IN THE COMMONWEALTH COURT OF PENNSYLVANIA

3SI Security Systems, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 2437 C.D. 2008
	:	Submitted: June 19, 2009
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD McGINLEY, Judge
HONORABLE RENEE COHN JUBELIRER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: September 16, 2009

3SI Security Systems, Inc., (Employer) petitions for review from an order of the Unemployment Compensation Board of Review (Board) which reversed the determination of a referee and granted unemployment benefits to Robin Springer (Claimant), concluding that under Section 402(b) of the Unemployment Compensation Law (Law), she had a cause of a necessitous and compelling nature for voluntarily leaving her work with Employer.[1] We reverse.

[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 ….

Claimant worked for Employer for approximately five months as a customer service manager until her resignation on April 16, 2008. Claimant's application for unemployment benefits was granted by the service center. On appeal, a referee conducted a hearing, and reversed the determination of the service center, concluding that Claimant did not have a necessitous and compelling reason for voluntarily leaving her employment.

Claimant appealed to the Board which made the following findings of fact:

> 1. The claimant was last employed as a customer service manager by 3SI Security Systems from November 5, 2007 to April 16, 2008. Her final rate of pay was $59,500.00.
>
> 2. The employer's sexual harassment policy states that it "will not tolerate any kind of harassing behavior while on company business. Given the serious personal and corporate consequences of sexual harassment, we are dedicated to providing a work environment which is free from all forms of intimidation and hostility. 3SI Security Systems will move quickly to investigate and take strong action to deal with any such incidents in our organization."
>
> 3. The employer's sexual harassment policy is a zero tolerance policy.
>
> 4. On or about March 5, 2008, the claimant was on a business trip with the vice president of sales.
>
> 5. While out to dinner with her coworkers, the vice president asked the claimant multiple times to remove her shirt. Each time the claimant said no.

6. The vice president also asked the claimant whether she loved her husband and if she would ever cheat on him. The claimant again said no.

7. During the evening, the claimant informed the vice president that his behavior constituted sexual harassment.

8. As the group left the restaurant, the vice president commented on another woman's physical appearance. He said, "Look at that a**. Isn't that a nice a**. Robin, what do you think? Isn't that a nice a**."

9. The claimant declined to comment.

10. On March 12, 2008, during a conference call, the vice president of sales stated that he knew one of the female customers who was participating in the conference call when she posed for "Biker World magazine."

11. On March 13, 2008, during a presentation, one of the claimant's coworkers showed the CNN Home Page, which displayed a picture of the prostitute connected with Elliott Spitzer, the former Attorney General of New York. The employee asked the group whether they thought, "that's worth $1,500 an hour" referring to the woman on the screen.

12. The claimant filed a formal sexual harassment complaint with the employer on March 17, 2008.

13. The employer conducted an investigation into the three incidents.

14. The employer spoke with the male employees who made the inappropriate comments. They each admitted responsibility for their actions.

15. The employer concluded that the vice president's comment to the customer about her

> appearance in "Biker World magazine" was not businesslike.
>
> 16. None of the employees who made the statements were discharged.
>
> 17. The employer required each of the employees to receive additional training in sexual harassment by watching the employer's videotape on the topic on their own time. A memorandum detailing their conduct was placed in their individual files. Additionally, each employee had his bonus suspended temporarily.
>
> 18. On or about April 16, 2008 the claimant was treated by a psychologist for posttraumatic stress syndrome.
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> 19. The claimant was instructed by her psychologist to immediately stop reporting to work.
>
> 20. The claimant was able and available for work anywhere but for the employer.
>
> 21. The claimant feared that she would be subject to additional sexual harassment and possible retribution for filing a complaint.
>
> 22. The claimant quit because the employer did not adequately address her concern.

(Board's decision at p. 1-3.)

Based on the above, the Board concluded that Claimant credibly testified that she voluntarily terminated her employment because she feared that she would face continual harassment or retaliation after she filed her sexual harassment complaint. Although the March 12 and 13, 2008 conduct was not as egregious as the March 5, 2008 conduct of the vice

president of sales, the employees received the same punishment. Each was required to watch Employer's sexual harassment video on their own time and each had their bonus suspended temporarily. The Board concluded that it was reasonable for Claimant to fear, based on the limited punishment that the vice president of sales received, that she would face continued harassment and/or retribution. As such, according to Board, Claimant had a necessitous and compelling reason to voluntarily terminate her employment. This appeal followed.[2]

We initially address Employer's argument that the Board erred in concluding that Claimant had a necessitous and compelling reason for voluntarily leaving 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, 378 A.2d 829 (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, 893 A.2d at 832 (citation omitted). Harassment can constitute a necessitous and compelling cause to leave one's work. Homan v.

[2] Our review is limited to determining whether constitutional rights were violated, whether an error of law was committed and whether necessary findings are supported by substantial evidence. Central Dauphin School District v. Unemployment Compensation Board of Review, 893 A.2d 831 (Pa. Cmwlth. 2006).

Unemployment Compensation Board of Review, 527 A.2d 1109 (Pa. Cmwlth. 1987).

Here, as found by the Board, Claimant quit her employment because she did not feel that Employer adequately addressed her concerns. However, in accordance with its policy and as found by the Board, Employer investigated Claimant's harassment claims. In doing so, Employer interviewed the individuals involved and they admitted responsibility for their actions. Employer then imposed sanctions against the individuals, which included the suspension of bonuses, the placing of a memo in their files which detailed their conduct and both were required to view a sexual harassment video. Moreover, although the Board maintains that Employer's response was inadequate given its zero tolerance policy, nowhere in Employer's policy does it state that acts of harassment would result in termination. Although Claimant may not have agreed with the punishment imposed, she did not speak to Employer about her reservations, nor did she attempt to return to work. Claimant has not shown that she made a reasonable effort to preserve her employment and that she had no other real choice than to leave her employment. Malloy v. Unemployment Compensation Board of Review, 523 A.2d 834 (Pa. Cmwlth. 1987).

Additionally, although the Board found that Claimant did not return to work because she feared retribution and retaliation, there is nothing in the record to show that such would happen. Moreover, there were no further complaints of harassment after Claimant informed Employer of the incidents at issue.

The Board maintains that this case is similar to Comitalo v. Unemployment Compensation Board of Review, 737 A.2d 342 (Pa. Cmwlth. 1999). In that case, the claimant experienced repeated sexual harassment from her manager, including suggestive comments, touching and grabbing. Despite complaints by the claimant's husband, the employer took no action. The claimant then contacted human resources, which concluded that harassment did occur. The manager was then transferred but allowed to return to the store and did so in a drunken state and accused the claimant of lying. The claimant's new manager repeatedly yelled at her because of his new assignment and co-workers criticized the claimant for filing her complaint. The claimant told the employer about the behavior and was told by the employer to stick it out and take off a few days. The employer, however, did not offer to protect the claimant from further harassment. The claimant quit because she did not believe that the employer would resolve the current harassment against her given the employer's earlier response.

This court in Comitalo concluded that the employer did not takes proper steps necessary to enforce its policy to eliminate harassment against the claimant. Because the Board committed an error of law in determining that the claimant did not have cause of a necessitous and compelling nature to quit her job, this court reversed the order of the Board and granted the claimant benefits.

Here, unlike in Comitalo, there was no continuing harassment of Claimant. Once Claimant informed Employer of the harassment, Employer, in accordance with its policy, immediately took steps to investigate the harassment and those individuals involved were disciplined.

Neither was there retaliatory conduct by Claimant's co-workers as was the case in Comitalo. Unlike the employer in Comitalo, Employer here took reasonable steps to address the harassment and it was incumbent on Claimant to make an effort to preserve her employment, such as, requesting to be assigned to other duties or, at least, waiting to see if the discipline imposed by Employer stopped the offensive conduct. There is not substantial evidence in the record to support Claimant's speculation that the remedy imposed by Employer would fail and justify her fears that she would then face continued harassment and/or retribution.

Accordingly, because Claimant did not make a reasonable effort to preserve her employment, the decision of the Board is reversed.[3]

JIM FLAHERTY, Senior Judge

[3] Because of our determination, we need not address Employer's other arguments. We note, however, that although Employer takes issue with the Board's finding of fact no. 17, which stated that three individuals were involved in the sexual harassment, the Board concedes that this was a typographical error as only two individuals were involved. Additionally, the finding that both individuals had their bonuses suspended is supported by the testimony of Employer's president.

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O R D E R

Now, September 16, 2009, the order of the Unemployment Compensation Board of Review, in the above captioned matter, is reversed.

JIM FLAHERTY, Senior Judge