IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jean Ann Boyle,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1052 C.D. 2012
	:	Submitted: November 9, 2012
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: January 23, 2013**

Jean Ann Boyle (Claimant) petitions for review of the decision and order of the Unemployment Compensation Board of Review (Board), holding that she is ineligible for unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law[1] on the ground that she voluntarily quit her job without a necessitous and compelling reason. Because we conclude that Claimant met her burden of showing a necessitous and compelling reason for terminating her employment, we reverse.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, §402, *as amended*, 43 P.S. §802(b). Section 402(b) provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week… [i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature …." *Id.*

Claimant was employed as a part-time consumer finance representative by Northwest Bancshares Inc. (Employer) from July 22, 2010 until December 28, 2011. (Record Item (R. Item) 16, Board Decision and Order, Findings of Fact (F.F.) ¶1; R. Item 13, Referee Hearing Transcript (H.T.) at 5-6; R. Item 3, Employer Separation Information Document No. 15.) Claimant was paid on an hourly basis at a rate of $10.26 per hour at the time her employment ended. (R. Item 16, F.F. ¶1; R. Item 13, H.T. at 5; R. Item 3, Employer Separation and Wage Information.) Claimant worked in Employer's Meadville office and was hired to work 19.5 hours per week. (R. Item 16, F.F. ¶2; R. Item 13, H.T. at 5; R. Item 3, Employer Separation Information Document No. 15.)

Claimant believed that her manager at the Meadville office, Lois Warp, began cutting her hours after Employer decided that it wanted to make her position a full-time position. (R. Item 16, F.F. ¶¶3-8; R. Item 13, H.T. at 5-6; R. Item 2, Claimant Separation Information Document No. 10.) On December 16, 2011, Ms. Warp sent Claimant home early despite the fact that Claimant had work to do. (R. Item 16, F.F. ¶¶6-7; R. Item 13, H.T. at 6-7.) When Claimant asked why she was being sent home when work was available, Ms. Warp screamed at Claimant to leave and told Claimant that she was sending her home because she could not stand to see Claimant or hear Claimant's voice. (R. Item 16, F.F. ¶¶7-8; R. Item 13, H.T. at 6-7; R. Item 2, Claimant Separation Information Document No. 10.) Ms. Warp also made clear that she was trying to force Claimant to leave her employment, telling Claimant that if Claimant were not "so damn stubborn," she would have quit when Ms. Warp was cutting her hours. (R. Item 16, F.F. ¶8; R. Item 13, H.T. at 6; R. Item 2, Claimant Separation Information Document No. 10.)

On December 19, 2011, Claimant filed a complaint against Ms. Warp with Employer. (R. Item 16, F.F. ¶9; R. Item 13, H.T. at 7; R. Item 2, Claimant Separation Information Document No. 10.) Upon receiving Claimant's complaint on December 20, 2011, Employer removed Claimant from its Meadville office and instructed her that she would work in its Titusville office for the next two months. (R. Item 16, F.F. ¶¶10-14, 16; R. Item 13, H.T. at 7-8.) The Titusville office was a 62 mile round-trip commute from Claimant's home. (R. Item 16, F.F. ¶15; R. Item 3, Employer Separation Information Document No. 16.) Claimant was advised by the supervisor at the Titusville office that she would work there five hours a day three days a week. (R. Item 13, H.T. at 10-11.)

Claimant asked Employer's employee relations manager whether she would have a job after the 60-day assignment and whether she would be returning to the Meadville office. (R. Item 13, H.T. at 8, 10.) Employer's employee relations manager responded that he did not know, but that Employer would address the situation after the regional manager returned from vacation in early January. (R. Item 16, F.F. ¶19; R. Item 13, H.T. at 8-11.) Claimant was sick on December 27, 2011, the day she was scheduled to start work in the Titusville office and she properly reported her illness to Employer. (R. Item 16, F.F. ¶¶17-18; R. Item 13, H.T. at 8-9.) On December 28, 2011, Claimant advised Employer that she could not afford the expense of commuting to Titusville and was therefore resigning. (R. Item 16, F.F. ¶¶20-21; R. Item 13, H.T. at 9; R. Item 3, Employer Separation Information Document No. 16.) Claimant found a part-time job with another employer in early February 2012. (R. Item 13, H.T. at 13.)

Claimant applied in December 2012 for benefits, stating that she was forced to leave her employment because her supervisor acted abusively toward her

and told her not to come in to work and that the cost of the commute to Titusville was prohibitive in comparison to what she would earn. (R. Item 2, Claimant Questionnaire.) After the Unemployment Compensation Service Center denied Claimant's application for benefits, Claimant appealed, and a Referee conducted a hearing at which Claimant and Employer's employee relations manager testified. Ms. Warp did not testify at the hearing, and Employer did not dispute the accuracy of Claimant's allegations concerning Ms. Warp's conduct.

On March 8, 2011, the Referee issued a decision affirming the Service Center's determination that Claimant was ineligible for benefits. (R. Item 14, Referree's Decision and Order.) Claimant appealed the Referee's decision to the Board. The Board, following its review of the record, made its own assessment of the credibility of the witnesses and its own findings of fact. (R. Item 16, Board Decision and Order.) The Board specifically found that "Ms. Warp informed the claimant that she was sending her home because she could not stand to hear the claimant's voice or see her face any longer," and that "Ms. Warp informed the claimant that if she wasn't 'so damn stubborn' she would have quit when she was 'cutting' the claimant's hours." (R. Item 16, F.F. ¶8.) The Board also found that Employer transferred Claimant to its Titusville office for 60 days following her complaint about Ms. Warp and that this would require Claimant to travel 62 miles each work day. (R. Item 16, F.F. ¶¶15-16.) The Board, however, concluded that Claimant did not show that she had a necessitous and compelling reason for resigning and, therefore, affirmed the Referee's decision denying benefits. (R. Item

16, Board Decision and Order at 3.) Claimant timely filed the instant petition for review appealing the Board's order to this Court.[2]

A claimant seeking benefits after voluntarily quitting her job has the burden to demonstrate that she had a necessitous and compelling reason for doing so. *Middletown Township v. Unemployment Compensation Board of Review*, 40 A.3d 217, 227-28 (Pa. Cmwlth. 2012); *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). To prove a necessitous and compelling reason for leaving employment, the claimant must show circumstances that produced real and substantial pressure to terminate employment and would compel a reasonable person to act in the same manner, and must also show that she acted with ordinary common sense and made a reasonable effort to preserve her employment. *Middletown Township*, 40 A.3d at 228; *Brunswick Hotel & Conference Center*, 906 A.2d at 660. Whether or not a claimant had a necessitous and compelling cause for leaving employment is a question of law subject to this Court's plenary review. *Middletown Township*, 40 A.3d at 227, 228; *Brunswick Hotel & Conference Center*, 906 A.2d at 661.

Abusive behavior by a supervisor can constitute a necessitous and compelling reason for leaving employment if the abusive behavior is sufficiently extreme, claimant reports the abuse to senior management and the employer fails to resolve the problem. *First Federal Savings Bank v. Unemployment*

[2] Our scope of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. 2 Pa. C.S. §704; *Middletown Township v. Unemployment Compensation Board of Review*, 40 A.3d 217, 223 n.8 (Pa. Cmwlth. 2012); *First Federal Savings Bank v. Unemployment Compensation Board of Review*, 957 A.2d 811, 814 n.2 (Pa. Cmwlth. 2008).

Compensation Board of Review, 957 A.2d 811, 816-17 (Pa. Cmwlth. 2008). An employer's imposition of a substantial unilateral change in the terms of employment can also constitute a necessitous and compelling cause for an employee to terminate her employment. *Middletown Township*, 40 A.3d at 228; *Brunswick Hotel & Conference Center*, 906 A.2d at 660; *Morysville Body Works, Inc. v. Unemployment Compensation Board of Review*, 430 A.2d 376, 377 (Pa. Cmwlth. 1981). Whether a change in employment conditions is sufficiently substantial to be cause for terminating employment must be measured by the impact on the claimant, and whether it involves any real difference in employment conditions. *Middletown Township*, 40 A.3d at 228; *McCarthy v. Unemployment Compensation Board of Review*, 829 A.2d 1266, 1272 (Pa.Cmwlth. 2003).

A large increase in the required commute and commuting expense caused by reassignment to a different workplace can constitute a substantial unilateral change in employment conditions that is a necessitous and compelling cause for leaving employment. *Love v. Unemployment Compensation Board of Review*, 520 A.2d 107, 109 (Pa. Cmwlth. 1987); *Shingles v. Unemployment Compensation Board of Review*, 513 A.2d 575, 576 (Pa. Cmwlth. 1986); *J.C. Penney Co. v. Unemployment Compensation Board of Review*, 457 A.2d 161, 163 (Pa. Cmwlth. 1983). In determining whether such a change is sufficiently substantial to constitute a necessitous and compelling reason to quit, we must consider not only the distance of the commute, but also the increased time and expense of the commute and how the expense compares to the salary that the claimant would earn. *Love*, 520 A.2d at 108-09; *J.C. Penney Co.*, 457 A.2d at 163. Where the increased commuting time or expense required of the claimant is excessive in proportion to the claimant's earnings, it constitutes an insurmountable

barrier to continuing the employment and a necessitous and compelling reason for terminating the employment. *Love*, 520 A.2d at 109; *J.C. Penney Co.*, 457 A.2d at 162-63.

The Board in this case found that Claimant had been treated abusively and effectively removed from her job in the Meadville office by her supervisor. (R. Item 16, F.F. ¶8.) The Board also found that Claimant complained and that Employer promptly removed Claimant from contact with the abusive supervisor. (R. Item 16, F.F. ¶¶9-11, 13-14.) Employer's response to Claimant's complaint, however, imposed on Claimant a 62 mile per day commute for part-time hours with gross earnings of only $51.30 per day. This constitutes a substantial and unilateral adverse change in Claimant's working conditions and is sufficient to show a necessitous and compelling reason for her resignation. *J.C. Penney Co.*, 457 A.2d at 163 (change in work location of 12 miles that increased commuting costs by $12 per week on a salary of approximately $120 per week, approximately 10% of gross pay, constituted a necessitous and compelling circumstance for terminating employment); *see also Brunswick Hotel & Conference Center*, 906 A.2d at 661-62 (increased expense that amounted to 14.2% decrease in pay was sufficient to constitute a necessitous and compelling circumstance for terminating employment). Claimant made clear that her reason for resigning was the cost of that commute, stating that "whatever money I would be making would be going in my gas tank." (R. Item 3, Employer Separation Information Document No. 16; *see also* R. Item 13, H.T. at 9.)

In its decision, the Board did not address whether the reassignment was a substantial change in Claimant's employment conditions or whether the increased commute was sufficient to constitute a necessitous and compelling cause

for terminating employment. Instead, the Board based its ruling that Claimant had not shown a necessitous and compelling reason for leaving employment solely on the conclusion that Claimant did not make a good faith effort to preserve her employment. (R. Item 16, Board Decision and Order at 3.) Claimant had an obligation to take reasonable steps to solve the issue of the increased commute and to preserve the employment relationship before terminating her employment. *Middletown Township*, 40 A.3d at 228; *J.C. Penney Co.*, 457 A.2d at 162-63. There was no suggestion in the evidence or by the Board, however, that Claimant had any way of reducing the expense of the commute. This was not a situation that lent itself to the possibility of carpooling or riding with other employees; Claimant was a single employee transferred from one office to another, not part of a group transfer, and she worked a part-time schedule. The evidence from both Claimant and Employer was that Claimant made inquiries with both the manager of the office where she was assigned and Employer's employee relations manager concerning the assignment, and Claimant requested reimbursement for the increased commuting expense and was told that Employer would not reimburse the commuting expense. (R. Item 13, H.T. at 8-11; R. Item 2, Claimant Questionnaire.)

The Board did not reject any of that evidence or find that Claimant had failed to seek reimbursement of commuting expenses or explore commuting alternatives, but held that Claimant failed to act in good faith solely because she resigned before the regional manager returned from vacation in January 2012. (R. Item 16, Board Decision and Order at 3.) There was no evidence, however, that waiting for the regional manager to return and meeting with him could have resolved the commute issue confronting Claimant. Employer's evidence showed

that it had decided that it needed to have Claimant work at the Titusville office for 60 days in order to evaluate her work and determine how it would resolve the situation with Ms. Warp and that this decision was not subject to any revision or reconsideration. (R. Item 13, H.T. at 7-8.) The matter that Employer contended could be resolved by meeting with the regional manager when he returned was what Claimant's situation could be after the 60-day transfer was over, whether she might be able to return to the Meadville office after that two-month period, whether she would be required to stay in the Titusville office or another location or whether she would be out of a job altogether. (R. Item 13, H.T. at 10-11.)

The Board also argues in its brief that the denial of benefits was proper because a 62 mile round-trip commute is allegedly not excessive and because the transfer was temporary. (Respondent's Brief at 6-7.) We do not agree.

As discussed above, in determining whether a transfer to a more distant workplace is a necessitous and compelling reason for leaving employment, the issue is not solely the distance of the commute, but whether it creates an excessive burden in comparison to the employee's earnings, and distances far less than a 62 mile round-trip commute have been held to constitute necessitous and compelling circumstances where they result in an excessive burden. *See, e.g.*, *Love*, 520 A.2d at 108-09 (change in worksite from Pittsburgh to northern Allegheny County held necessitous and compelling reason for terminating employment); *J.C. Penney Co.*, 457 A.2d at 162-63 & n.1 (increased round-trip commute of 24 miles held necessitous and compelling reason for terminating employment). In addition, whether increased commuting distance is a necessitous and compelling circumstance also depends on whether it is a substantial change in the claimant's terms of employment. *Compare Shingles*, 513 A.2d at 575-76

(change from assignment to two nearby stores to working at 12 to 15 stores with commutes of up to an 80 mile round-trip was necessitous and compelling circumstance because it was a substantial unilateral change in employment conditions) *with Thomas v. Unemployment Compensation Board of Review*, 560 A.2d 922 (Pa. Cmwlth. 1989) (assignment to distant worksite was not necessitous and compelling circumstance where claimants' work from the start had involved assignments to distant worksites).

The cases cited by the Board that denied benefits on grounds that a round-trip commute comparable to or greater than 62 miles was not excessive are inapposite because none of those cases involve part-time work and a substantial change in commuting distance from the terms under which the employee had been hired. *See Kieley v. Unemployment Compensation Board of Review*, 471 A.2d 1345 (Pa. Cmwlth. 1984) (claimant was employed in a managerial position); *Musguire v. Unemployment Compensation Board of Review*, 415 A.2d 708 (Pa. Cmwlth. 1980) (claimant required to make 60 mile commute was full-time employee working 10 to 12 hours per day); *Cardwell v. Unemployment Compensation Board of Review*, 465 A.2d 145 (Pa. Cmwlth. 1983) (claimant's job required travel to and work at job sites throughout the United States); *Stratford v. Unemployment Compensation Board of Review*, 466 A.2d 1119, 1121 (Pa. Cmwlth. 1983) (claimant's job had always required him to travel to distant job sites).[3]

[3] The remaining case cited by the Board as holding that a 62 mile round-trip commute cannot be a necessitous and compelling cause for leaving employment, *Bushofsky v. Unemployment Compensation Board of Review*, 626 A.2d 687 (Pa. Cmwlth. 1993), did not involve voluntary termination of employment at all, but instead involved the question of what constituted a "commuting area" for travel reimbursement under a different statute. Nor do the other cases relied on by the Board support the conclusion Claimant's increased commute was not excessive.
(Footnote continued on next page…)

The fact that the transfer was for 60 days likewise does not make Claimant's decision to resign and seek other employment unreasonable. The minimum length of the transfer was both significant, given the burden of the commute in proportion to her part-time earnings, and considerably longer than the temporary transfer in *Stratford* (three to four weeks). Moreover, Claimant's removal from the Meadville office was not clearly temporary. Return to the Meadville office after 60 days was a possibility, but was only one possible outcome. Employer's employee relations manager testified that Claimant was sent to the Titusville office not only to remove her from the effects of Ms. Warp's behavior, but also to evaluate whether to retain her as an employee given poor performance reviews she had received from Ms. Warp. (R. Item 13, H.T. at 7-8.) Thus, depending on Employer's evaluation of her performance in the Titusville office, there was also a significant possibility that Claimant would be terminated from employment at the end of the 60 day period, and Employer could not give Claimant any assurance as to what would have happened at the end of the 60 day period. (R. Item 13, H.T. at 7-8.)

(continued…)

Kawa v. Unemployment Compensation Board of Review, 573 A.2d 252 (Pa. Cmwlth. 1990), *Alexander v. Unemployment Compensation Board of Review*, 446 A.2d 991 (Pa. Cmwlth. 1982), and *Wagman v. Unemployment Compensation Board of Review*, 430 A.2d 383 (Pa. Cmwlth. 1981), all involved transportation problems arising out of events in the employees' lives, not increased commutes imposed by the employer. *Quality Building Services, Inc. v. Unemployment Compensation Board of Review*, 498 A.2d 1 (Pa. Cmwlth. 1985), involved an increased commute of a lesser distance than here, a 16 or 40 mile round-trip. 498 A.2d at 2. Moreover, this Court did not hold in *Quality Building Services* that the increased commute was or was not sufficient to constitute a necessitous and compelling reason for leaving employment. Rather, the Court remanded the case to the Board for consideration of factors including both the claimant's efforts to overcome the commuting problem and the cost to the claimant of the commute. 498 A.2d at 3.

For the foregoing reasons, we reverse the Board's denial of benefits.

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JAMES GARDNER COLINS, Senior Judge

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	:	
Unemployment Compensation Board of Review,	:	
	:	
Respondent	:	

O R D E R

AND NOW, this 23rd day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

JAMES GARDNER COLINS, Senior Judge