IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kendan Industries, Petitioner	:	
v.	:	No. 2323 C.D. 2007
	:	Submitted: May 16, 2008
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: July 25, 2008

Kendan Industries (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board), which reversed the referee's decision and determined that under Section 402(b) of the Unemployment Compensation Law (Law), Nancy A. Johnston (Claimant) was eligible for benefits because she had a necessitous and compelling reason for voluntarily leaving her employment.[1] We affirm the Board.

[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 Law provides that 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….

After her separation from employment, Claimant applied for unemployment compensation benefits, which application was denied by the job center. Claimant appealed to the referee who conducted a hearing. The referee affirmed the job center and denied benefits. Claimant appealed to the Board. The Board made the following findings of fact:

> 1. The claimant was last employed as a full-time store manager by Kendan Industries from August 8, 2005, at a final rate of $11.00 per hour and her last day of work was April 12, 2007.
>
> 2. The employer had outbursts on a weekly basis where he spoke in a loud, agitated tone of voice to the claimant.
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> 3. The employer had a rule that employees could only communicate with him by e-mail.
>
> 4. If the claimant attempted to personally speak to the employer regarding work related problems, the employer told the claimant that he didn't have time for this, that the claimant could handle it, that the claimant should just leave him alone because he had "too much other sh*t going on."
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> 5. The claimant attempted to speak to the employer a few times regarding his behavior via e-mail without success.
>
> 6. On April 12, 2007, the employer berated the claimant regarding an incorrect order of uniform pants for a client.
>
> 7. The claimant told the employer that she ["]did not care what["], but before the claimant could finish her

> statement, the employer screamed, "You better care," then stormed out of the room.
>
> 8. The claimant could no longer tolerate the employer's behavior and voluntarily quit her employment.

Board's Decision, November 30, 2007, Findings of Fact (F.F.) Nos. 1-8, at 1-2. The Board determined that:

> Here, the claimant voluntarily quit her employment due to her employer's intolerable behavior. The record reveals that the employer had weekly outbursts where he spoke loudly and became agitated. The Board finds the claimant credible that she attempted to communicate her concerns to the employer via e-mail prior to quitting without success. On April 12, the claimant attempted to speak to the employer, but the employer screamed at the claimant, then stormed out of the room. When the employer's behavior became intolerable, the claimant had no other choice but to voluntarily quit. The claimant has shown cause of a necessitous and compelling reason for voluntarily quitting her employment. Benefits are granted under Section 402(b) of the Law.

Board's Decision, at 2. The Board reversed the referee, concluding that Claimant was eligible for benefits under Section 402(b) of the law. Employer now petitions our court for review.[2]

Employer contends that the Board erred in determining that Claimant had satisfied her burden in demonstrating cause of a necessitous and compelling nature for voluntarily resigning from her employment and also that the Board erred

[2] Our review is limited to a determination of whether constitutional rights were violated, whether an error of law was committed and whether necessary findings of fact are supported by substantial evidence. Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

in determining that Claimant had taken reasonable steps to preserve her employment.

Under Section 402(b) of the Law, if a claimant has voluntarily terminated her employment, the claimant has the burden to demonstrate that her cause for doing so was of a necessitous and compelling nature. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). In showing a necessitous and compelling cause, the claimant must establish 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) she acted with ordinary common sense; and 4) she made a reasonable effort to preserve her employment." Central Dauphin School District v. Unemployment Compensation Board of Review, 893 A.2d 831, 832 (Pa. Cmwlth. 2006). In other words, "it can be said that 'good cause' for voluntarily leaving one's employment (i.e. that cause which is necessitous and compelling) results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner." Taylor, 474 Pa. at 358-59, 378 A.2d at 832-33. Perhaps most important to the present case, it is well established that "a claimant need not indefinitely subject herself to unjust accusations and abusive conduct." Berardi v. Unemployment Compensation Board of Review, 458 A.2d 668, 670 (Pa. Cmwlth. 1983).

Employer argues that the Board's findings of fact do not demonstrate that Claimant left her work due to a necessitous and compelling cause. Instead, Employer argues that a mere personality conflict between Claimant and Employer existed and, at best, Claimant only indicated that she was unhappy with both Employer and her work. The record, when viewed in its entirety, provides

substantial evidence that Claimant was subject to the Employer's intolerable behavior.

The Board is the ultimate fact-finder and "the findings of the Board as to facts, if supported by the evidence are conclusive." Unemployment Compensation Board of Review v. Ruffel, 336 A.2d 670 (Pa. Cmwlth. 1975). "[T]he question of whether or not a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to our review." Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282, 1284 (Pa. Cmwlth. 1981).

In the present case, Employer argues that in accordance with Lynn v. Unemployment Compensation Board of Review, 427 A.2d 736, 737 (Pa. Cmwlth. 1981)), "[t]he law is clear. Resentment of a reprimand, absent unjust accusations, profane language or abusive conduct…do not amount to necessitous and compelling causes." While the above statement is indeed a correct statement of the law, Employer has failed to acknowledge that the Board, in addition to being the ultimate fact-finder, also has the authority to make credibility determinations. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). Likewise, this Court must "examine the testimony in the light most favorable to the party in whose favor the Board has found, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony…." Taylor, 474 Pa. at 355, 378 A.2d at 831.

Here, the Board concluded that Claimant quit her employment due to Employer's intolerable behavior. As found by the Board, Employer "had outbursts on a weekly basis where he spoke in a loud, agitated tone of voice to the claimant." Board's Decision, F.F. No. 2, at 1. The Board also determined that when Claimant "attempted to personally speak to the employer regarding work related problems, the employer told the claimant that he didn't have time for this, that the claimant

could handle it, that the claimant should just leave him alone because he had 'too much other sh*t going on.'" Id. at 1-2. Likewise, the Board found that "[o]n April 12, 2007, the employer berated the claimant regarding an incorrect order of uniform pants for a client," and that when Claimant attempted to confront Employer, Employer screamed at Claimant and then stormed out of the room. Id., F.F. Nos. 6-7, at 1-2.

Employer erroneously relies on Berardi and Lauffer v. Unemployment Compensation Board of Review, 434 A.2d 249 (Pa. Cmwlth. 1981). In Berardi, our Court affirmed the denial of benefits to a claimant based on the absence of a necessitous and compelling reason for voluntarily terminating her employment. This Court stated that, "[a]t best, Claimant only demonstrated [her] *belief* that [s]he was being harassed, discriminated against, and defamed. Claimant's unsubstantiated beliefs and allegations do not rise to the level of compelling reasons for [her] decision to resign." Berardi, 458 A.2d at 670 (citation omitted). Similar to Berardi, in Lauffer, the Board concluded that a supervisor's comments were not delivered in an offensive or profane manner nor were the comments, even if untrue, so uncalled for as to leave the claimant with no alternative other than quitting.[3]

In the present controversy, unlike Berardi and Lauffer, the Board determined that Claimant had been subjected to Employer's intolerable behavior.

[3] In Lauffer, the claimant argued that his supervisor "unjustifiably accused him of being a liar, that he was blamed by that supervisor for allowing his men to drink on the job, again without cause, and that the supervisor demanded too much night work from him." Lauffer, 434 A.2d at 251. However, this court, in affirming the Board's determination, found that the "comments were not delivered in an offensive or profane manner and…that, although profanity may have been used on one occasion, such language was considered to be acceptable in the workplace and the [claimant] did not find it to be objectionable." Id. Rather, "the comments to which [claimant] object[ed] were directly related to employee relations and work performance...." Id.

On a weekly basis, Employer had outbursts wherein he spoke loudly and became agitated. On different occasions, Claimant was screamed at and berated by Employer. We agree with the Board's conclusion that such circumstances existed which produced real and substantial pressure for Claimant to terminate her employment and that a reasonable person in the same circumstances would have acted similarly.

Second, Employer contends that Claimant failed to demonstrate that she made a sufficient effort to preserve her employment. Claimant, in meeting her burden of establishing that she had a necessitous and compelling reason for quitting her employment, "must take common sense action to obviate the problem so that ... she does not have to terminate employment, and this is accomplished by informing one's superiors of the harassing, humiliating or abusive conduct." Porco v. Unemployment Compensation Board of Review, 828 A.2d 426, 428 (Pa. Cmwlth. 2003).

Employer argues that Claimant failed to specifically address her issues regarding Employer's behavior in the e-mails she sent to Employer and that Claimant's own testimony contradicts the Board's finding that Claimant "attempted to speak to the employer a few times regarding his behavior via e-mail without success." Board's Decision, F.F. No. 5, at 1. Employer cites to Colduvell v. Unemployment Compensation Board of Review, 408 A.2d 1207 (Pa. Cmwlth. 1979), in support of its contention. In Colduvell, this court determined that the claimant was ineligible for benefits because she had only made one attempt to notify her employer of the intolerable employment conditions she was subjected to. This court also determined that the claimant had failed to further indicate the nature of the problem to her employer. When the employer responded to the claimant that 'at that particular moment, he was too busy to see her,' the claimant

then failed to make any further attempt to notify him prior to quitting. Colduvell, 408 A.2d at 1208.

In the present controversy, Claimant testified that she e-mailed Employer, informing him that she would like to speak with him. According to Claimant, Employer acknowledged receiving her emails and responded that he would "catch her on a certain day," but Employer failed to do so. Reproduced Record (R.R.) at 55a. Additionally, Claimant testified that when Claimant attempted to talk to Employer regarding work-related matters, she was told by Employer, "I don't have time for this. I can't deal with this. You handle it. Just leave me alone. I got too much other shit going on." R.R. at 54a; *See also* Board's Decision, F.F. No. 4, at 1. Claimant also testified that on April 12, 2007, she attempted to speak to Employer but Employer screamed at Claimant, then stormed out of the room.[4] R.R. at 52a; *See also* Board's Decision, F.F. No. 6, 7, at 2. Such testimony of Claimant, credited by the Board, supports the Board's finding that Claimant attempted to communicate with Employer via e-mail and personally regarding his behavior. Thus, this case is distinguishable from Colduvell, where the claimant made only one attempt to notify the employer.

Similarly, Employer erroneously relies on Shearer v. Unemployment Compensation Board of Review, 364 A.2d 516 (Pa. Cmwlth. 1976), as support for its contention that Claimant's alleged failure to pursue a complaint constitutes a failure to take reasonably necessary steps to preserve her employment. Unlike the

[4] The present case is distinguishable from Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003) where this Court determined that the claimant was ineligible for benefits because he failed to speak to upper level management regarding the hostile working conditions with which he was faced. In the present case, Employer is also the President of the company and therefore, Claimant is unable to speak with higher authority and has no other readily available alternative to notify of intolerable working conditions, as required to preserve the employment relationship.

case *sub judice*, the claimant in Shearer suffered from anxiety caused by the harassment and abuse of her co-workers and, because she failed to establish this by medical testimony and further failed to request a change of shift prior to her resignation, the claimant did not establish a necessitous and compelling reason to voluntarily terminate her employment. Shearer, 364 A.2d at 518. The court in Shearer further noted that the Board, in adopting the referee's determination, had determined that the claimant had made no attempt to maintain her employment relationship prior to quitting. Id. Claimant, however, in the present case, was found to have made attempts on various occasions to preserve her employment relationship without success. The record reflects that she attempted to speak to Employer as well as having sent e-mails regarding Employer's behavior. *See* Board's Decision, F.F. Nos. 4,5, 7 at 1-2.

Employer further contends that Claimant had merely e-mailed Employer, but did not attempt to remedy the problem via face-to-face interaction. Specifically, Employer argues that Claimant attended a meeting on April 4, 2007, in which both parties, along with another individual, attended. However, the Board accepted as true Claimant's testimony that she did attempt to confront him face to face and that Employer had a rule requiring employees to communicate with him only by e-mail and that her previous attempts in notifying Employer had been unsuccessful. As a result, the Board's determination that Claimant had attempted to communicate her concerns to Employer is supported by substantial evidence. The Board did not err in determining that Claimant had a necessitous and compelling reason for voluntarily terminating her employment.

Accordingly, we affirm the decision of the Board.

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JIM FLAHERTY, Senior Judge

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v.	:	No. 2323 C.D. 2007
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ORDER

AND NOW, this 25th day of July, 2008, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge