

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Heather Black,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 780 C.D. 2010
	:	SUBMITTED: September 10, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: December 10, 2010

Claimant Heather Black petitions *pro se* for review of the March 23, 2010 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 for voluntarily leaving work without cause of a necessitous and compelling nature. We affirm.

Claimant worked as a waitress for Employer Surf N Turf Inn from September 2008 until August 15, 2009. She worked three-hour shifts three days

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

per week, earning \$2.83 per hour plus tips ranging from \$20 to \$100 per night. On Claimant's last day of work, she paid the owner a sum of money from her paycheck for a missing guest check. Before that reimbursement, Claimant would call the manager each week to determine whether she was on the work schedule. After Claimant's last day of work, however, the manager did not receive any further inquiries from her regarding the schedule. The referee determined, therefore, that Claimant effectively abandoned her position by failing to contact the manager on a weekly basis for her schedule and that she failed to establish cause of a necessitous and compelling nature for her voluntary termination. The Board affirmed the referee's decision² and Claimant's timely petition for review to this Court followed.

As an initial matter, we note that, under Section 402(b) of the Law, 43 P.S. § 802(b), an employee is ineligible for benefits during any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." A claimant bears the burden of proving necessitous and compelling reasons for leaving his or her job. *Wivell v. Unemployment Comp. Bd. of Review*, 673 A.2d 439 (Pa. Cmwlth. 1996). In order to show necessitous and compelling cause, the claimant must establish that circumstances existed which produced real and substantial pressure to terminate the claimant's employment, which would compel a reasonable person to act in the same manner; the claimant acted with ordinary common sense; and the claimant

² In rendering its decision and order, the Board adopted and incorporated the referee's findings and conclusions in their entirety. Credibility and evidentiary weight are determined by the Board, and its findings of fact are conclusive on appeal when 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).

made a reasonable effort to preserve his or her employment. *Brown v. Unemployment Comp. Bd. of Review*, 780 A.2d 885 (Pa. Cmwlth. 2001); *Fitzgerald v. Unemployment Comp. Bd. of Review*, 714 A.2d 1126 (Pa. Cmwlth. 1998). The issue of whether necessitous and compelling reasons for voluntarily leaving employment exist “is a legal conclusion always subject to appellate review.” *Fekos Enters. v. Unemployment Comp. Bd. of Review*, 776 A.2d 1018, 1020 n.3 (Pa. Cmwlth. 2001).

On appeal, Claimant argues that the referee erred in refusing to determine that she established necessitous and compelling reasons for her voluntary quit in light of her testimony that she tried to contact Employer for her work schedule subsequent to her last day of work. She claims that the referee thwarted her attempt to prove that she made such efforts, which Employer’s manager denied, by refusing to grant a request for a subpoena of relevant records.³ Further, she contends that, when the only physical records of such contact are within the control of an employer, it is unreasonable to require an employee to produce such records. In support of her position, she cites *Fekos*, in which this Court found ample evidence to support the Board’s conclusion that the claimant did not quit, but rather was dismissed, where the record indicated that he attempted to contact his employer to determine when he should return to work and was told that he had been removed from the schedule.

³ The Board in its brief maintains that Claimant waived a challenge to the findings by failing to dispute them in her petition for review. We disagree. Even though Claimant in her petition for review did not specify which fact-finding she wished to dispute, her averments therein clearly constitute a challenge to Finding of Fact No. 5. That fact-finding provides as follows: “After her last day of work, the employer’s manager never received any further inquiries from claimant regarding her work schedule.” Finding of Fact No. 5.

In response, the Board emphasizes that the referee rejected as not credible Claimant's testimony that, after she paid the owner for the missing guest check, she continued to contact the premises on a weekly basis, but was never able to reach the manager and was advised that she was not on the work schedule. Referee's Decision at 2. The Board recites the well-established law that "[q]uestions of credibility and the resolution of evidentiary conflicts are within the sound discretion of the Board, and are not subject to re-evaluation on judicial review." *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 277, 501 A.2d 1383, 1388 (1985) [quoting *Miller v. Unemployment Comp. Bd. of Review*, 405 A.2d 1034, 1036 (Pa. Cmwlth. 1979)]. In addition, the Board points out that there is no indication in the record that Claimant ever requested a subpoena for any of Employer's records. Accordingly, the Board maintains that having resolved the credibility dispute in favor of Employer's manager, it properly concluded that Claimant did not establish necessitous and compelling cause to quit. We agree.

In the present case, the onus was on Claimant to call and ascertain her weekly work assignment. In a similar case involving a contingent employee who was responsible for obtaining his assignment weekly by calling or stopping at employer's personnel office, *Calloway v. Unemployment Compensation Board of Review*, 414 A.2d 181 (Pa. Cmwlth. 1980), the Board held that the claimant abandoned his work without cause of a necessitous and compelling nature by failing to call or stop by the office for an assignment subsequent to his last day of work. Further, we note that Claimant has somewhat mischaracterized the record in this matter. Not only is it apparent from the transcript that Claimant never requested a subpoena for any of Employer's records, but the transcript also reflects that she represented that her own phone would have contained relevant text

messages but for the fact that she lost it. Specifically, in response to the referee’s question as to whether she had copies of her phone records showing that she contacted Employer subsequent to her last day, Claimant testified that “unfortunately I lost that phone and I just got a new one; otherwise, I would have all those texts on there.” *Id.* at 12. In summary, this case essentially consisted of a credibility dispute between Claimant and Employer’s manager. The referee, whose findings and conclusions the Board adopted in their entirety, chose to believe the manager and we cannot overturn that credibility determination on appeal. *Fitzpatrick v. Unemployment Comp. Bd. of Review*, 616 A.2d 110 (Pa. Cmwlth. 1992). Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Board of Review,	:	
	:	
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ORDER

AND NOW, this 10th day of December, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge