IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Eileen M. Britsch,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 786 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: September 10, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: December 28, 2010**

Eileen M. Britsch (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) decision that Claimant quit her job without necessitous and compelling reasons and was, therefore, ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1] The Board found Claimant ineligible for benefits because she failed to establish that she

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

made a reasonable effort to preserve her employment after notifying Heeter Printing (Employer) of a co-worker's inappropriate conduct directed towards Claimant.

Claimant applied for unemployment compensation benefits after becoming separated from her employment with Employer. The Unemployment Compensation Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(b). Claimant appealed the Service Center's determination, and an evidentiary hearing was held before the Referee. During the hearing, Claimant and her husband testified on Claimant's behalf. Of relevance, Claimant testified that she worked for Employer for 12 days as a bindery helper. She testified that her last day of employment was Friday, October 23, 2009, because on the day prior, Thursday, October 22, 2009, Claimant was subjected to inappropriate behavior by a co-worker. Claimant testified that she was directed to work with this co-worker to help her "sort the job . . . get it wrapped with the shrink wrap machine, and then proceed to box it." (Hr'g Tr. at 3.) During this time, the co-worker became impatient with Claimant, began to yell at Claimant, and told her she had to "F-ing . . . start working faster than this because this job had to get out today, not tomorrow;" the co-worker "shoved in front of [Claimant]" and said "what's so F-ing hard?"; and the co-worker began "slamming the [shrink wrap] machine" and throwing things. (Hr'g Tr. at 4-5.) When Claimant noticed that the co-worker's "temper was really starting to escalate," Claimant backed away, approached the floor manager about the co-worker's behavior, and moved into the mail room where she proceeded to cut boxes. (Hr'g Tr. at 5.) At the end of the day her husband picked her up from work, she began to cry, and told her husband she did not think she could go back to work because the co-worker "scared" her. (Hr'g Tr. at 6.) Claimant testified that, due to

her anxiety, she called her doctor, who prescribed her medication. (Hr'g Tr. at 6.) Claimant also testified that she was able to go to work on Friday, October 23, 2009, because she was medicated. (Hr'g Tr. at 6.)[2]

Employer's owner and Vice President, Tim Thomas, testified on behalf of Employer. Mr. Thomas testified that, on Friday, October 23, 2009, Claimant came to the office and reported the matter to the Plant Manager. Based on Claimant's complaint, Mr. Thomas testified that he and the Plant Manager discussed the matter with Claimant and she "told us her side of the story." (Hr'g Tr. at 8.) Mr. Thomas explained that they told Claimant that they "were not going to tolerate such behavior from another employee," they "assured [Claimant] that this would not happen again[, and, i]f it did, [Employer] would terminate this other employee." (Hr'g Tr. at 8.) Mr. Thomas testified that they also explained to Claimant that they "were training [Claimant] so that she would work an opposite shift of [the co-worker]." (Hr'g Tr. at 8.) He explained that Employer operates 24 hours per day, 7 days per week, and that they wanted Claimant and the co-worker "to rotate because they were into similar positions." (Hr'g Tr. at 8.) Additionally, Mr. Thomas testified that he

> tried to assure [Claimant] that, you know, you wouldn't be working along side of this woman, and if she did, like I said, make any other -- whether swearing or bad gestures or just being a bully, we would fire her immediately. I assured her that because that's not the kind of business we want to run here. And we were appalled by the behavior of this woman, and we wanted to give her one formal warning and one opportunity to straighten her act out, and we did that.

[2] Although the record is not clear, it appears that Claimant had a similar encounter with the same co-worker on Wednesday, October 21, 2009. (Hr'g Tr. at 6-7.)

(Hr'g Tr. at 8-9.) Mr. Thomas testified that immediately after the meeting with Claimant, they called the co-worker into the office, and formally wrote her a "last warning" stating that any more incidences with Claimant or any other employee would be cause for immediate termination. (Hr'g Tr. at 8.) Claimant finished her work day on Friday, October 23, 2009 and called Employer on Monday, October 26, 2009 to notify them that she quit, even though continuing work was available to Claimant.

Following the hearing, the Referee affirmed the Service Center's determination and made the following findings of fact:

1. The claimant was a full-time Bindary [sic] Helper with He[e]ter Printing of Canonsburg, PA for 12 days. The claimant's rate of pay was $10.00 per hour. The claimant's last day of work was Friday, October 23, 2009.

2. The claimant voluntarily quit this position following a confrontation with a co-worker that occurred on Thursday, October 22, 2009.

3. On Friday, October 23, 2009 the claimant met with two of the owners discussing the incident that occurred with a co-worker.

4. The employer informed the claimant that the behavior she described with the co-worker from the previous day would not be tolerated and that the co-worker would be informed that any further such behavior would result in further discipline or termination.

5. The employer did meet with the co-worker, gave the co-worker a written warning and informed [sic] that if any other employee reported such conduct, she would be terminated from her employment immediately.

6. The claimant decided on Sunday, October 25, 2009 that she would not return to work with this employer for her scheduled hours on Monday, October 26, 2009.

7. Continuing work was available for the claimant.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-7.) The Referee determined that Claimant was ineligible for benefits because Claimant did not act in good faith to preserve her employment. The Referee stated that:

> [E]mployer seriously discussed the circumstances the claimant described and responded by giving the employee the claimant accused of the abusive and inappropriate treatment a written warning and putting the other employee on notice that any further such conduct would result in termination. The claimant chose not to return to work rather than determine if any further such conduct would occur.

(Referee Decision at 2.) Claimant appealed to the Board. After conducting a review of the record, the Board adopted the Referee's factual findings and conclusions and affirmed the Referee's decision. The Board stated:

> The Board agrees that the claimant failed to establish that she made a reasonable effort to maintain her employment. Furthermore, while the claimant indicated that she called her physician about anxiety, the claimant failed to credibly establish that she informed the employer of a[] medical condition or restrictions. Additionally, employer credibly established that the claimant was informed that she was being trained so she could work an opposite shift from the employee that used profanity with the claimant.

(Board Order.) Claimant now petitions this Court for review.[3]

[3] When reviewing an order from the Board, this Court may only determine whether the Board committed an error of law, whether constitutional rights were violated, or whether necessary factual findings are supported by substantial evidence. Nolan v. Unemployment Compensation Board of Review, 797 A.2d 1042, 1045 n.4 (Pa. Cmwlth. 2002).

Where a claimant has voluntarily quit employment, in order to obtain benefits, she must show that she left her employment for necessitous and compelling reasons. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 354, 378 A.2d 829, 830 (1977). In order to show a necessitous and compelling reason to quit, the claimant must show that "circumstances existed which produced real and substantial pressure to terminate employment"; such "circumstances would compel a reasonable person to act in the same manner"; the claimant "acted with ordinary common sense"; and the claimant "made a reasonable effort to preserve her employment." Comitalo v. Unemployment Compensation Board of Review, 737 A.2d 342, 344 (Pa. Cmwlth. 1999). Harassment or abusive conduct at the workplace has been found to justify quitting one's employment; however, in order to avoid disqualification, the claimant must provide notice of the conduct to the employer. Moskovitz v. Unemployment Compensation Board of Review, 635 A.2d 723, 724 (Pa. Cmwlth. 1993). "If the employer promises to take action to alleviate the problem, good faith requires that the employee continue working until or unless the employer's action proves ineffectual." Craighead-Jenkins v. Unemployment Compensation Board of Review, 796 A.2d 1031, 1034 (Pa. Cmwlth. 2002).

Claimant first argues that she acted reasonably in quitting her employment because she was fearful of the co-worker because, on "several occasions," the co-worker subjected her to "verbal and physical harassment, threats, and intimidation," which caused anxiety. (Claimant's Br. at 9.) Relying on this Court's decision in Unemployment Compensation Board of Review v. Tickle, 339 A.2d 864 (Pa. Cmwlth. 1975), Claimant argues that because her fear of violence from the co-worker was reasonable, she is entitled to benefits. In opposition, the Board argues that

Claimant did not uphold her burden of proof because her termination of her employment was prompted by "normal workplace pressure" that did not amount to an intolerable working atmosphere, per Astolfi v. Unemployment Compensation Board of Review, 995 A.2d 1286, 1289 (Pa. Cmwlth. 2010).

Initially, we note that the Referee did not make a factual finding that Claimant was subjected to abuse or harassment on "several occasions." Rather, the Referee found that Claimant quit her employment following a single confrontation with the co-worker on October 22, 2009, (FOF ¶ 2), which the Referee described as behavior by the co-worker that was "inappropriate to say the least." (Referee Decision at 2.) The law is clear that the Board is the ultimate finder of fact and arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343, 1344 (Pa. Cmwlth. 1978). That Claimant may have given "a different version of the events, or . . . might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." Tapco, Inc. v. Unemployment Compensation Board of Review, 650 A.2d 1106, 1108-09 (Pa. Cmwlth. 1994). Here, there is substantial evidence to support the Board's finding that Claimant quit after the confrontation involving the co-worker on October 22, 2009. While Claimant may have mentioned that she had a similar incident with the co-worker on October 21, 2009 (Hr'g Tr. at 6-7), that testimony by Claimant is not clear and certainly was not the focus of Claimant's own explanation of why she terminated her employment.

As to whether the confrontation Claimant had with the co-worker on October 22, 2009, was grounds to quit her employment, we agree with the Board that the evidence presented does not amount to intolerable working conditions. Contrary to Claimant's assertion, the facts of this case are not similar to those in Tickle. In Tickle, the issue was whether the claimants were eligible for benefits when they refused to cross a picket line because they feared for their personal safety. This Court reversed the Board's order denying benefits to the claimants because the record evidence clearly showed: "(1) that the pickets were intoxicated; (2) that [the pickets] were armed with steel balls and hammers; (3) that [the pickets] were making specific [physical] threats directed to the claimants; and (4) that [the pickets] actually grabbed two members of the claimants' class in order to dissuade them from going to work." Tickle, 339 A.2d at 871. As such, this Court concluded that "the actions of the pickets were sufficient to instill in a reasonable person a genuine fear for his personal safety." Id. In this case, however, the specific behavior of the co-worker, to which Claimant testified, did not rise to the level of threat of the pickets and resultant fear to the claimants as in Tickle. Here, Claimant testified that she was subjected, on one particular occasion, to a co-worker yelling at her with profane language, slamming a shrink wrap machine, and throwing things. There is no evidence that the co-worker called Claimant a derogatory name, that Claimant was physically assaulted, that the co-worker threatened Claimant with any type of physical violence, or that she was subjected to the kinds of intolerable abusive language experienced by successful claimants in other voluntary quit cases, which this Court cites in Astolfi, 995 A.2d at 1289-90. See, e.g., Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977) (for three years, an African-American claimant was subjected to prejudicial treatment and repeated racial slurs); Mercy Hospital of

Pittsburgh v. Unemployment Compensation Board of Review, 654 A.2d 264, 266 (Pa. Cmwlth. 1995) (claimant was excessively taunted by co-workers who called the claimant derogatory names such as "alcoholic," "faggot," and "crazy"); Danner v. Unemployment Compensation Board of Review, 443 A.2d 1211, 1213 n.2 (Pa. Cmwlth. 1982) (the claimant submitted testimony that "a number of his fellow employees, including his foreman, had questioned him as to whether or not his girlfriend had had a sex change operation and that they often verbally abused him in an extremely derogatory manner and physically pushed him.").

Even assuming Claimant was subjected to intolerable working conditions, Claimant still has the burden of proving that she made a good faith effort to preserve her employment, which the Board concluded she failed to prove. Claimant argues that she upheld this burden because, after notifying Employer of the encounter with the co-worker, Employer did not notify Claimant that it gave the co-worker a final written warning; rather, Employer merely assured Claimant that the problems she was having with the co-worker would not happen again. Further, Claimant asserts that the possibility of working different shifts than the co-worker was not sufficient because the different "shifts were 'rotating' in nature, meaning that Claimant would work on a different shift from the co-worker for two weeks, followed by two weeks working during the same shift as the co-worker." (Claimant's Br. at 10.) For these reasons, Claimant argues that she acted reasonably in quitting her employment because "a reasonable person would feel his or her options were exhausted due to the employer's apparent acquiescence to the presence of a belligerent and potentially dangerous employee in the workplace." (Claimant's Br. at 10.) However, these arguments are not supported by the credited facts.

The record establishes that Claimant failed to make a reasonable effort to maintain her employment after putting Employer on notice of her complaints with regard to the co-worker. Employer immediately discussed Claimant's complaint with Claimant the day following the incident when Claimant approached the Plant Manager. Employer took Claimant's allegations about the co-worker's behavior seriously, told Claimant that the situation that took place with the co-worker would not happen again and, if it did, the co-worker would be immediately terminated. Employer also told Claimant that it would train her to work a different shift than the co-worker. Contrary to Claimant's argument, there are no factual findings and no evidence presented to establish that Claimant's new shift would be rotating in nature such that Claimant would have to work side-by-side with the co-worker in the future. In fact, Mr. Thomas explained that Claimant was being trained to "work an opposite shift" of the co-worker, (Hr'g Tr. at 8), and that Claimant "wouldn't be working along side of this [co-worker]." (Hr'g Tr. at 8-9.) More importantly, immediately following the discussion with Claimant, Employer met with the co-worker and gave her a final written warning that if any incident happened in the future with Claimant or another employee, the co-worker would be terminated immediately. There is no evidence of record, and certainly no factual findings, to indicate that Claimant had any contact with the co-worker following her discussion with Employer, or that any other incident happened between Claimant and the co-worker to make Claimant reasonably believe that Employer "acquiesce[d] to the presence of a belligerent and potentially dangerous employee in the workplace." (Claimant's Br. at 10.) Claimant quit her position without giving Employer a fair opportunity to remedy the situation and, as such, has not met her burden of proving that she made a reasonable effort to preserve her employment.

Accordingly, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, December 28, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge