IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Amy L. Byham,	:	
Petitioner	:	
v.	:	No. 1999 C.D. 2007
Unemployment Compensation Board of Review,	:	Submitted: April 18, 2008
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: July 18, 2008**

Amy L. Byham (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which affirmed the Unemployment Compensation Referee's (Referee) decision denying her benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1] Claimant

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

argues, on appeal, that the Board erred in denying her benefits because she had a necessitous and compelling reason to quit her employment with the Pennsylvania Department of Corrections, State Correctional Institution at Forest (Employer) due to her child care situation. For the reasons discussed below, we affirm.

Claimant applied for unemployment compensation benefits on August 6, 2006. The Altoona Unemployment Compensation Service Center (Service Center) found that Claimant was eligible for benefits under Section 402(b) of the Law, but denied her benefits under Section 401(d)(1) of the Law.[2] Claimant appealed the Service Center's decision. An evidentiary hearing was held before the Referee. Claimant, represented by counsel, appeared at the hearing, along with a witness. A witness for Employer also appeared. Following the hearing, the Referee issued a decision finding Claimant eligible for benefits under Section 401(d)(1) of the Law, but ineligible for benefits under Section 402(b) of the Law. Claimant subsequently appealed the Referee's decision to the Board, which issued a decision and order affirming the Referee. In its decision, the Board made the following findings of fact:

> 1. The claimant was employed with SCI-Forest from December 19, 2004 through August 31, 2006 as a Corrections Employment Vocational Coordinator at a [sic] $20.12 an hour.
> 2. The claimant took a leave of absence under FMLA after the premature birth of her son on September 1, 2006.
> 3. The claimant's scheduled return to work date was February 26, 2007.
> 4. The claimant's son was seven weeks premature, which makes him unable to go to daycare due to the risk of him becoming ill, as he is highly susceptible to respiratory disease.
> 5. The claimant's son is breast-fed.

[2] 43 P.S. § 801(d)(1). The Service Center found Claimant did not show that she was "available for suitable work." 43 P.S. § 801(d)(1).

> 6. The employer is located half an hour from the claimant's home and it takes her an extra ten minutes to go through security.
> 7. The claimant contacted human resources to see what her options were if she could not return to work on February 26, 2007.
> 8. The employer offered the claimant the option of extending her leave of absence.
> 9. The claimant decided to not ask for an extension of her leave of absence because her job would not have been held for her and she would have been on leave without pay and without benefits.
> 10. The employer has made accommodations for employees to work half days. The claimant was not offered this option since human resources was not aware the claimant could work at all.
> 11. The claimant turned in a letter of resignation on February 20, 2007 and she had an exit interview on February 23, 2007.
> 12. The claimant informed the employer on March 8, 2007 she did not have child care for her son.
> 13. The claimant's mother work[s] part-time and she is willing to quit her job to care for her grandson while the claimant works.
> 14. The employer was not aware the claimant had child care or that she was available to work two to three hours.
> 15. The claimant is available to work within close proximity of her home so she could go home on her breaks to feed her son.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-15.) Based on these findings, the Board determined that Claimant did not make a reasonable effort to maintain her employment with Employer and, therefore, did not have a necessitous and compelling reason to voluntarily quit. Claimant now petitions this Court for review.[3]

On appeal to this Court, Claimant argues that the Board erred in concluding that she did not have a necessitous and compelling reason to voluntarily quit. We disagree.

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[3] This Court's review of a Commonwealth Agency's order is limited to determining whether Claimant's constitutional rights have been violated, whether findings of fact are supported by substantial evidence, or whether an error of law was committed. Finfinger v. Unemployment Compensation Board of Review, 854 A.2d 636, 637 (Pa. Cmwlth. 2004).

Section 402(b) of the Law provides that a claimant shall be ineligible for benefits for a period "[i]n which [her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature . . . ." 43 P.S. § 802(b). A claimant who quits her employment bears the burden of proving that she quit for a necessitous and compelling reason. Fitzgerald v. Unemployment Compensation Board of Review, 714 A.2d 1126, 1129 (Pa. Cmwlth. 1998). In order to establish cause of a necessitous and compelling nature for quitting, a claimant must prove that: "1) circumstances existed which produced real and substantial pressure to terminate employment; 2) like circumstances would compel a reasonable person to act in the same manner; 3) [the claimant] acted with ordinary common sense; and 4) [the claimant] made a reasonable effort to preserve her employment." Id. Child care problems may constitute cause of a necessitous and compelling nature for quitting one's employment. Ganter v. Unemployment Compensation Board of Review, 723 A.2d 272, 274 (Pa. Cmwlth. 1999). A claimant who quits due to child care problems must show that she made a "sufficient attempt" to sustain her employment by properly advising her employer of her child care problems prior to quitting. Blakely v. Unemployment Compensation Board of Review, 464 A.2d 695, 696 (Pa. Cmwlth. 1983).

In the present case, Claimant argues that the Board used an incorrect legal standard and that "relevant case law merely requires an employee to inform the employer of the factual circumstances giving rise to the child care problem prior to voluntarily terminating the employment." (Claimant's Br. at 8.) We agree that this is a correct statement of the law, per Blakely, but we disagree that the Board applied the incorrect legal standard. The Board recognized the appropriate legal standard in its

opinion, stating that "[t]he Courts have held that, at a bare minimum, the claimant must at least discuss the situation with the employer and allow the employer an opportunity to accommodate any problem areas." (Board Op. at 3.) The Board applied the facts of Claimant's case to this standard, stating that "[t]he employer was not aware the claimant was available to work for any length of time and therefore the employer did not offer the claimant to work partial days or any other option." (Board Op. at 3.) We find, therefore, that the Board did apply the correct legal standard.

Claimant also argues that there is evidence on the record to show that she met this standard. The fallacy in Claimant's argument, however, is that the Board did not agree with her view of the facts and did not find that Claimant fully informed Employer of her child care situation or the necessity and logistics of breast-feeding her son before quitting her employment. Instead, the Board found that Claimant only "informed the employer . . . she did not have child care for her son" *after* turning in her letter of resignation and participating in an exit interview. (FOF ¶ 12.) The Board also found that Claimant's statement to Employer regarding a lack of child care was not true because Claimant's mother was "willing to quit her job to care for her grandson while the claimant works." (FOF ¶ 13.) The Board further found that Claimant was available to work two to three hours, but had failed to make Employer aware of this availability before quitting her employment. (FOF ¶¶ 10, 14.)

It is beyond purview that the Board is the ultimate finder of fact, and as long as there is substantial evidence to support the Board's findings, this Court will not overturn such findings. <u>Peak v. Unemployment Compensation Board of Review</u>, 509 Pa. 267, 276-79, 501 A.2d 1383, 1388-89 (1985). Substantial evidence is defined as

"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 275, 501 A.2d 1387 (quoting Murphy v. Department of Public Welfare, 480 A.2d 382, 386 (Pa. Cmwlth. 1984)).

Here, Claimant specifically contends that the Board's findings of fact that she was available to work for Employer and that she failed to make Employer aware of this availability are not supported by substantial evidence.[4] The Board did find that "[t]he employer was not aware the claimant had child care or that she was available to work two to three hours." (FOF ¶ 14.) That Claimant had child care is supported by her own testimony and that of her mother that her mother could quit her job to care for Claimant's child. (Referee Hr'g Tr. at 6, 11.) Additionally, the finding that Claimant was available to work two to three hours is supported by Claimant's testimony that she can leave her son for up to three hours between breast-feedings and that she lives approximately half an hour from Employer.[5] (Referee Hr'g Tr. at

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[4] We note that this is not an entirely accurate characterization of the Board's finding, which is quoted above. The Board did not make a finding regarding whether Employer made a position available in which Claimant could work because the Board did not *need* to make such a finding, since Claimant never advised Employer of the circumstances of her child care difficulties. It may be true, as Claimant argues, that she would only be able to work for Employer for an hour and a half or so at any time, and that this would not be acceptable to Employer. However, Claimant never gave Employer the opportunity to make accommodations for her situation. Therefore, the Board did not need to make a finding as to whether Claimant was "available to work at SCI-Forest." (Claimant's Br. at 14.)

[5] In her brief, Claimant argues that, given the length of her commute to SCI-Forest and the time it took her to get through security, she would have been able "to work, at most, an hour and a half." (Claimant's Br. at 14.) It is true, given the facts found by the Board, that "[t]he employer is located half an hour from the claimant's home and it takes her an extra ten minutes to go through security," that Claimant would have been able to work for Employer only about an hour and forty minutes at a time. This does not foreclose, however, the possibility that Claimant could have been available to work for the Employer for up to three hours at a time in some other arrangement, such as working from home for parts of the day. As noted by the Board in its discussion, "[t]he employer

8.) Moreover, contrary to Claimant's assertion that Employer's witness, Debra Carter (Carter), a Human Resource Analyst for the Employer, testified that Claimant "fully informed her of the child care problems," (Claimant's Br. at 12) Carter actually testified that Claimant had not told her that she had child care issues prior to resigning, but had only indicated that "she could . . . not return to work at all." (Referee Hr'g Tr. at 16.) Claimant did not explain to Carter why she could not work. As the Board's findings are supported by substantial evidence, this Court may not now overturn them.

Given the Board's factual findings, Claimant's argument that the decisions in Ganter and Blakely require a determination that Claimant had a necessitous and compelling reason to quit is misplaced. In Ganter, the employer unilaterally changed the geographic area in which the claimant had to travel. The employer asked claimant at 2:30 p.m. to go to Philadelphia to conduct a patient admission. "Claimant refused the assignment, explaining to Employer that she would not have enough time to travel to Philadelphia, conduct the patient intake interview and admission, and return to pick up her son from daycare by 6:00 p.m." Ganter, 723 A.2d at 273. The employer suspended the claimant for three days without pay, put her on probation for three months, and told her that if she refused an assignment again she would be fired. Id. Thus, in Ganter, the claimant did inform the employer of her child care problems, and so tried to sustain her employment. However, the employer did not

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was not aware the claimant was available to work for *any* length of time and therefore the employer did not offer the claimant to work partial days *or any other option*." (Board Op. at 3 (emphasis added).) It is not beyond belief that, had Claimant attempted to retain her employment by telling Employer the specifics of her child care issues, Employer might have been able to negotiate a workable accommodation with Claimant.

accommodate the claimant but, rather, took adverse action against her. In that situation, the claimant had a necessitous and compelling reason to quit.

Similarly, in Blakely, the employer unilaterally made a change in the claimant's employment that interfered with her child care arrangements and required the claimant, on short notice, to make other arrangements. In Blakely, it was the hours of employment that were changed, from the 7:15 a.m. to 3:45 p.m. shift to the 3:45 p.m. to 12:00 a.m. shift. The claimant reported her inability to obtain someone to care for her children during those hours on such short notice to the shop steward and the personnel department. Blakely, 464 A.2d at 695-96. Our Court found that by reporting the problem both to the shop steward and the personnel department, the claimant made a sufficient attempt to retain her employment. Id. at 696.

The circumstances of Blakely and Ganter, however, differ from the facts found by the Board in the present case. In the previous cases, the claimants promptly explained to their respective employers the conflicts that arose in their abilities to care for their children. In Ganter, the claimant was sanctioned, and in Blakely, there was no offer to change the claimant's hours. In this case, however, the Board found that, prior to resigning from her job, Claimant did not explain to Employer what her conflict was with regard to taking care of her child. The Board found Employer credible that Employer had previously offered accommodations to other employees, but did not in this case because Employer was unaware that Claimant could work at all. The result was that Claimant did not make a "sufficient attempt" to retain her employment. Therefore, we find no error in the Board's determination that Claimant did not have a necessitous and compelling reason to quit.

Accordingly, for the reasons discussed above, the Board's order is affirmed.

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RENÉE COHN JUBELIRER, Judge

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Respondent	:	

O R D E R

NOW, July 18, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **affirmed**.

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RENÉE COHN JUBELIRER, Judge