

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gretchen D. Weekley, :
Petitioner :
 :
v. : No. 34 C.D. 2011
 : Submitted: May 20, 2011
Unemployment Compensation Board of :
Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN¹

FILED: July 8, 2011

Gretchen D. Weekley (Claimant) petitions for review of an Unemployment Compensation Board of Review (UCBR) order, dated December 13, 2010, which affirmed a referee's decision that Claimant is ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law),² 43 P.S. §802(b). We affirm.

¹ This case was reassigned to the opinion writer on May 25, 2011.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*. Section 402(b) of the Law provides that

[a]n employe 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, irrespective of

(Footnote continued on next page...)

The UCBR, adopting the referee's findings of fact, found as follows. Claimant started working for Boy Scouts of America (Employer) on April 12, 2004. She last worked full time for Employer on March 31, 2010, as an administrative assistant to the Field Director, earning \$12.17 per hour. Claimant's administrative assistant duties included coordinating fundraisers and maintaining accounts receivable.

As the result of a merger of Employer's Keystone and York-Adams Area Councils, Claimant's job was eliminated. Employer offered Claimant work as an assistant manager of the scout store, with the same pay and benefits. In the assistant manager role, Claimant would primarily work as a cashier waiting on customers. Although the job description was not finalized at the time Employer offered it to Claimant, Claimant would have retained some of her previous duties. Nonetheless, on March 15, 2010, Claimant refused the work because she thought that it was a

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whether or not such work is in 'employment' as defined in this act . . .
And provided further . . . that in determining whether or not an
employee has left his work voluntarily without cause of a necessitous
and compelling nature, the department shall give consideration to the
same factors, insofar as they are applicable, provided, with respect to
the determination of suitable work under [Section 4(t) of the Law, 43
P.S. §753(t)]. . . .

43 P.S. §802(b). Section 4(t) of the Law defines "suitable work" as "all work which the employee is capable of performing." 43 P.S. §753(t). Further, "[i]n determining whether or not any work is suitable for an individual, the department shall consider . . . [his] prior training and experience[.]" *Id.* Previous earnings shall also be considered. *Id.*

demotion and that it would not utilize the skills she had learned. On March 17, 2010, Employer terminated Claimant's employment, effective March 31, 2010. (Findings of Fact, Nos. 1-9.)

Claimant applied for unemployment compensation benefits, and the local job center deemed her eligible under section 402(a) of the Law, 43 P.S. §802(a).³ Employer appealed from this determination and further requested that the referee consider the matter pursuant to section 402(b) of the Law.⁴ The referee granted Employer's request and then denied Claimant benefits under section 402(b). In doing so, the referee specifically reasoned:

As administrative assistant, claimant was responsible for and coordinated various fund raising [sic] efforts, as well as other job duties. On March 12, 2010, Claimant was offered

³ Section 402(a) provides that

[a]n employe shall be ineligible for compensation for any week-

(a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him. . . .

43 P.S. §802(a). Section 402(a) of the Law, unlike Section 402(b), applies only to claimants who, *while they are unemployed*, refuse an offer of suitable work. Claimants who, *while employed*, refuse an offer of continued employment are deemed to have quit their position and, thus, are subject to Section 402(b) of the Law. *Hospital Service Association of Northeastern Pennsylvania v. Unemployment Compensation Board of Review*, 476 A.2d 516, 518 (Pa. Cmwlth. 1984).

⁴ Afterward, a revised hearing notice specifically listed section 402(b) as another issue of law to be considered.

the assistant manager job. . . . The employer testified that while claimant's complete duties were in flux due to the merger, claimant's main job would be working as a cashier and waiting on customers. Claimant would also be involved in the popcorn fund raiser [sic] and be in charge of special projects that she had handled as the administrative assistant. Employer testified that they had gone before the Scout Board to create this position for the claimant because her skills and institutional memory were appreciated. In this case, it is clear that the claimant's responsibilities were considerably changed; however, her salary and benefits would remain the same. Here, the referee cannot conclude that the claimant has met her burden in regard to necessitous and compelling reason for leaving her job.

(Referee's Decision/Order at 2.)

On appeal by Claimant, the UCBR affirmed the referee's decision. In doing so, the UCBR also emphasized that "the employer had not clearly established with specificity the totality of the claimant's work before the quit," (UCBR's Op. at 1), and that "the claimant refused the job because it would not be enough to keep her satisfied and she decided to further her education instead," (*id.*). Claimant requested reconsideration, which the UCBR denied. Claimant's appeal to this court followed.⁵

We now decide whether Claimant had necessitous and compelling cause to leave her employment.⁶ Claimant contends that she had such cause because, given

⁵ Our scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or findings of fact were unsupported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

⁶ A determination of a voluntary quit is not an absolute bar to the recovery of unemployment benefits. *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657, 661 (Pa. Cmwlth. 2006). Rather, a claimant may prove necessary and compelling reasons that could excuse her voluntary action. *Id.* A claimant seeking unemployment **(Footnote continued on next page...)**

her prior training and experience, the assistant store manager job was not suitable work under Section 4(t).⁷ Claimant specifically argues:

During the nearly six years that she worked for Employer, Claimant provided office support and developed skills and experience in coordinating and planning various events and drives, keeping and monitoring records and reports, maintaining and monitoring financial summaries and other financial reporting, planning meetings, and composing various communication materials, among other duties. In the as-yet undefined position in the scout store, Claimant would act as assistant to the store's manager. Under even the best scenario, few of her prior duties would have transferred to the envisioned store clerk position.

(Claimant's Brief at 8.) Claimant relies on *Unemployment Compensation Board of Review v. Franklin & Lindsey, Inc.*, 497 Pa. 2, 438 A.2d 590 (1981), and *Shay v. Unemployment Compensation Board of Review*, 424 Pa. 287, 227 A.2d 174 (1967), to support her position that the assistant store manager job was not suitable work

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benefits after a voluntary quit has the burden of proving necessitous and compelling cause for quitting. *Id.* In a case such as this one, where a claimant has been offered continuing employment in the face of a job elimination or layoff, "[t]he crux of deliberation on whether compensation should be paid is whether the proffered work is suitable." *Shay v. Unemployment Compensation Board of Review*, 424 Pa. 287, 291, 227 A.2d 174, 176 (1967).

⁷ Claimant also argues that she had good cause for leaving work because the continued employment offered by Employer represented a unilateral change in the terms and conditions of her employment and that she was not required to attempt the offered employment in order to fulfill her good-faith duty of maintaining the employment relationship. However, because Claimant did not raise these matters in her petition for review, they are waived, and we will not consider them. *Lausch v. Unemployment Compensation Board of Review*, 679 A.2d 1385, 1391 (Pa. Cmwlth. 1996); Pa. R.A.P. 1513(a).

because it did not utilize the skills she had previously gained in her job as the Field Director's administrative assistant. However, neither *Franklin & Lindsey* nor *Shay* dictates the result here.

In *Franklin & Lindsey*, our Supreme Court reversed this court's decision that the claimant was ineligible for benefits under section 402(a), because the former employer's offer of purely secretarial work ignored the claimant's more recent and extensive experience as a draftsman-surveyor. In *Shay*, our Supreme Court vacated the Superior Court's decision and remanded the case for further hearing because the referee, the UCBR and the Superior Court all ignored the question of the suitability of the unskilled positions offered to a long-time carpenter and a long-time bricklayer who had opted for layoffs rather than accept the reductions in wages and changes of duties associated with those positions. Here, however, the UCBR found, and the record reflects, that, as the assistant store manager, Claimant would have retained some of the duties that she had performed in her earlier position. Moreover, as the UCBR emphasized and Claimant acknowledged in her brief, the assistant store manager job was not fully defined at the time Claimant rejected it.⁸ Even so, it was a full-time position with the same pay and benefits that Claimant had previously earned.

⁸ Claimant believed that the assistant store manager job was a demotion and consequently "beneath" her. (N.T., 9/7/10, at 12-13.) Nevertheless, while the Field Director acknowledged that, in this position, the majority of Claimant's time would have been spent on store-related matters, (*id.* at 18), he also stated that, because this newly created job was in flux, certain jobs that Claimant previously performed could and would have been returned to her. (*Id.* at 23.) Claimant acknowledged, for example, that she still would have been involved in the popcorn fundraiser. (*Id.* at 14.)

Accordingly, this case is more akin to *Anchor Darling Valve Company v. Unemployment Compensation Board of Review*, 598 A.2d 647 (Pa. Cmwlth. 1991), than to the cases relied on by Claimant. In *Anchor Darling*, we reversed a decision of the UCBR awarding benefits to the claimant where the claimant refused to accept his employer’s “offer of continued alternative work with similar duties, and the same salary and benefits, at the same location.” *Id.* at 650. We also pointed out that the claimant’s belief that he was being demoted did not constitute a necessitous and compelling cause for his quit where the specific aspects of the offered job had not been defined. Relying on well-established precedent, we explained:

This Court has previously established that claimants have the duty to take all necessary and reasonable steps to preserve employment. . . . We have also acknowledged the fact that employers frequently have occasion to alter work assignments and schedules in accordance with changing business conditions and managerial judgment. . . .

In *Grossman v. Unemployment Compensation Board of Review* . . . 415 A.2d 1018, 1020 ([Pa. Cmwlth.] 1980), this Court considered and rejected a claimant’s belief that the purpose of the . . . Law . . . is to protect a worker’s specialized skills in the face of economic difficulties. We stated that remaining unemployed would not serve to better maintain the abilities of the claimant and determined the fundamental purpose of the [Law] is not to preserve workers’ skills, but rather to “provide a semblance of economic security to those who are unemployed through no fault of their own.”

Id. at 649-50 (citations omitted; footnotes omitted).

Further, in *Unangst v. Unemployment Compensation Board of Review*, 690 A.2d 1305 (Pa. Cmwlth. 1997), a case in which the claimant rejected her

employer's offer of continued employment due to her largely speculative fears of an increased workload, we noted that the claimant "never actually attempted the new position and thus never determined how the overall workload would be absorbed among the remaining staff." *Id.* at 1308. Hence, we decided that the claimant in that case had also failed to prove that she had necessitous and compelling cause to voluntarily terminate her employment.

Similarly, here, Claimant did not attempt to perform the alternative position before rejecting it, even though the specifics of that job were not fully defined. Instead, considering the alternative job a demotion, Claimant chose to go back to school and not remain with Employer earning the same pay and benefits and performing some of the same tasks. Clearly, Claimant did not fulfill her duty of taking all reasonable and necessary steps to preserve her employment. Therefore, Claimant did not meet her burden of proving necessitous and compelling cause for her voluntary quit. Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

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ORDER

AND NOW, this 8th day of July, 2011, the order of the Unemployment Compensation Board of Review, dated December 13, 2010, is hereby affirmed.

ROCHELLE S. FRIEDMAN, Senior Judge