

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ivy Smith (Motley), :  
Petitioner :  
 :  
v. : No. 2228 C.D. 2007  
 : Submitted: April 18, 2008  
Unemployment Compensation :  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Judge  
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE McCLOSKEY

FILED: June 11, 2008

Ivy Smith-Motley (Claimant) petitions, pro se, for review of an order of the Unemployment Compensation Board of Review (Board), affirming the Referee's decision concluding that she was ineligible for benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> We now vacate and remand.

Claimant was employed as a full-time direct support professional by Children & Adult Disability and Education Services (Employer) from August 15, 2005, through June 4, 2007. On March 9, 2007, Claimant filed a complaint with the Pennsylvania Human Relations Commission alleging that she was being sexually harassed by her supervisor. Claimant took a leave of absence in April 2007. Claimant executed a Separation Agreement and Release on June 8, 2007. At the time of her final separation, Claimant was earning \$9.41 per hour. Subsequent to her final separation

---

<sup>1</sup> Act of December 5, 1936, Second Executive Sess., P.L. (1937), as amended, 43 P.S. §802(b).

from her employment, she applied for unemployment compensation benefits with her local job center. The local job center issued a notice of determination concluding that Employer initiated Claimant's separation in this case and characterizing the same as a dismissal. Hence, the local job center proceeded to analyze the case under Section 402(e) of the Law, 43 P.S. §802(e), relating to willful misconduct. Ultimately, the local job center concluded that Claimant was not ineligible for benefits under Section 402(e).

Employer timely appealed and a hearing before a Referee was scheduled.<sup>2</sup> Employer alleged that Claimant's separation from employment was due to her voluntarily quit for personal reasons. Employer asserted that after Claimant's sexual harassment complaint was filed, it conducted an internal investigation which revealed that the allegations were unfounded. Employer alleged that Claimant requested that she be allowed to voluntarily quit and it agreed, plus it paid her four weeks severance pay.

A hearing before the Referee was held on August 21, 2007. Employer and three witnesses, William Forrest, a TALX representative, Ellen Bartley, a financial coordinator, and Sheila Sutton, an assistant director for Employer, appeared and testified at this hearing.<sup>3</sup> Claimant did not appear. The Referee brought the hearing to order and noted that Claimant had not appeared, that she had been denied a continuance, that she had not informed the office that she would be late and that the notice of hearing had not been returned by the United States Post Office as undeliverable.<sup>4</sup> (N.T.,

---

<sup>2</sup> Claimant's request for a continuance, by letter dated August 13, 2007, was denied.

<sup>3</sup> The record indicates that Unemployment Services, LLC, d/b/a TALX, is a duly authorized representative of Employer.

<sup>4</sup> Pursuant to the transcript, the Referee brought the hearing to order at 9:01 a.m. and closed the hearing at 9:07 a.m.

Referee's Hearing, August 21, 2007, at 1). The Referee reviewed documents in the file and Employer objected to Service Center Exhibits #6 and #7, the Claimant Questionnaire and Oral Interview, respectively.<sup>5</sup> The Referee heard direct testimony from Employer's witnesses, William Forrest and Ellen Bartley, with regard to Claimant's job title, dates of employment, pay rate and reason for separation from employment.

Following the hearing, the Referee issued a decision and order reversing the decision of the local job center finding Claimant eligible under Section 402(e) of the Law and denying Claimant benefits under Section 402(b) of the Law, 43 P.S. §802(b).<sup>6</sup> In rendering her decision, the Referee found that Claimant was a full-time employee who began her employment on August 15, 2005, and separated from that employment on June 4, 2007. The Referee also found that Claimant's final rate of pay was \$9.41 an hour. Additionally, the Referee found that Claimant resigned her position, that continuing work was available at the time of her resignation and that she did not return to work after a leave of absence.

Further, the Referee noted that Claimant had failed to appear at the hearing to offer testimony after being duly notified of the date, time, and place of the hearing. The Referee indicated that her decision was based on the credible testimony of Employer's witnesses and the local job center documents, which revealed the findings

---

<sup>5</sup> The referee noted that she was "not going to make any evidentiary finding based on anything that's written" in these exhibits. (N.T., Referee's Hearing, August 21, 2007, at 3).

<sup>6</sup> Section 402(b) of the Law provides that an employee shall be ineligible for compensation for any week:

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.

as stated above. Based upon this evidence and the lack of any testimony/evidence presented by Claimant, the Referee concluded Claimant had not set forth a prima facie case under Section 402(b) of the Law that her voluntary separation from employment was due to a compelling and necessitous cause.

Thereafter, Claimant filed a petition for appeal to the Board. In this appeal, Claimant attempted to explain the reasons why she did not appear at the Referee's hearing and asked the Board to take these reasons into consideration.<sup>7</sup> Specifically, Claimant indicated that she was unable to arrive at the Referee's office on time for the hearing because she had to rely on another person for transportation, she got lost in a severe rain storm that morning and she had difficulty locating the Referee's office by the street address because the office was actually located behind other buildings on the named street. Nonetheless, Claimant noted that she had arrived at the Referee's office by 9:10 a.m. Claimant proceeded to raise allegations of error with respect to the merits of the Referee's decision, including errors in the testimony of Employer's witnesses which she characterized as untrue and misleading. Specifically, Claimant alleged that she was exposed to routine sexual harassment over the course of her employment which led to her experiencing numerous physical problems, including stress and high blood pressure.<sup>8</sup>

The Board issued a decision and order dated October 12, 2007, which affirmed the Referee's decision and found Claimant ineligible for benefits pursuant to Section 402(b) of the Law. The Board simply found as fact that Claimant took a leave

---

<sup>7</sup> Claimant filed her appeal pro se and, while not specifically stated in her petition, Claimant was essentially seeking a rehearing before the Referee by attempting to justify her failure to appear.

<sup>8</sup> In her appeal to the Board, Claimant attached a copy of a complaint filed against Employer with the Pennsylvania Human Relations Commission in March of 2007 with respect to this allegation.

of absence in April of 2007, that she voluntarily resigned and that continuing work was available to her with Employer. In its discussion, the Board did not discuss Claimant's purported reasons for failing to appear at the Referee's hearing. Instead, the Board simply indicated that notice of said hearing was mailed to Claimant's last known address and said notice was not returned as undeliverable. The Board noted that Claimant had requested a continuance, but the same was properly denied by the Referee. Hence, the Board indicated that it was basing its decision on the uncontradicted testimony of Employer's witnesses, which it found to be credible. As did the Referee, the Board noted that since Claimant failed to appear at the Referee's hearing, she failed to offer sufficient, competent and credible evidence that she had a necessitous and compelling reason to quit her employment. Claimant thereafter filed a petition to review with this Court.

On appeal,<sup>9</sup> Claimant essentially argues that the Board erred as a matter of law in concluding that she was ineligible for benefits under Section 402(b) of the Law as she was not given an opportunity to present testimony at the hearing before the Referee. Claimant proceeds to allege that she was exposed to a sexual harassment situation at work which caused her health problems, including stress and high blood pressure, which eventually forced her to leave her employment. Claimant alleges that she did take reasonable and common sense actions, such as reporting the harassment to Employer, before leaving her employment.

The Board's regulations address a request for reopening of a record. Specifically, these regulations provide that if a party does not attend a scheduled

---

<sup>9</sup> Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Shrum v. Unemployment Compensation Board of Review, 690 A.2d 796 (Pa. Cmwlth.), petition for allowance of appeal denied, 548 Pa. 663, 698 A.2d 69 (1997).

hearing, he/she may, prior to the issuance of a decision, request a rehearing. 34 Pa. Code §101.24(a). The regulations further provide that the request must be in writing and, if the referee determines that the reasons for failing to attend constitute just cause, the case shall be reopened. Id. These regulations further provide as follows:

A request for reopening the hearing which is not received before the decision was mailed, but is received or postmarked on or before the 15th day after the decision of the referee was mailed to the parties shall constitute a request for further appeal to the Board and a reopening of the hearing, and the Board will rule upon the request. If the request for reopening is allowed, the case will be remanded and a new hearing scheduled, with written notice thereof to each of the parties. At a reopened hearing, the opposing party shall be given the opportunity to object to the reopening if he so desires. If the request to have the hearing reopened is denied, the Board will append to the record the request, supporting material and the ruling on the request, so that it shall be subject to review in connection with any further appeal to the Commonwealth Court.

34 Pa. Code §101.24(c).

In the present case, the Referee's decision was mailed on August 22, 2007. Fifteen days later, on September 6, 2007, Claimant filed her petition for appeal to the Board addressing the merits of her case and also requesting that the Board take into consideration certain reasons she set forth as to why she failed to attend the Referee's hearing. While admittedly Claimant did not formally request another hearing, we keep in mind that Claimant was proceeding in this matter pro se and we believe that her request was sufficiently phrased such that it constituted a request for a reopening of the hearing.

Nevertheless, the Board failed to rule upon this request. Rather, in its decision on appeal, the Board simply avoided the issue by stating that notice of the

Referee's hearing was sent to Claimant's last known address and that said notice was not returned as undeliverable. Thus, we must conclude that the Board erred in failing to rule upon Claimant's request and a remand to the Board is warranted.

Accordingly, the order of the Board is vacated. The matter is remanded to the Board to make further findings and conclusions as to Claimant's stated reasons for her failure to appear at the Referee's hearing and her request for a reopening of said hearing.

---

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ivy Smith (Motley),	:	
Petitioner	:	
	:	
v.	:	No. 2228 C.D. 2007
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

**ORDER**

AND NOW, this 11<sup>th</sup> day of June, 2008, the order of the Unemployment Compensation Board of Review (Board) is hereby vacated. The matter is remanded to the Board for further findings and conclusions with respect to the request of Ivy Smith (Motley) for a reopening of the Referee's hearing.

Jurisdiction relinquished.

---

JOSEPH F. McCLOSKEY, Senior Judge