her employment, we need not address Claimant's next argument that the position offered to her as Patient Service Representative[4] constituted an unjustified demotion.[5]

[4] The position of Patient Service Representative entailed a pay reduction as well as the responsibility to report to the Office Manager, Claimant's former position. The pay for the

Because Claimant did not make a reasonable effort to preserve her employment nor meet her burden of proving that she had necessitous and compelling cause to voluntarily quit her employment, we must affirm the Order of the Board.

RENÉE COHN JUBELIRER, Judge

Patient Service Representative position was non-salaried at $11.00 per hour, approximately $10,000 less per year, (Referee Hr'g Tr. at 33, R.R. at 78a), than Claimant's position as Office Manager at a salary of $38,000 per year. (FOF ¶¶ 1, 4.)

[5] Although the Board found that "[t]he employer credibly testified that the claimant was being demoted due to unsatisfactory work performance in her role as office manager," (Board Op. at 1), we note that whether there was justification for Claimant's demotion does not turn on the credibility of Ms. Selders, who testified that she had never given Claimant any indication that Claimant had performance issues for which she could be demoted or her job changed. Ms. Selders further testified that the first time she informed Claimant that she would be demoted was June 16, 2010, the date of her demotion. Moreover, there is no documentation of any performance issues in the record before us that would have justified a demotion. On the contrary, the record contains a great deal of positive feedback and complimentary e-mails to Claimant. Therefore, had our resolution of this issue been necessary, we would have concluded that Claimant's demotion was not justified. Had the demotion been Claimant's only option, which it was not, she would have had necessitous and compelling reasons for voluntarily terminating her employment. Allegheny Valley School, 548 Pa. at 365 n.4, 697 A.2d at 248 n.4.

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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

NOW, October 26, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED.**

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RENÉE COHN JUBELIRER, Judge