

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Miscoe Chiropractic Clinic, P.C.,	:	
Petitioner	:	
	:	
v.	:	No. 1050 C.D. 2009
	:	SUBMITTED: November 6, 2009
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JOSEPH F. McCLOSKEY, Senior Judge¹

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: January 13, 2010

Miscoe Chiropractic Clinic, P.C. (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) that reversed the Referee’s denial of unemployment benefits to Melissa Cinko (Claimant), determining that she had a necessitous and compelling reason to quit her employment and was not ineligible for benefits under Section 402(b) of the Unemployment Compensation Law, Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b). We affirm.

¹ The decision in this case was decided before Senior Judge McCloskey retired on December 31, 2009.

The Board's findings of fact are as follows. Employer employed Claimant as a chiropractic/massage therapist from October 22, 2007, until May 23, 2008, her last day of work. The working members of the office consisted of Claimant, an office manager, and Dr. Frederic Miscoe. Dr. Miscoe is the primary officer of the clinic. The office manager does not have the authority to fire Dr. Miscoe.

On May 22, 2008, Claimant asked Dr. Miscoe whether employees could "dress down" for work on May 23, 2008. Dr. Miscoe stated that Claimant should at least wear a thong to work. Claimant worked on May 23, 2008, but Employer closed its office after about one hour of business because Dr. Miscoe had to leave for an airplane flight. Claimant was off work on May 26, 2008, due to the Memorial Day holiday. Claimant called off of work on May 27 and May 28, 2008. Claimant was a no call/no show for her scheduled shifts from May 29, 2008, through June 3, 2008. Claimant decided to voluntarily terminate her employment as of May 29, 2008, because of Dr. Miscoe's behavior. Dr. Miscoe previously grabbed and hugged Claimant, attempted to kiss her about twice a week, and made inappropriate sexual comments to Claimant. Claimant did not raise concerns with Dr. Miscoe because she did not want him to retaliate and terminate her employment. Claimant moved her work area into a public area to minimize her contact with Dr. Miscoe.

Employer has a policy prohibiting harassment. In pertinent part, it informs employees that if they feel that they have suffered harassment, that they should report the incident to the clinic manager or any other officer at Employer with whom the employee feels comfortable. Claimant was aware of Employer's policy. Claimant did not raise her concerns with the office manager because she

was ashamed of what was happening to her. Claimant terminated her employment on May 29, 2008, because she could no longer tolerate Dr. Miscoe's behavior.

The Referee determined that Claimant was not entitled to benefits because she failed to provide sufficient evidence establishing that she was sexually harassed or that she voluntarily terminated her employment for other necessitous and compelling reasons. On appeal, the Board found Claimant's testimony credible and resolved conflicts in her favor.² The Board did not find Dr. Miscoe's testimony credible. Further, the Board determined that Claimant quit her employment because she was being harassed by her immediate supervisor and any efforts to raise her concerns with the office manager or Dr. Miscoe would have been futile. Consequently, the Board reversed the Referee's decision and granted unemployment benefits to Claimant.

The sole issue raised by Employer is whether Claimant is entitled to unemployment compensation benefits because she did not exhaust her reporting obligations under Employer's policy and failed to avail herself of any common sense alternative for obviating the problems that gave rise to her voluntary resignation. Employer contends that Claimant admitted that she could have reported Dr. Miscoe's behavior to the office manager. Employer also argues that Claimant expressed satisfaction with her job while the alleged harassment occurred. Employer asserts that Claimant ignored Employer's policy even though the office manager could have taken steps to make Claimant more comfortable at her position.

² The Board is the fact-finder and arbiter of credibility in unemployment compensation cases, and it is not our role to re-weigh the evidence. *Curran v. Unemployment Comp. Bd. of Review*, 752 A.2d 938 (Pa. Cmwlt. 2000).

The Board argues that the office manager could not have rectified the situation if Claimant reported Dr. Miscoe's behavior to the office manager because Dr. Miscoe was the head of the office and was the only person with authority to terminate an employee. Further, the Board argues that Claimant did not have to notify the office manager of the harassment because the primary company officer, Dr. Miscoe, perpetrated the harassment.

In order to establish a necessitous and compelling cause to leave employment, a claimant must establish that circumstances that produced real and substantial pressure to terminate employment existed; a reasonable person would act in the same manner; she acted with common sense; and she made a reasonable effort to preserve her employment. *First Fed. Sav. Bank v. Unemployment Comp. Bd. of Review*, 957 A.2d 811 (Pa. Cmwlth. 2008). Sexual harassment may constitute a necessitous and compelling reason to voluntarily leave employment if the claimant can show that she acted with common sense and prudence to alleviate the sexual harassment. *Hussey Copper Ltd. v. Unemployment Comp. Bd. of Review*, 718 A.2d 894 (Pa. Cmwlth. 1998). Such common sense action includes providing the employer an opportunity to understand the nature of a claimant's objections and to take steps to resolve those objections. *Collier Stone Co. v. Unemployment Comp. Bd. of Review*, 876 A.2d 481 (Pa. Cmwlth. 2005).

Where a mechanism, such as an employment policy, exists to deal with problems of sexual harassment, a claimant must make a good faith effort to utilize that mechanism. *Hussey Copper Ltd.* However, a claimant is not required to perform a futile act. *Mauro v. Unemployment Comp. Bd. of Review*, 751 A.2d 276 (Pa. Cmwlth. 2000). Further, where a claimant's supervisor has knowledge of harassment against a claimant, the employer is deemed to have the knowledge as

well, and the claimant is not required to report the harassment to higher levels of management. *Peddicord v. Unemployment Comp. Bd. of Review*, 647 A.2d 295 (Pa. Cmwlth. 1994). Ultimately, the employer is responsible for eliminating harassment in the workplace. *Collier Stone Co.*

We agree with the Board that Claimant would have committed a futile act by reporting the harassment to the office manager or Dr. Miscoe. It is undisputed that Dr. Miscoe is in charge of Employer's office and is the only person in the office with the authority to terminate an employee.³ As the Board found, Dr. Miscoe grabbed and hugged Claimant, attempted to kiss her several times a week, and made inappropriate sexual comments to her. Claimant's testimony, which the Board credited, detailed the extensive nature of Dr. Miscoe's harassment.⁴ Dr. Miscoe's harassment was not a one-time event. Dr. Miscoe committed blatantly offensive harassment, and he was the person with the authority to resolve the situation. Consequently, Claimant had no obligation to report the harassment to the office manager or Dr. Miscoe because the facts found by the Board establish that such report would have been futile.

Accordingly, we affirm the Board's order.

BONNIE BRIGANCE LEADBETTER,
President Judge

³ Dr. Miscoe testified that he is the primary officer at Employer and he is the only person that could terminate his employment. *See* Notes of Testimony at 26.

⁴ Claimant testified that Dr. Miscoe's harassment started a week after her employment began. Claimant also testified that Dr. Miscoe touched, groped, caressed, and kissed her. She testified that Dr. Miscoe placed her hand on his erection and made inappropriate comments concerning that situation. She further testified that Dr. Miscoe placed his hands on her hips and thrust his body toward her rear end. *See id.* at 8-10.

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Board of Review,	:	
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ORDER

AND NOW, this 13th day of January, 2010, the order of Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge