IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Betty A. Butler,	:	
Petitioner	:	
	:	
v.	:	No. 327 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 SENIOR JUDGE KELLEY FILED: August 12, 2011

Betty A. Butler (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that denied Claimant's application for benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).[1] 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:

> An employe shall be ineligible for compensation for any week—
>
> * * *
>
> (b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is "employment" as defined in this act.

Claimant filed a claim for benefits with the Scranton Unemployment Compensation Service Center upon the termination of her employment as a deli clerk for Rodnicks Discount Grocery (Employer). The Service Center representative issued a determination denying her claim for benefits pursuant to Section 402(b) of the Law.

Claimant appealed this determination and a hearing was conducted before a Referee on October 29, 2010. See N.T. 10/29/10 at 1-27.[2] That same day, the Referee issued a decision affirming the Service Center's determination that Claimant was ineligible for benefits pursuant to Section 402(b) of the Law.

Claimant appealed the Referee's decision to the Board. On December 22, 2010, the Board issued a decision and order disposing of Claimant's appeal in which it made the following relevant findings of fact: (1) Claimant was employed as a deli clerk by Employer from July 16, 2010 to August 7, 2010; (2) Claimant was hired to work the afternoon shift starting at 2:00 or 3:00 p.m.; (3) claimant worked when the owner's father was in the store; (4) the owner's father was not an employee, but "helped out" and had access to all parts of the store; (5) Claimant began to be sexually harassed by the owner's father both inside the store during working hours and outside the store while off duty; (6) Employer did not have an official policy regarding sexual harassment, but did advise Claimant to come to him if she had any concerns or problems; (7) Claimant did not inform Employer about his father's actions because she was embarrassed; (8) Claimant asked Employer to change her to an earlier shift, but she did not tell him why she had asked for the change; (9)

[2] "N.T. 10/29/10" refers to the transcript of the hearing conducted before the Referee on October 29, 2010.

Employer denied Claimant's request because he had a full staff on the earlier shift; and (10) Claimant quit her job on August 7, 2010. Board Decision at 1-2.

Based on the foregoing, the Board made the following relevant conclusions:

> Generally, sexual harassment is good cause to leave employment; however, the employee must take reasonable steps to alleviate the problem and make the employer aware of the harassment and given an opportunity to correct the behavior. Failure to take these steps will result in disqualification for benefits under Section 402(b) of the Law.
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> In this case, the claimant did not advise her employer about the harassment, as a result, the employer did not have an opportunity to address the behavior and correct the situation. While the Board in no way condones the egregious behavior of the employer's father, it is constrained by the requirement of a claimant to provide notice to the employer prior to quitting.

Board Decision at 2. Accordingly, the Board issued an order affirming the Referee's determination that Claimant was precluded from receiving benefits pursuant to Section 402(b) of the Law. Claimant then filed the instant petition for review.[3]

[3] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994). In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

The sole claim raised by Claimant in the instant appeal is that the Board erred in affirming the Referee's decision that she is precluded from receiving benefits pursuant to Section 402(b) of the Law. We do not agree.

As noted above, Section 402(b) of the Law provides that an employee is ineligible for unemployment compensation benefits for any week in which unemployment is due to the employee's voluntary separation from work without cause of a necessitous and compelling nature. The question of whether a claimant had necessitous and compelling cause for resigning is a legal conclusion subject to review by this court. Matvey v. Unemployment Compensation Board of Review, 531 A.2d 840 (Pa. Cmwlth. 1987); Magazzeni v. Unemployment Compensation Board of Review, 462 A.2d 961 (Pa. Cmwlth. 1983).

A claimant who voluntarily quits her employment bears the burden of proving that the termination was caused by reasons of a necessitous and compelling nature. Carter v. Unemployment Compensation Board of Review, 629 A.2d 212 (Pa. Cmwlth. 1993); Uniontown Newspapers, Inc. v. Unemployment Compensation Board of Review, 558 A.2d 627 (Pa. Cmwlth. 1989). In order to establish a necessitous and compelling reason for resigning, a claimant must demonstrate that her conduct was consistent with ordinary common sense and prudence, and that the circumstances promoting the resignation were for reasons which were real, substantial and reasonable, and not for reasons imaginary, trifling or whimsical. Creason v. Unemployment Compensation Board of Review, 554 A.2d 177 (Pa. Cmwlth. 1989). Thus, a claimant must show that the necessitous and compelling reason resulted from circumstances which produced real and substantial pressure to terminate her employment and which would compel a reasonable person under like circumstances to act in the same manner. Carter; Drs. Meltzer & Weisberg v. Unemployment Compensation Board of Review,

471 A.2d 157 (Pa. Cmwlth. 1984). Further, a claimant must establish that she acted with ordinary common sense in quitting, made a reasonable effort to preserve her employment, and had no real choice other than to leave that employment. Carter.

It is true that sexual harassment may constitute cause of a necessitous and compelling nature requiring a claimant to terminate her employment. Andrews v. Unemployment Compensation Board of Review, 698 A.2d 151 (Pa. Cmwlth. 1997) (citing Peddicord v. Unemployment Compensation Board of Review, 647 A.2d 295 (Pa. Cmwlth. 1994)). However, even if the record supports a claimant's contention that the termination of employment was due to repeated sexual harassment, the claimant has a duty to notify the employer of the offending conduct before quitting. Martin v. Unemployment Compensation Board of Review, 749 A.2d 541 (Pa. Cmwlth. 2000); Johnson v. Unemployment Compensation Board of Review, 725 A.2d 212 (Pa. Cmwlth. 1999); Platz v. Unemployment Compensation Board of Review, 709 A.2d 450 (Pa. Cmwlth.), petition for allowance of appeal denied, 556 Pa. 699, 727 A.2d 1125 (1998); Colduvell v. Unemployment Compensation Board of Review, 408 A.2d 1207 (Pa. Cmwlth. 1979).

Nevertheless, Claimant contends that her situation is similar to that described in Peddicord, where a claimant's failure to report incidents of sexual harassment was excused because she was correct in believing that such an act would be futile. More specifically, Claimant asserts that because Employer's father was her supervisor, and because he was aware of the sexual harassment, she was relieved of her duty to report the sexual harassment to Employer under Peddicord. We do not agree.

In Peddicord, the employer's regional manager, who had direct authority over the claimant and her ability to transfer within the company, made two offensive

remarks to the claimant relating to her daughter. The claimant's immediate supervisor was present and witnessed the first incident, but did nothing about it.

On appeal, this Court reversed the Board's denial of benefits, concluding that "[b]ecause the immediate supervisor observed, but did not react to, blatant harassment, the claimant had every reason to believe that reporting the incident would have produced no satisfactory result." Peddicord, 647 A.2d at 298. This Court noted the fact that "[u]pper-level employees were perpetrating and witnessing the harassment also supports why the claimant was reticent to go over the head of the regional manager." Id.

In contrast, in the instant case, the Board found as fact that Employer's father was not an employee, but that he helped out and had access to all areas of the store. Board Decision at 1. In addition, the Board found as fact that Claimant was told by Employer to come to him with any problems or issues regarding her employment, and that she did not notify Employer about his father's actions because she was embarrassed. Id. These findings are amply supported by Claimant's and Employer's testimony at the hearing before the Referee. See N.T. 10/29/10 at 8, 18, 22-23, 25. As a result, these findings are conclusive on appeal. Taylor.

In addition, these findings demonstrate that Claimant utterly failed to establish either that Employer's father was her supervisor, or that any attempt to report the sexual harassment to Employer would be futile, thereby distinguishing the instant matter from Peddicord. See Martin, 749 A.2d at 544 ("Here, the Board acknowledged [the claimant]'s testimony in which she alleged that she was sexually harassed by [her direct supervisor]. [The claimant], however, did not complain of this harassment to anyone prior to her resignation. When directly questioned at various times by [higher level supervisors], [the claimant] denied that any sexual

harassment had occurred. Despite [the claimant]'s assertion, *Peddicord* does not excuse an employee from reporting sexual harassment whenever the perpetrator is the employee's supervisor. The Court instead acknowledged that a failure to report harassment may be excused if the circumstances indicate that reporting would be futile…."); Johnson, 725 A.2d at 214 ("The Court concluded in *Peddicord* that the claimant did not fail to take common sense action to preserve her employment; she successfully demonstrated that she reasonably believed her employer would have taken no action to prevent her leaving the job, and therefore she was entitled to benefits. In contrast, [in this case,] Claimant did not show that any employee responsible for sexual harassment complaints witnessed the conduct at issue or that any reason existed to warrant her reticence in superseding the store manager's authority. Claimant admitted that she made no attempt to alleviate the problem by approaching anyone other than the store manager…." (footnote omitted)).

Moreover, these findings support the Board's determination that Claimant is ineligible for benefits pursuant to Section 402(b) of the Law. See Johnson, 725 A.2d at 214-215 ("The Board argues that Claimant should have used the procedure that Employer established for reporting sexual harassment complaints. However, the Board made no findings of fact concerning this procedure or whether Claimant knew of the procedure. Nonetheless, the duty to take common sense action to alleviate the problem of sexual harassment in order to avoid leaving one's job would, in the absence of other circumstances, necessarily include reporting complaints of sexual harassment to an employer representative other than the perpetrator of the conduct when the perpetrator is subject to the employer's supervision. The Court notes that Claimant was scheduled to meet with an area supervisor on the day she quit and that she failed to attend the meeting. Accordingly,

the Court concludes that the Board did not err in determining that Claimant failed to sustain her burden of proof, and the Board's order is therefore affirmed."); Colduvell, 408 A.2d at 1208 ("The problem of job-related sexual harassment or insinuation is a very difficult one; employees are understandably reticent to complain or try to prove affronts of such a personal and debasing nature, especially when they come from a supervisor. However, for purposes of unemployment compensation benefits the law is clear: the claimant must sustain the burden of proving a reasonable attempt to stay on the job. Claimant's failure to give the owners an opportunity to understand the nature of her objection, before resigning, did not meet that burden. Therefore, we affirm the order of the board denying claimant benefits.").

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 12th day of August, 2011, the order of the Unemployment Compensation Board of Review, dated December 22, 2010 at No. B-511094, is AFFIRMED.

JAMES R. KELLEY, Senior Judge