

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nissa S. McMillan, :
Petitioner :
 :
v. : No. 2038 C.D. 2007
 : Submitted: March 20, 2008
Unemployment Compensation Board :
of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: April 15, 2008

Nissa S. McMillan (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board) determining that she left her employment with the Borough of Duncannon (Employer) without a necessitous and compelling reason as required by Section 402(b) of the Unemployment Compensation Law (Act)¹ because she failed to sustain her allegation that she left her employment because she was being sexually harassed by the Borough Manager.²

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). Section 402(b) of the Act provides, in relevant part:

An employe shall be ineligible for compensation for any week...[i]n which his unemployment is due to voluntarily leaving work without
(Footnote continued on next page...)

Claimant was employed as the Borough Secretary and Assistant Treasurer for four years. Claimant worked in the Borough office and shared the front office space with two other Borough employees: Terry Brackbill (Brackbill), the Borough Business Administration Manager and Claimant's Supervisor, and Brenda Kelly (Kelly), the Billing Clerk. Daniel Rapp (Rapp), the Borough Foreman, also had a workstation in the Borough office and was responsible for supervision of the Borough's utility operation. On March 26, 2007, Rapp was promoted to Borough Manager, directly supervising Claimant.

On April 18, 2007, Claimant submitted her resignation letter citing "numerous unanswered concerns" as the reason for her resignation. In her exit interview on April 24, 2007, Claimant claimed that Rapp had been sexually harassing her and she submitted written terms for her continued employment that included Rapp no longer being her supervisor and not having any power over her; Rapp refraining from intimidating or harassing her; and him not knowing or being able to

(continued...)

cause of a necessitous and compelling nature, irrespective of whether or not such work is "employment" as defined in this act[.]

² In order to meet the burden of proving that such termination was for a necessitous and compelling reason under Section 402(b) of the Act, a claimant must show that cause of a necessitous and compelling nature results from the circumstances which produced real and substantial pressure to terminate one's employment and which would compel a reasonable person under like circumstances to act in the same manner. *Carter v. Unemployment Compensation Board of Review*, 629 A.2d 212 (Pa. Cmwlth. 1993). Sexual harassment can constitute a necessitous and compelling cause to leave employment under Section 402(b) of the Act if a claimant made reasonable and prudent attempts to alleviate the harassment. *Homan v. Unemployment Compensation Board of Review*, 527 A.2d 1109 (Pa. Cmwlth. 1987).

change her computer password. Claimant's terms also included an increase in yearly salary to \$40,000 with overtime pay; annual cost-of-living increases; assumption of additional work duties; and the ability to leave council meetings at a certain time. Declining to meet Claimant's terms, Employer accepted Claimant's resignation. Claimant filed for unemployment compensation benefits alleging that she left her employment due to sexual harassment. The Service Center denied benefits, and Claimant appealed.

Before the Referee, Claimant testified about Rapp's sexual harassment of her during her employment.³ She also testified that she informed her Supervisor, Brackbill, who told her that she had informed the Personnel Committee Chairperson to discuss the matter with other members of the Committee.

³ Claimant testified at length about incidents involving Rapp sexually harassing her. She testified that Rapp brought in roses from his house and put them on her desk; that when she would do the gardening in front of Employer's office, he would come by and make statements referring to her breasts, saying, "if those fall out of your top, can I put them back in?;" he told her during the summer that she "felt good between the sheets;" when Rapp would bring in doughnuts and muffins to work, he would comment that he couldn't wait to taste her "brown buns;" he sent her an email during Halloween, which was titled "Loving Wishes" and stated "I find you simply spine tingling;" on several occasions, Rapp commented that her breasts were getting bigger; during the Christmas gift exchange, Rapp was designated to buy her a present and he emailed a link to Victoria's Secret for her to pick something out and she felt that it was inappropriate and did not want anything from there; he gave her "Playboy Mood Lip Gloss and some Lip venom" in front of her co-workers. Claimant also testified that in February 2007, Rapp brought in a sexual position book from one of Employer's trucks, put it on her desk and inquired if she had ever tried one of the positions. Claimant also testified that at the end of that same day, she discovered that the sexual position book was in her tote bag. After Rapp was promoted to Borough Manager, Claimant stated that he told her she "would do whatever he wanted and whatever else he desired." Finally, Claimant testified that Rapp "smacked her in the rear" when she was filing the tax documents and would try to rub up against her when she would wait on customers at the cash register. (Citations from June 28, 2007 Hearing Transcript at 20-22.)

Supervisor Brackbill testified that she had personally observed Rapp's inappropriate behavior toward Claimant, and that Claimant had notified her of the times that Rapp was behaving inappropriately. She stated that she contacted the Personnel Committee in response to two incidents occurring in 2005, one in 2006, and two more in 2007. In addition to these formal meetings, Brackbill testified that she also went directly to the individual Borough Council members to discuss these incidents.

Kelly, the former Billing Clerk in the office, testified that she observed a "couple" of incidents of sexual harassment by Rapp. Specifically, Rapp left a rose on Claimant's desk, sent Claimant the "Halloween" email, and made a comment about the mole on Claimant's lip. Kelly also testified that Rapp hovered over Claimant's desk and whispered to her before and after he was promoted to Borough Manager. He also wouldn't "let her [Claimant] alone" in the break room because Claimant would go back with her at lunch and watch television, but Rapp would always go back and stand with her.

In opposition to the claim, Employer presented the testimony of three witnesses. Frederick Lauster Jr. (Lauster), the Borough Council President, testified that the Borough Council was never alerted by Claimant, Brackbill or any other individual that Rapp was sexually harassing Claimant, and that during his daily visits to the office, he did not observe any sexual harassment of Claimant by Rapp. Michael Bomberger (Bomberger), a Borough Councilman, who also served on the

Personnel Committee, testified that he never had any conversations with Brackbill relating to any sexual harassment of Claimant by Rapp.

Rapp testified that from 2005 until early 2007, he and Claimant had a relationship and other employees observed that they regularly went alone on lunchtime walks together. After March 2007, he no longer walked with Claimant because he was under consideration to be Borough Manager and other employees were starting to talk. With regard to the book containing sexual positions, Rapp testified that he brought it in to show Claimant that the workers had it in one of the Borough's trucks, and then threw the book into a trash can. Rapp denied ever touching Claimant in an unwarranted, unsolicited, sexual fashion and testified that Claimant never told him not to touch her or not to come near her. As to Claimant's allegation that Rapp constantly hovered over her desk, Rapp testified that to perform his new job as Borough Manager, he needed financial information that was in the possession of Claimant, and that he frequently asked Claimant questions. Due to his eye condition, he would have to squat down to see her computer. He denied ever making inappropriate comments to Claimant about her body and explained that any comment as to Claimant's lip condition was an inquiry as to potential health problems, including skin cancer. He also testified that he was never approached by anyone from the Personnel Committee before Claimant resigned or by Supervisor Brackbill with an allegation of inappropriate conduct. He also denied ever making any comment regarding Claimant's breasts while she was gardening, making a comment about wanting to "taste her brown buns," or as to her breasts getting bigger.

Finally, in response to the Referee's question as to the nature of his relationship with Claimant, Rapp responded that it was sexual and mutual, but that he ended it in March, 2007 when he was under consideration for the Manager's position. The Referee offered Claimant an opportunity to respond, but she declined to do so.

The Referee found that Claimant's testimony concerned incidents that occurred one year before when Claimant continued to walk daily with Rapp without accompaniment and that they were having a two-year affair, ending in early 2007. Even if the incidents that occurred during the year could be considered sexual harassment, the Referee found that Claimant was aware of Employer's grievance procedure, but she did not make use of it. Because the Referee concluded that Claimant failed to prove that she made a good faith effort to preserve her employment and remedy the situation before submitting her resignation, benefits were denied. Claimant appealed to the Board, which affirmed, but made its own findings determining that this case turned "entirely on credibility of the witnesses."

Resolving all credibility determination in favor of Employer, the Board found that from 2005 to 2007, Claimant and Rapp engaged in a mutual sexual relationship until February or March 2007, when Rapp found that he was under consideration for Borough Manager and ended the relationship. It also found that Rapp never touched Claimant in an "unsolicited sexual manner, nor did he otherwise harass her." Regarding Claimant's and Brackbill's testimony that Council was notified about Claimant being sexually harassed, the Board rejected that testimony finding that Council had never been informed that Claimant was being sexually harassed, and that Claimant's first written complaint was prepared on April 3, 2007,

after meeting with the Personnel Committee. The Personnel Committee subsequently conducted an investigation and concluded that Claimant had not been sexually harassed. In the discussion portion of its opinion, the Board found it significant that after Rapp testified as to his mutual sexual relationship with Claimant over a two-year period, Claimant consulted with counsel and then chose not to present further testimony in rebuttal. The Board also determined that unrefuted testimony, in conjunction with the facts that Claimant communicated with Rapp on a personal level, willingly worked after hours alone with him, and regularly walked alone with him during lunch, weighed heavily in the Employer's favor. Concluding that Claimant was not sexually harassed, it held that Claimant did not meet her burden of proving a necessitous and compelling cause to quit employment. Claimant now appeals to this Court.⁴

Claimant contends that the Board's findings of fact are not based on substantial evidence because the testimony indicates that Rapp sexually harassed her. There was, however, substantial evidence to support the Board's finding, specifically the testimony of Employer's three witnesses. What this argument attacks is not the lack of substantial evidence, but the credibility determinations made by the Board. As we have stated over and over and over again, in unemployment compensation matters, "the board is the ultimate fact finder and is empowered to resolve conflicts in the evidence and to determine the credibility of witnesses." *Owoc v. Unemployment*

⁴ Our scope of review is limited to a determination of whether one's constitutional rights were violated, whether an error of law was committed, or whether any findings of fact are not supported by substantial evidence. *Wivell v. Unemployment Compensation Board of Review*, 673 A.2d 439 (Pa. Cmwlth. 1996).

Compensation Board of Review, 809 A.2d 441, 443 (Pa. Cmwlth. 2002). Because the Board had substantial evidence to support its finding that Claimant was not sexually harassed and did not have a necessitous and compelling reason to leave employment, just because one party to a proceeding may view testimony differently than the Board, is not grounds for reversal. *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106 (Pa. Cmwlth. 1994).⁵ Accordingly, we affirm the decision of the Board.

DAN PELLEGRINI, JUDGE

⁵ Claimant also argues that regardless of the Board's credibility determination, it erred as a matter of law in concluding both that the alleged previous sexual relationship with Rapp precluded her claim of sexual harassment and that she did not have a necessitous and compelling reason to leave her employment. While a previous consensual sexual relation does not necessarily preclude a claim that a claimant had cause to leave employment because of post-relationship sexual harassment, the Board, in this case, based on substantial evidence, found that no sexual harassment ever occurred.

