IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kimberly A. Foglia,	:	
Petitioner	:	
	:	
v.	:	No. 312 C.D. 2011
	:	SUBMITTED: July 8, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: August 30, 2011**

Claimant Kimberly A. Foglia petitions for review of the January 14, 2011 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee to deny her unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law),[1] providing that an employee is ineligible for benefits during any week "[i]n which his [or her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." We affirm.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

Claimant worked as a sales representative for Employer Nutrisystem, Inc. from August 2, 2009 until July 27, 2010. Her compensation was a combination of an hourly rate, plus commission, and she worked forty or more hours each week. Pursuant to Employer's compensation plan, Claimant would be guaranteed a minimum of $10.00 per hour or whatever commissions she generated, whichever was greater, over a two-week pay period.

Starting in January 2010, Employer amended its policy to include "a proviso that employees who [were] unsuccessful in generating at least three sales for every ten incoming calls by prospective customers [would] be placed on a secondary priority list." Referee's Finding of Fact No. 3. When there were more calls at any one time for first-priority list employees to handle, agents on the secondary-priority list would receive phone calls. On a busy day, a typical employee on the first priority list could handle as many as fifty calls while someone on the secondary list could handle as few as ten calls. On a light day, a first-priority list employee could get ten calls, while a secondary-list employee could get as few as three. Although the priority list could be updated on an hourly basis, it was more difficult for a secondary-list employee to move up than it was for someone in the first-priority list to move down. Prior to initiating this system, all of the salespersons handled about the same number of calls per day.

Also starting in January 2010, Claimant had to take some retention calls from existing customers. This involved handling their concerns and often coaxing them to retain their memberships. Despite the often negative nature of these calls, the referee found that it was possible for employees in the retention group to make more money than those in the sales group.

The referee also found that although "there is no evidence to show that Claimant handled fewer sales calls overall in proportion to all of the incoming calls after Employer initiated the priority system than she handled before" and her "compensation during the term of her employment was roughly equivalent to an upper level performing sales person for each of the months for which she worked for Employer," she did not like Employer's priority rule. *Id*. at Nos. 10 and 18. She "thought it unfair that, on an unlucky day she could be put to the secondary pool and deprived of an opportunity to earn the maximum amount of commissions." *Id*. at No. 16. She quit her job without advising Employer of her problems with the changes in the conditions of her employment, instead representing that her reason for leaving was her sick grandmother. Continuing work was available to Claimant.

Claimant applied for benefits, which the service center denied. The referee affirmed, concluding that "Claimant failed to show that the changes instituted by Employer by establishing two priority grades for the sales persons created an onerous condition of her employment." Referee's Decision at 3. The Board affirmed, adopting and incorporating the referee's findings and conclusions. In addition, it specifically resolved all relevant conflicts in testimony in favor of Employer and emphasized the testimony of Claimant's former supervisor that Claimant never indicated that she intended to resign due to dissatisfaction with the new priority system.[2] Claimant's timely petition for review followed.[3]

[2] The facts as found by the Board are conclusive on appeal as long as the record, in its entirety, contains substantial evidence to support those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999). In addition, because the Board resolved any relevant credibility conflicts in favor of Employer, we are bound to view the evidence, and every reasonable inference deducible therefrom, in the light most favorable to **(Footnote continued on next page…)**

A claimant bears the burden of proving necessitous and compelling cause for leaving his or her job. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006). In order to show such cause, the claimant must establish 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 her employment." *Id*. at 660. While we recognize that cause of a necessitous and compelling nature may exist where an employer has instituted an unreasonable, unilateral change in the employment agreement, mere dissatisfaction with reasonable modifications in working conditions is not considered good cause for a voluntary quit. *Kistler v. Unemployment Comp. Bd. of Review*, 416 A.2d 594 (Pa. Cmwlth. 1980). It is up to the claimant to establish that the change was so unreasonable and so burdensome that a reasonable person under like circumstances would have been compelled to quit. *Unangst v. Unemployment Comp. Bd. of Review*, 690 A.2d 1305 (Pa. Cmwlth. 1997).

Moreover, it has been held that where an employer modifies the method by which it pays its employees, such as altering the basis for commissions, necessitous and compelling cause for a voluntary quit may be established. *#1 Cochran, Inc. v. Unemployment Comp. Bd. of Review*, 579 A.2d 1386 (Pa. Cmwlth. 1990). While a significant reduction in pay may constitute necessitous

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(continued…)

Employer as the prevailing party. *Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review*, 496 Pa. 620, 437 A.2d 1213 (1981).

[3] A determination of whether necessitous and compelling cause exists is a question of law, fully reviewable by this Court. *Steinberg Vision Assocs. v. Unemployment Comp. Bd. of Review*, 624 A.2d 237 (Pa. Cmwlth. 1993).

and compelling cause, *Naylon v. Unemployment Compensation Board of Review*, 477 A.2d 912 (Pa. Cmwlth. 1984), there is no talismanic percentage figure to denote a sufficiently substantial reduction in pay from one that is not. Each case must be decided on its own circumstances. *Steinberg Vision Assocs*.; *Ship Inn, Inc. v. Unemployment Comp. Bd. of Review*, 412 A.2d 913 (Pa. Cmwlth. 1980).

Claimant contends that the Board erred in determining that she did not have necessitous and compelling reasons for resigning, arguing that Employer's changes were sufficiently substantial and harmful so as to eviscerate her earnings. She maintains that the effect of the changes was to fill up her available work hours with duties that did not make her any money. We disagree.

Notwithstanding Employer's implementation of the changes, the record reflects that Claimant was an above-average performing sales person.[4] In addition, relying on her own estimates, she failed to put into evidence either her pay stubs or sales book in an effort to substantiate her claim that implementation of the changes constituted such an onerous modification in her employment

[4] In that regard, Employer's witness testified as follows:

> Q: Now in regards to Ms. Foglia's direct compensation, just based on the estimates that she provided, would you say that she was in line with the low or above her peers?
>
> A: Kim was probably was slightly above her peers.
>
> Q: [B]ased on the timeframe that she resigned do you think that it was feasible for her to actually hit the margin that we set for these guys, which is roughly around 40k?
>
> A: Yes.

Referee's October 25, 2010 Hearing, Notes of Testimony ("N.T.") at 82.

conditions that a reasonable person would have been compelled to quit. Most significant, Claimant failed to establish that any reduction in her earnings was directly attributable to Employer's changes to its policy rather than to either a seasonal or an economy-related slowdown in Employer's business, which evidently had occurred.[5]

Claimant next argues that the Board erred in determining that she failed to afford Employer the opportunity to address the problem prior to her resignation. She emphasizes the evidence that, prior to her resignation, she complained to supervisors about the changes and they advised her that nothing could be done. Further, she maintains that the Board misinterpreted her

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[5] Both sides alluded to the impact of these factors on sales. N.T. at 51, 81-02. In that regard, Claimant testified as follows:

> It's supposed to be very slow November/December, we were aware of that in October. … So we started preparing for that and, you know, told save your money because you're going to need it, you're not going to make much of anything for those, you know, two months, okay, no problem, fine, I accepted that. *January was supposed to be crazy*, buy your red bull, bring your food to your desk, work 12 hours, six days a week because we're going to need you, *that never happened*.
>
> ….
>
> Didn't come. So that was unexpected. But then we were supposed to get a bump because of advertising, that really didn't – we had maybe a couple of days where it was busy in I think May.
>
> ….
>
> So just – and I can't fault them for, you know, whether people call or whether people are interested, I can't fault them for that. …

N.T. at 51 (emphasis added).

resignation letter to mean that she was terminating her employment due to her grandmother's health and not due to her dissatisfaction with the changes. She contends that, at that point, it was obvious that any further efforts on her part to protest the policies would have been futile. In her resignation letter addressed to her former supervisor, Claimant stated:

> I'm still in Boston with my grandma. This isn't exactly how I wanted to leave my job, but I think I'm going to resign effective immediately. I would have preferred to give two weeks notice, but as I understand it, once you do, you get told to leave the same day anyway. *My resignation has nothing to do with you personally, just rather Nutrisystem in general*. I apologize and it was a pleasure working with you.

Employer's Exhibit 1 (emphasis added).

We conclude that the Board did not err in determining that Claimant failed to establish that she made a reasonable effort to preserve her employment. Employer never disputed the fact that Claimant voiced her concerns about the priority rule in the months prior to quitting. Voicing one's concerns with changes in employment conditions, however, does not necessarily equate with making a reasonable effort to preserve one's employment. Here, the Board accepted the testimony of the former supervisor that Claimant failed to advise her that Claimant's concerns with the changes were serious enough to warrant quitting. The former supervisor testified:

> Q: Were you aware that … Ms. Foglia was basically looking to resign her position if she didn't have – for lack of better words – a process or a rule change implemented for the organization?
>
> A: No.

> Q: Did she ever explore any possibilities of maybe alternative positions that better met her skill set prior to resigning her position?
>
> A: No, never did.
>
> Q: Did she offer to you that … being placed on a lower priority based on her current performance standards was enough to make her want to resign her position?
>
> A: No.

N.T. at 80-01.

In addition, Claimant in her letter of resignation did not indicate that she made the necessary effort to preserve her employment. While it is true that Employer was aware of Claimant's dissatisfaction with its changes, she did not advise Employer of her specific reasons for leaving. She stated in her letter only that her resignation was due to "Nutrisystem in general." As the fact finder stated, "[w]hen she decided to quit, she decided to use a sick grandmother as an excuse rather than going to employer and explaining what her problem was and giving Employer one opportunity, at the least, to fix things for her satisfaction." Referee's Decision at 1. He reasoned that Claimant's failure to advise Employer of her true reasons for quitting resulted in her "not only fail[ing] to exhaust all reasonable alternatives but fail[ing] to show that her conditions of employment were onerous in any way." *Id*.

For the above reasons, we affirm the Board's order.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 30th day of August, 2011, the order of the Unemployment Compensation Board of Review is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge