IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sandra Lee Steinmetz,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1043 C.D. 2012
	:	
Unemployment Compensation Board of Review,	:	Submitted: October 26, 2012
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: January 3, 2013**

Sandra Lee Steinmetz (Claimant), pro se, petitions for review of the Order of the Unemployment Compensation Board of Review (Board), affirming the decision of an Unemployment Compensation Referee (Referee), determining that Claimant was ineligible for unemployment compensation (UC) benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law),[1] because

[1] Act of December 5, 1986, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(b). Section 402(b) of the Law provides that a claimant is ineligible for benefits for any week "[i]n which h[er] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature." Id.

Claimant voluntarily quit her employment without a necessitous and compelling reason. On appeal, Claimant challenges the Board's determination, arguing that: (1) there was sufficient evidence to show Claimant was constructively discharged, and (2) Claimant had cause of a necessitous and compelling nature to voluntarily leave her employment because she was harassed by her supervisors and was issued a final written warning that contained several factual misrepresentations. Because we discern no error, we affirm.

Claimant worked as a Business Class Customer Account Executive for Comcast Corporation (Employer). She terminated her employment on September 2, 2011, and applied for UC benefits. The Philadelphia UC Service Center denied her benefits pursuant to Section 402(b) of the Law. (Notice of Determination, R. Item 5.) Claimant appealed and the matter was assigned to a Referee for a hearing. (Notice of Hearing, R. Item 8.) A hearing was held on January 10, 2012, during which Claimant and Claimant's witness, Harry R. Steinmetz, testified. Employer did not appear at the hearing. (Hr'g Tr., R. Item 9.) After the hearing, the Referee made the following findings of fact:

> 1. The claimant was employed by Comcast Corporation as a full-time Business Class Customer Account Executive from May 15, 2011 until her last day [of] work on September 2, 2011 at the final rate of pay of $16.95 per hour.
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> 2. On or about August 15, 2011, the employer issued the claimant a final written warning.
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> 3. The claimant protested to the employer that the information contained in the final written warning was not true and further complained that she was not receiving direction or [the] support necessary to perform her job.

> 4. The claimant considered the employer to be harassing her because she was constantly being questioned by her supervisor regarding her work performance.
>
> 5. The claimant believed that the employer intended to terminate her employment.
>
> 6. The employer did not inform the claimant that she was subject to termination of employment or that it intended to terminate her employment.
>
> 7. On September 2, 2011, the claimant submitted her two weeks[’] notice of resignation with her last day of work to be September 16, 2011.
>
> 8. The employer instructed the claimant that she was to leave immediately.

(Referee Decision, Findings of Fact (FOF) ¶¶ 1-8). The Referee determined that Claimant voluntarily terminated her employment without good cause because she quit her job only to avoid the possibility of discharge. The Referee concluded that Claimant "acted on the speculative belief that she would be fired at some point in the future" and denied Claimant UC benefits pursuant to Section 402(b) of the Law.[2] (Referee Decision at 2.) Claimant appealed to the Board. (Claimant's Petition for Appeal, R. Item 11.) Upon review, the Board adopted the Referee's

[2] Because Claimant was discharged before the effective date of her resignation, the Referee also considered whether Claimant was ineligible for UC benefits pursuant to Section 402(e) of the Law, 43 P.S. § 802(e); specifically, whether Employer established that Claimant committed willful misconduct between the last day of work until the effective date of her resignation. (Referee Decision at 2.) However, because Employer did not show that Claimant committed any act of willful misconduct, the Referee determined that Claimant was not ineligible pursuant to Section 402(e) for UC benefits for the waiting week ending September 17, 2011. (Referee Decision at 2.) Consequently, Claimant was found not eligible for UC benefits under Section 402(b) of the Law beginning with the compensable week ending September 24, 2011. (Referee Decision at 2.)

findings of fact and conclusions of law, and affirmed the Referee's decision. The Board concluded that, "[b]ased upon the totality of the evidence and testimony," Claimant "was not in imminent danger of discharge and made a personal choice to resign her employment." (Board Order.) Claimant now petitions this Court for review.[3]

Claimant argues on appeal that: (1) her supervisors harassed her and misrepresented facts about her performance, which, along with the final written warning, constructively terminated her employment, and; (2) this harassment and misrepresentation constituted necessitous and compelling cause for Claimant to voluntarily quit.[4]

We first address Claimant's arguments that Employer constructively terminated her employment by misrepresenting facts about her performance, issuing the final written warning, and subjecting her to continuing harassing behavior. Initially, we note that, although Claimant raised this issue in her Statement of Questions Involved, (Claimant's Br. at 7), Claimant does not develop

[3] "Our scope of review is limited to determining whether constitutional rights have been violated, an error of law has been committed or whether necessary findings of fact are supported by substantial evidence." Wise v. Unemployment Compensation Board of Review, 700 A.2d 1071, 1073 (Pa. Cmwlth. 1997).

[4] Claimant also argues she should not be ineligible for benefits under the provisions of Section 402(b) of the Law, 43 P.S. § 402, because Section 402 does not exist since it was repealed on May 22, 1933. Claimant's assertion is not correct. It is true that former Section 402 of Title 43 was repealed; however, this repealed Section 402 Claimant is referring to is regarding sanitary regulations for bakeries, not UC provisions. The Law, which establishes a UC system, was initially enacted on May 6, 1936, and Section 402(b) of the Law, 43 P.S. § 802(b), is still in effect.

this issue in the remainder of her brief. Because Claimant failed to develop this issue in her brief, it is waived. Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636, 638 (Pa. Cmwlth. 1998) (citing Rule 2119(a) of the Pennsylvania Rules of Appellate Procedure, Pa. R.A.P. 2119(a)). Moreover, even if it were not waived, this argument would fail.

To prove a constructive employment termination, a claimant must demonstrate that the employer's actions had the immediacy and finality of a firing. Maines v. Unemployment Compensation Board of Review, 532 A.2d 1248, 1250 (Pa. Cmwlth. 1987). Alternatively, when an employer offers employees a choice to remain working or to resign, there is not sufficient finality and immediacy to establish a constructive discharge. See Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 44-47, 565 A.2d 127, 128-30 (1989). Most importantly, this Court has determined that an employee voluntarily terminates her employment if she resigns to avoid the *possibility* or *chance* of a dismissal. Charles v. Unemployment Compensation Board of Review, 552 A.2d 727, 729 (Pa. Cmwlth. 1989).

Claimant argues that Employer constructively discharged her when it: issued her a final written warning that inaccurately or falsely stated that she was insubordinate, argumentative, and unprofessional during interactions with supervisors; refused to remove these inaccuracies; and harassed her by requiring her to meet with her supervisor regularly, while her supervisor gave her contradictory feedback about her performance. However, the Board's findings of fact, as well as Claimant's testimony, even if accepted as true, are not sufficient to

conclude that Employer constructively discharged Claimant. There is no evidence to show that the final written warning, and the alleged harassing behavior and factual misrepresentations, taken as a whole, constituted Claimant's discharge. Whether the information contained in the final written warning was truthful or not, it only indicated Employer's dissatisfaction with Claimant's job performance, and that any future instances of noncompliance *might* result in Claimant's employment termination. The Board found that, although Claimant believed she was going to be terminated from her employment, Employer did not inform Claimant that she was subject to employment termination or that it intended to terminate her employment. (FOF ¶¶ 5-6.) Additionally, Claimant's supervisors did not use any specific language indicating that Claimant's employment was being terminated. Although Claimant was supervised and scrutinized more closely after she was issued the warning, there is no evidence to show that Claimant was acting to avoid an imminent discharge. Even if Claimant acted in fear that she would be discharged due to the increased pressure after she was issued the warning, voluntarily quitting to avoid the mere possibility of discharge does not constitute constructive discharge. See Pennsylvania Liquor Control Board v. Unemployment Compensation Board of Review, 648 A.2d 124, 126 (Pa. Cmwlth. 1994) (stating that "[a] claimant who resigned under the circumstances indicating only a possibility of a discharge is considered to have voluntarily resigned"). Therefore, even if Claimant had preserved this issue, we would not hold that the Board erred in concluding that she voluntarily quit rather than was constructively discharged by Employer.

We next address Claimant's argument that she had necessitous and compelling cause to terminate her employment. Despite a claimant's decision to quit, voluntarily terminating employment does not automatically disqualify a claimant from receiving UC benefits. Monaco, 523 Pa. at 47, 565 A.2d at 130 (citing Genetin v. Unemployment Compensation Board of Review, 499 Pa. 125, 128, 451 A.2d 1353, 1354-55 (1982)). To be eligible for UC benefits after voluntarily leaving one's employment, a claimant has the burden of showing that the cause to voluntarily quit was of a necessitous and compelling nature. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977); First Federal Savings Bank v. Unemployment Compensation Board of Review, 957 A.2d 811, 816 (Pa. Cmwlth. 2008). "Although the Board is the ultimate finder of facts, the question of whether or not a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to our review." Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282, 1284 (Pa. Cmwlth. 1981). To show necessitous and compelling cause, a claimant must prove '"(1) circumstances existed that produced real and substantial pressure to terminate employment; (2) like circumstances would compel a reasonable person to act in the same manner; (3) [s]he acted with ordinary common sense; and (4) [s]he made a reasonable effort to preserve h[er] employment."' First Federal Savings Bank, 957 A.2d at 816 (quoting Central Dauphin School District v. Unemployment Compensation Board of Review, 893 A.2d 831, 832 (Pa. Cmwlth. 2006) (citation omitted)). The conditions producing pressure to leave must be both real and substantial. PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 49, 51 n.1 (Pa. Cmwlth. 2006).

Claimant argues that the harassment, final written warning, and misrepresentations contained therein constituted necessitous and compelling cause for her to quit.

The Board found that Claimant felt harassed because she was constantly questioned by her supervisor regarding her work performance. (FOF ¶ 4.) However, such questioning or critiquing does not constitute necessitous and compelling cause. When determining the existence of necessitous and compelling cause in instances of supervisor conduct, "a mere dissatisfaction with working conditions or resentment of a superior's criticism without a demonstration of unjust accusations, abusive conduct or profane language is insufficient" absent an intolerable work environment. Lauffer v. Unemployment Compensation Board of Review, 434 A.2d 249, 251 (Pa. Cmwlth. 1981) (citing Krieger v. Unemployment Compensation Board of Review, 415 A.2d 160, 161 (Pa. Cmwlth. 1980)). Mere resentment of a reprimand does not constitute a necessitous and compelling cause to voluntarily quit, Lynn v. Unemployment Compensation Board of Review, 427 A.2d 736, 737 (Pa. Cmwlth. 1981), nor do working environments that are uncomfortable, but not intolerable. Ann Kearney Astolfi, DMD, PC. v. Unemployment Compensation Board of Review, 995 A.2d 1286, 1290 (Pa. Cmwlth. 2010).

In Lauffer, the claimant alleged that his supervisor, without cause, accused him of lying, blamed him for other employees drinking on the job, and put unreasonable work demands on him. Lauffer, 434 A.2d at 251. The claimant asserted that these accusations were untrue. This Court determined that the supervisor's criticisms, whether true or not, were neither delivered in a profane or

offensive manner, nor were the reprimands so severe that the claimant's only option was to resign. Id. We also determined that the "comments to which [claimant] objects were directly related to employee relations and work performance which are legitimate concerns of the [claimant]'s superior." Id. We held that these allegations, and the personal conflict between the claimant and his supervisor, did not amount to good cause to voluntarily terminate his employment. Id.

Similar to Lauffer, Claimant asserts here that her supervisors reprimanded her, and fabricated allegations that she used profane language and acted inappropriately. As stated above, dissatisfaction with a supervisor's reprimand or criticism does not amount to necessitous or compelling cause to voluntarily quit and Claimant does not assert that she was reprimanded in a profane or offensive manner. Claimant alleges that her supervisor's reprimands were offensive because they were untrue, and did not adhere to company policies. A false allegation is sufficient to constitute necessitous and compelling cause only if it is delivered in a profane or offensive manner. Id. Additionally, the Board found that Claimant felt harassed for being constantly questioned about her work performance. (FOF ¶ 3.) However, as in Lauffer, comments directly related to work performance are legitimate concerns of any supervisor and do not amount to necessitous or compelling cause.

In Ann Kearney Astolfi, 995 A.2d at 1290, the claimant was unhappy with her chaotic work environment, yet the worst treatment the claimant experienced was being "yelled at" by her superior. The claimant was also criticized at work,

causing her stress and anxiety. She was convinced that her boss was trying to induce her to quit. Despite this displeasure, the claimant was "not publicly reprimanded or accused of being a criminal" and was not "subjected to the kinds of intolerable abusive language experienced by successful claimants in other voluntary quit cases." Id. at 1289; See, e.g., Mercy Hospital of Pittsburgh v. Unemployment Compensation Board of Review, 654 A.2d 264, 266 (Pa. Cmwlth. 1995) (employees called claimant names such as "alcoholic," "faggot," and "crazy.").

Here, Claimant was reprimanded by her supervisors before and after her final written warning was issued, yet these reprimands were work-related and no worse in severity to the claimant in Ann Kearney Astolfi being yelled at. Furthermore, these public reprimands do not constitute necessitous and compelling cause because Claimant was not subjected to any abusive or profane language. "Being 'yelled' at…is not comparable to being called names or being unjustly accused of criminal conduct." Ann Kearney Astolfi, 995 A.2d at 1290. Claimant's final written warning was issued in private, and the Claimant agrees that her supervisors never used any profane, abusive, or inappropriate language while addressing her.

Finally, Claimant asserts that she, herself, was unjustly accused of using profane language while interacting with her supervisors. Whether these accusations are true or not, Claimant was not unjustly accused of any criminal conduct. Accusations of Claimant's profanity and unprofessionalism are simply not enough to make a finding of necessitous and compelling cause. Accordingly,

the Board properly denied Claimant UC benefits pursuant to Section 402(b) of the Law.

For the foregoing reasons, we affirm the Board's Order.

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RENÉE COHN JUBELIRER, Judge

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	:	
Respondent	:	

O R D E R

NOW, January 3, 2013, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge