

Determination denying Claimant's application on the basis that Claimant was ineligible for benefits under Section 402(b)¹ of the Unemployment Compensation Law (Law) because Claimant voluntarily left work without cause of a necessitous and compelling nature.

Claimant timely appealed the Service Center's notice to the referee. A hearing was held on July 17, 2007. The referee found that Claimant failed to sustain her burden of providing cause of a necessitous and compelling nature to voluntarily leave her employment. The referee concluded that Claimant was ineligible for benefits pursuant to Sections 402(b) of the Law. By decision dated July 18, 2007, the referee affirmed the decision of the Service Center and denied benefits.

From this decision, Claimant filed an appeal with the Board. The Board made the following findings. On January 17, 2007, Claimant met with her supervisor for her annual performance review. During that review, her supervisor told Claimant that she needed to improve her business relationships immediately. He told Claimant to speak with the Vice-President for Organizational Development. The Vice-President for Organizational Development told Claimant to go back and speak to her supervisor because the vice-president was not aware of any issues with Claimant's work performance. Claimant was confused and upset by the conflicting information that she received from her superiors. Claimant met with Employer's Executive Vice-

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

An employee shall be ineligible for compensation for any week --

(b) In which his unemployment is due to voluntarily leaving work *without cause of a necessitous and compelling nature* irrespective of whether or not such work is in "employment" as defined in this Act ... :

43 P.S. §802(b) (emphasis added).

President/COO. The Vice President/COO told Claimant that she was a strong female and that she needed to show more emotion and use the feminine side of her personality. On February 5, 2007, Claimant submitted her letter of resignation to Employer because she felt that the Vice President/COO's comments were degrading and that she had no recourse, as he was the second highest individual in the company. On February 15, 2007, Claimant composed a letter to the President/CEO, which rescinded her resignation effective February 15, 2007, and which made the President/CEO aware of the sexually discriminatory comments that were made by the Vice President/COO. On February 16, 2007, the Human Resources Department became aware of the allegations and interviewed both Claimant and the Vice President/COO. On February 19, 2007, the Human Resources Department informed Claimant that her complaint against the Vice President/COO had not been substantiated. Employer did not accept the rescission of Claimant's resignation and the work relationship ended.

The Board observed that the only testimony as to the conversation between Claimant and the Vice President/COO was that of Claimant. The Board found that Claimant credibly testified that the COO told her to become feminine and show more emotion in order to improve her business relationships. The Board determined that Claimant was justifiably offended by those comments. The Board further concluded that Claimant resigned because the Vice President/COO was the second highest person in the organization and she reasonably believed that there was no recourse to remedy the situation. The Board concluded that the Vice President/COO's behavior toward Claimant constituted cause of a necessitous and compelling nature for her resignation. Claimant's rescission of that resignation is irrelevant because subsequent actions confirmed her original belief that no action would be taken to resolve the situation. The Board ultimately concluded that

Claimant is not ineligible for benefits under Section 402(b) of the Law. By decision dated January 7, 2008, the Board reversed the referee's decision and awarded benefits to Claimant. Employer then filed the instant appeal.²

Employer raises the following issues for our review:

1. Whether the Board erred by reversing the referee's decision and finding that Claimant had cause of a necessitous and compelling nature to voluntarily leave work.
2. Whether the Board erred by not finding that Claimant failed to properly revoke her resignation in a timely manner in order to make Claimant eligible for unemployment compensation benefits.

Employer contends that the Board erred by reversing the referee's decision and determining that Claimant had cause of a necessitous and compelling nature to voluntarily leave work. We disagree.

Whether or not one has "cause of a necessitous and compelling nature" to quit employment so as to be entitled to collect unemployment compensation benefits is a question of law subject to review by this Court. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). A claimant seeking to collect unemployment compensation bears the burden of proving that a voluntary termination of employment was for cause of a necessitous and compelling nature. Mutual Pharmaceutical Company, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 37 (Pa. Cmwlth. 1994); Steinberg Vision Associates v. Unemployment Compensation Board of Review, 624 A.2d 237

² This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

(Pa. Cmwlth. 1993). A cause of a necessitous and compelling nature is one that results from circumstances which produce pressure to terminate employment which is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 565 A.2d 127 (1989).

In establishing that a voluntary termination was reasonable, a claimant “must establish that he acted with ordinary common sense in quitting his job, that he made a reasonable effort to preserve his employment, and that he had no other real choice than to leave his employment.” Stroh-Tillman v. Unemployment Compensation Board of Review, 647 A.2d 660, 662 (Pa. Cmwlth. 1994). If a claimant does not take all “necessary and reasonable steps to preserve the employment relationship, he or she has failed to meet the burden of demonstrating necessitous and compelling cause.” PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 58, 61 (Pa. Cmwlth. 1996).

This Court has held that sexual harassment may qualify as a necessitous and compelling reason for voluntarily terminating the employment relationship provided that a claimant made reasonable and prudent attempts to alleviate the harassment. Peddicord v. Unemployment Compensation Board of Review, 647 A.2d 295 (Pa. Cmwlth. 1994); Homan v. Unemployment Compensation Board of Review, 527 A.2d 1109 (Pa. Cmwlth. 1987). The duty to take a common sense action includes reporting the harassment to an employer representative other than the perpetrator if the perpetrator is subject to the employer's supervision. Martin v. Unemployment Compensation Board of Review, 749 A.2d 541 (Pa. Cmwlth. 2000). The failure to report harassment may be excused if the circumstances indicate that reporting would be futile. Id.; see St. Barnabas, Inc. v. Unemployment

Compensation Board of Review, 525 A.2d 885, 887 (Pa. Cmwlth. 1987) (“This Court has never required a claimant to perform a futile act...”).

Here, the Board found that Claimant’s Vice President/COO advised Claimant that she needed to show more emotion and use the feminine side of her personality in order to improve her business relationships. Employer does not challenge any of the Board’s findings of fact and, as a result, this finding is conclusive on appeal. See Campbell v. Unemployment Compensation Board of Review, 694 A.2d 1167 (Pa. Cmwlth. 1997).

Rather, Employer argues that Claimant is merely a disgruntled employee unhappy with a deserved negative performance evaluation. However, the record is completely devoid of any evidence which could support the negative performance evaluation given to Claimant. Employer did not refute Claimant’s testimony that neither Claimant’s supervisor nor the Vice-President for Organizational Development could explain Claimant’s supposed shortcomings. The Vice President/COO did not testify.

The Vice President/COO’s comments are sexually discriminatory and degrading on their face. Claimant reasonably understood his comments to mean that she should be less strong and play up her sexuality in the performance of her job. Reproduced Record (R.R.) at 12a. We conclude that the Board did not err in determining that the Vice President/COO’s behavior toward Claimant went beyond conduct that must be tolerated in a work place and produced circumstances which would compel a reasonable person to terminate employment.

Employer further argues that Claimant failed to make reasonable and prudent attempts to preserve the employment relationship because she did not properly revoke her resignation in a timely manner. We disagree.

Ordinarily, an employee who revokes his resignation before the "effective date" of his resignation and before the employer has taken steps to replace him is entitled to unemployment benefits. Spadaro v. Unemployment Compensation Board of Review, 850 A.2d 855 (Pa. Cmwlth. 2004). If, however, the employer has taken steps to replace the employee before revocation, a resignation, later revoked, remains a voluntary termination of employment, disqualifying the employee from receiving unemployment compensation. PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 40 (Pa. Cmwlth. 1996).

Had this case been simply a voluntary termination without cause of a necessitous and compelling reason, we would agree with Employer that Claimant's attempted revocation of her resignation on the effective date of her resignation, after Employer had undertaken substantial steps to replace Claimant, would be ineffective and Claimant would not be eligible for benefits. However, as Claimant has demonstrated circumstances which produced real and substantial pressure to terminate employment, Claimant only needed to show that she made a reasonable attempt to preserve her employment relationship or show that such action was futile to remain eligible for benefits.

Claimant reasonably believed that there was no recourse to remedy the situation. The Vice President/COO was the second highest person in the organization. Nevertheless, after submitting a letter of resignation, Claimant notified the President/CEO that sexually discriminatory comments were made by the Vice President/COO and attempted to rescind her resignation. Employer's Human Resources Department promptly investigated the allegations by interviewing both Claimant and the Vice President/COO; the Vice President/COO denied he made the comments. Claimant's allegations were dismissed based upon the Vice

President/COO's version of the incident. Although Claimant waited until the effective date of her resignation to attempt to preserve the employment relationship, Employer's handling of the matter confirmed the futility of reporting the incident. We, therefore, conclude that the Board did not err in determining that Claimant met her burden of establishing cause of a necessitous and compelling nature to voluntarily terminate employment.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Willow Valley Retirement | : | |
| Community, | : | |
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| Petitioner | : | |
| | : | |
| v. | : | No. 188 C.D. 2008 |
| | : | |
| Unemployment Compensation | : | |
| Board of Review, | : | |
| | : | |
| Respondent | : | |

ORDER

AND NOW, this 12th day of November, 2008, the order of the Unemployment Compensation Board of Review, at Decision No. B-468436, dated January 7, 2008, is AFFIRMED.

JAMES R. KELLEY, Senior Judge