

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mark C. Knolles,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 2439 C.D. 2009
Respondent	:	Submitted: April 23, 2010

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: May 27, 2010

Mark C. Knolles (Claimant) petitions this Court for review of the November 20, 2009 order of the Unemployment Compensation Board of Review (UCBR) affirming the decision of the Referee to deny Claimant benefits under Section 402(b) of the Unemployment Compensation Law (Law).¹ The only issue before this Court is whether Claimant had a necessitous and compelling reason for voluntarily leaving his employment. For reasons that follow, we affirm the UCBR's order.

Claimant became employed by Ferrario Auto Center (Employer) as a car salesman beginning on May 27, 2008. On January 19, 2009, Claimant suffered an

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

injury at work, for which he underwent surgery and was off work from March 13, 2009 through April 13, 2009, during which period he received workers' compensation benefits. Claimant returned to work for an hour on April 13, 2009, then voluntarily quit his employment. Claimant applied for Unemployment Compensation (UC) benefits.

In his Claimant Questionnaire, filed April 29, 2009, Claimant stated that the reason he quit his job was "[l]ack of sales due to economy." Original Record (O.R.) Item 4 at 1. Claimant's Employment Separation Questionnaire, filed the same day, reflects that he was unemployed due to:

economic issues reflecting poor sales. Pursuing work in a different field with more stable income. I originally took this job because I ran out of unemployment benefits. I applied for this job, was hired and was given an EUC [emergency unemployment compensation] extension one month later I held in as long as possible without quitting and now have several opportunities to work in the next month.

O.R. Item 4 at 3. On May 6, 2009, the UC Service Center mailed a notice of determination to Claimant denying him UC benefits under Section 402(b) of the Law. Claimant appealed. In his Petition for Appeal filed May 18, 2009, Claimant set forth his reasons as follows:

1. Due to unsuitable work – prevailing condition of labor market in auto sales and auto industry[:] could not pay bills.
2. Job not the same as what was anticipated – advertised job without stating a draw pay system.
3. Took sales job due to no more unemployment compensation. Three weeks after accepting position was sent EUC approval for extension. Had known prior would have waited.

4. Was off work 3/13/09 due to fall on uncleared ice in parking lot. Was on workers' compensation not disability.

5. Unable to keep contact with customer base from 3/13/09 thru 4/13/09 due to accident on unclear parking lot and fall on ice. Was willing to go back to work to try to salvage customer base but denied by employer and compensation company insuring dealership.

O.R. Item 6 at 1-3. A hearing was held before a Referee, during which the parties presented evidence.

Claimant testified at the hearing that he quit as a result of sexual harassment.² Claimant stated that “[t]here was a discrepancy that I had with the actual Employer and it couldn’t be resolved” Notes of Testimony, September 9, 2009 (N.T.), at 6. He then testified that, in January of 2009, on two occasions, Employer’s owner, Don Ferrario (Ferrario), touched him and said things to him with which he was uncomfortable.³ N.T. at 7-9, 11-13. Claimant claimed that he was too embarrassed to say anything about it but, when he returned to work on April 13, 2009, he “just didn’t want to deal with that anymore,” “it was just too – too much and I knew that when I came back . . . it was going to still go on” N.T. at 8, 10.

On September 11, 2009, the Referee mailed his decision denying Claimant’s application for benefits on the basis that Claimant had proffered three

² Employer’s counsel moved to continue the hearing in order to afford Employer the opportunity to respond to the sexual harassment allegation, as this was the first time Claimant had raised the allegation. Notes of Testimony, September 9, 2009 (N.T.), at 10. The motion was denied by the Referee. N.T. at 10.

³ On one occasion, Ferrario approached him with flowers, put his arm around Claimant and asked, “will this get me laid by you tonight?” N.T. at 8. On the other occasion, Ferrario approached Claimant at a co-worker’s wedding reception, put his arm around Claimant and told another individual that he and Claimant worked alone all day together that day, and he was nervous. N.T. at 9. While Claimant avers that employee, Larry Chilson (Chilson) witnessed the first incident, Chilson’s testimony did not support Claimant’s claim. N.T. at 9, 11-13.

distinct reasons for quitting his job, and the most recent of which - a claim of sexual harassment that occurred some three months earlier – was too remote in time to constitute a necessitous and compelling reason to leave his employment. Claimant appealed to the UCBR. The UCBR affirmed the decision of the Referee, having found Claimant’s testimony about the alleged sexual harassment not credible.⁴ Claimant appealed to this Court.⁵

Claimant argues on appeal that the UCBR erred in denying him benefits because he was unrepresented and too embarrassed to state in his initial claim forms that he quit because he was the victim of his male employer’s unwanted sexual advances. Claimant’s argument has no merit. Section 402(b) of the Unemployment Compensation Law provides that an employee shall be ineligible for compensation

⁴ It should be noted that:

[t]he regulations pertaining to unemployment compensation proceedings provide that the specific issues to be considered must be set forth in the notice of the appeal of the UC Service Center's decision. 34 Pa. Code § 101.85(a). The referee is permitted to consider only those issues expressly ruled upon by the UC Service Center, unless the parties agree otherwise. 34 Pa. Code § 101.87.

On Line Inc. v. Unemployment Comp. Bd. of Review, 941 A.2d 786, 791 (Pa. Cmwlth. 2008) (footnotes omitted). Moreover, “issues not previously considered or raised will not be considered by the [UCBR] . . . in the determination of an appeal unless the speedy administration of justice, without prejudice to any party, will be substantially served thereby and are supported by the record.” 34 Pa. Code § 101.107(a).

The issue of the sexual harassment Claimant allegedly suffered at Employer’s hands was not raised in Claimant’s application to the UC Service Center, nor was it raised on appeal to the Referee. However, the issue of whether sexual harassment is a cause of a necessitous and compelling reason to quit his job was the basis for Claimant’s appeal to the UCBR. Since that issue was not raised before the UC Service Center or the Referee, the UCBR should not have considered that issue on appeal. We, nonetheless, address the merits of Claimant’s appeal.

⁵ This Court’s review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

for any week “[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature”

Necessitous and compelling cause ‘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.’ An employee voluntarily terminating employment has the burden of proving his termination was necessitous and compelling.

Renda v. Unemployment Comp. Bd. of Review, 837 A.2d 685, 691-92 (Pa. Cmwlth. 2003) (citation omitted).

Claimant’s argument that he was not represented by counsel and was too embarrassed to accurately complete his initial claim forms is not a sufficient basis on which this Court will reverse the UCBR’s determination. *See Finfinger v. Unemployment Comp. Bd. of Review*, 854 A.2d 636 (Pa. Cmwlth. 2004); *Daly v. Unemployment Comp. Bd. of Review*, 631 A.2d 720 (Pa. Cmwlth. 1993). Moreover, Claimant failed to meet his burden of proof.

“Findings made by the Board are conclusive and binding on appeal if the record, when examined as a whole, contains substantial evidence to support those findings.” *Curran v. Unemployment Comp. Bd. of Review*, 752 A.2d 938, 940 (Pa. Cmwlth. 2000). Sexual harassment may be a necessitous and compelling reason for quitting employment. *Collier Stone Co. v. Unemployment Comp. Bd. of Review*, 876 A.2d 481 (Pa. Cmwlth. 2005). The UCBR in this case, however, rejected Claimant’s evidence of sexual harassment as not credible. It is well settled,

[i]n unemployment compensation proceedings, the [UCBR] is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. The [UCBR] is free to accept or reject the testimony of any witness in whole or in part.

McFadden v. Unemployment Comp. Bd. of Review, 806 A.2d 955, 958 (Pa. Cmwlth. 2002) (citation omitted). Moreover, “[t]he UCBR, as fact-finder, is not bound by the referee’s credibility determinations and can reverse the referee’s decision” *Cumberland Valley Animal Shelter v. Unemployment Comp. Bd. of Review*, 881 A.2d 10, 13 n.4 (Pa. Cmwlth. 2005). Furthermore, where substantial evidence supports the UCBR’s findings, credibility determinations made by the UCBR are not subject to review by this Court. *Duquesne Light Co. v. Unemployment Comp. Bd. of Review*, 648 A.2d 1318 (Pa. Cmwlth. 1994).

Without credited evidence that Claimant suffered sexual harassment at the hands of his employer, there is no support for his claim either that he had a necessitous and compelling reason for quitting his job, or that the UCBR erred by denying him benefits for being unrepresented and too embarrassed to truthfully complete his claim and appeal forms. Thus, Claimant has not met his burden. The order of the UCBR is, therefore, affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 27th day of May, 2010, the November 20, 2009
order of the Unemployment Compensation Board of Review is affirmed.

JOHNNY J. BUTLER, Judge