IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Florence M. Albert,	:	
Petitioner	:	
	:	
v.	:	No. 401 C.D. 2011
	:	Submitted: September 30, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: October 26, 2011

Florence M. Albert (Claimant) petitions for review of the January 10, 2011, order of the Unemployment Compensation Board of Review (UCBR), which affirmed the decision of a referee to deny Claimant unemployment compensation (UC) benefits under 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). Under section 402(b) of the Law, an employee is 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 worked for Conemaugh Valley School District (Employer) as a pre-K teacher from September 11, 2009, to May 7, 2010.[2] Claimant voluntarily left her employment in lieu of proceeding to arbitration for an unsatisfactory performance review. Claimant was concerned about the possible loss of her teaching certification if the arbitrator upheld the unsatisfactory performance review, resulting in Claimant being fired, and the stigma of being fired when applying for other jobs.

Before deciding to leave her employment, Claimant consulted with her union's legal counsel. Claimant subsequently tendered a verbal resignation to the union's counsel. After doing so, Claimant learned that Employer did not want Claimant to finish the school year, but that Employer would fulfill its contractual obligations to Claimant through August 2010. Claimant then entered into a settlement and release agreement with Employer.

Claimant filed an application for UC benefits, indicating that: (1) she quit; (2) Employer did not tell her that she would be discharged if she did not resign; and (3) she quit rather than risk losing her teacher certification through arbitration and rather than risk being fired. (C.R. at Item No. 2) Claimant's application was denied because Claimant did not exhaust all alternatives before resigning. (C.R. at Item No. 3.)

Claimant filed an appeal, asserting that she believed she had necessitous and compelling reasons for resigning. The matter was assigned to a referee, who held

[2] Claimant's contract ended in August 2010, and, although Claimant stopped working on May 7, 2010, Employer paid Claimant through the end of her contract.

a hearing on the matter. Employer did not appear at the hearing. Claimant testified that she had received an unsatisfactory job performance evaluation and that she was told that she was going to be given another unsatisfactory job performance evaluation in the spring. (N.T., 10/13/10, at 5.)

> The principal . . . said you know what that means, two unsatisfactory job performance evaluations, and that's your warning. *So I took that to mean that if I didn't quit I would be fired*, and if I'm fired I have to list it on my application for a new job. It would be hanged over my head for 10 years. And if I put it before an arbitrator and I lost, then I could lose my certificate permanently or part of the time.

(*Id.* at 5) (emphasis added). Claimant then testified that, after she resigned, she began thinking that she had done "the wrong thing." (*Id.*) Claimant sent some emails to the union, and counsel for the union responded in a letter, stating:

> Your e-mails of August 14, 2010 and August 18, 2010 . . . have been referred to me for a response. In reviewing my notes of the two meetings at the PSEA office with you . . . and myself, you indicated that your primary concern was to preserve your teaching career as I had informed you that if you went to arbitration on the validity of the *proposed discharge* because of unsatisfactory ratings and the arbitrator found against you, the District would be bound by law to report your discharge to the Professional Standards and Practices Commission in Harrisburg. There then would have been a separate proceeding with a hearing before a Hearing Examiner who would make a recommended order as to what type of discipline would be taken against your teaching certificate.

(C.R. at Item No. 8, Ex. C-1) (emphasis added). Claimant also testified, "I really think I would have won on arbitration." (N.T., 10/13/10, at 10.) She explained:

> The second [unsatisfactory performance evaluation] was based on the word of two other employees. One was a Pre-K teacher. She never spoke to me the whole year unless I spoke to her, and her aide. Her aide said that I said things to her that I would never say in public. And they just took her word against mine. And the other one, they took her word against mine, too, the Pre-K teacher. They had me in her room observing. And she said I was on the cell phone while I was observing. I have my cell phone record. I only make calls at night. But they just took her word for it. She said that I tried to take over her class. I didn't. I wrote a report after I observed in there. They could see that I was in there observing. How would I have written a report? I won't say I didn't talk at all. She did say I talked to another aide while I was in there. I did do that, you know, but I'm telling you it was bad.

(*Id.*) After considering the evidence, the referee denied Claimant UC benefits because Claimant's mere speculation that she would receive an adverse ruling from the arbitrator was not a necessitous and compelling reason to quit. Moreover, the referee pointed out that Claimant had cell phone records that would have disputed some of the claims against her.

Claimant appealed to the UCBR, arguing that she only resigned because she faced imminent discharge; thus, her resignation should be treated as a firing. In the alternative, Claimant requested a remand hearing to allow Claimant to present additional evidence, this time with the assistance of counsel. The UCBR affirmed the referee's decision because Claimant could have gone to arbitration to have the unsatisfactory performance evaluation dismissed and because her discharge was less than a certainty. The UCBR also denied Claimant's request for a remand, stating that

Claimant failed to advance good cause for a remand hearing. Claimant now petitions this court for review.[3]

Claimant argues that the UCBR erred in concluding that she did not face imminent discharge and in failing to treat her resignation as a firing. In making this argument, Claimant relies on the letter to her from counsel for the union, referring to Employer's "proposed discharge." However, even if Claimant correctly understood Employer's words to mean that she would be fired after receiving a second rating of unsatisfactory, Claimant testified that she believed that she would have prevailed had she proceeded to arbitration and that she might have made a mistake by resigning. Such testimony supports the UCBR's conclusion that Claimant's discharge was less than a certainty. *See Fishel v. Unemployment Compensation Board of Review*, 674 A.2d 770, 773 (Pa. Cmwlth. 1996) (stating that the existence of a right to appeal an employer's determination that the claimant should be discharged renders the prospect of discharge less than a certainty and, thus, not imminent).

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Senior Judge

[3] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

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O R D E R

AND NOW, this 26th day of October, 2011, the order of the Unemployment Compensation Board of Review, dated January 10, 2011, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge