

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barbara Labick,	:	
	Petitioner	:
v.	:	No. 416 C.D. 2010
	:	Submitted: August 20, 2010
Unemployment Compensation Board	:	
of Review,	:	
	Respondent	:

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE BROBSON**

FILED: December 15, 2010

Petitioner Barbara Labick (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board). The Board affirmed the Referee’s decision and denied Claimant unemployment compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).¹ For the reasons set forth below, we affirm.

Claimant applied for unemployment compensation benefits after she resigned from her sales position with Levin Furniture (Employer). The Duquesne

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, in pertinent part, that an employee shall be ineligible for compensation for any week “[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.”

UC Service Center (Service Center) issued a determination finding Claimant ineligible for benefits under Section 402(b) of the Law because she voluntarily terminated her employment without cause of a necessitous and compelling nature. Claimant appealed the Service Center's determination.

An evidentiary hearing was held before the Referee. The Referee determined that Claimant lacked necessitous and compelling cause for leaving employment. Claimant appealed to the Board, which issued an order affirming the Referee's determination. The Board adopted the Referee's findings, as follows:

1. The claimant was employed full-time as a Salesperson at Levin Furniture Company from January 14, 1991 to July 29, 2009 and was paid straight commission.
2. Approximately 10 years ago, the claimant's manager approached the claimant approximately 10 times over 2 months when the claimant and manager were alone, and asked the claimant for hugs.
3. The claimant was compliant and hugged the manager.
4. During the last occurrence, the manager informed the claimant that he fantasized about her all the time.
5. After the last occurrence, the claimant informed the manager in front of a co-worker that she would no longer tolerate hugging behind close doors.
6. After the claimant confronted the manager, the manager's requests for hugs and his inappropriate comments stopped.
7. Shortly after these events, the claimant mentioned the situation to the operations manager.

8. The claimant continued to work at the store with the manager for approximately 1 ½ months until the manager was transferred to a different location.

9. Although the employer did not have a human resources department at the time, the claimant could have taken her concerns to the president of the company, but chose not to do so.

10. In December 2008, the claimant's former manager was promoted to a sales manager for all of the Pennsylvania Levin Furniture stores.

11. After the former manager visited the employer's store where the claimant worked, the claimant informed her supervisor and current store manager that she did not feel comfortable with her former manager being a PA Sales Manager and informed them of the events that had taken place 10 years prior.

12. The claimant subsequently spoke with the department manager of human resources about the situation and that she was uncomfortable with her former manager now being her sales manager.

13. On July 29, 2009, the claimant was informed that because the incident had happened 10 years ago that the former manager would continue to be the Pennsylvania sales manager.

14. The claimant did not believe that someone who had sexually harassed her in the past should be anyone's boss and the claimant resigned her employment with Levin Furniture effective July 29, 2009.

15. Since his promotion to sales manager in December of 2008, the former manager did not make any inappropriate requests or comments of a sexual nature to the claimant.

(C.R., Item No. 16).²

Based upon those findings, the Board determined that Claimant failed to establish cause of a necessitous and compelling nature to voluntarily terminate her employment and is ineligible for benefits under Section 402(b) of the Law. In reaching its determination, the Board explained:

[C]laimant had been subjected to inappropriate behavior but continued to work with that individual. That individual was eventually transferred and [C]laimant had no dealings with him. The other person was promoted to a position above [C]laimant, 10 years after the last incident and [C]laimant speculated she would be harassed again. [C]laimant precipitously voluntarily terminated her employment.

(*Id.*)

Claimant now petitions this Court for review of the Board's order. On appeal,³ Claimant argues that the Board erred in concluding that Claimant lacked necessitous and compelling cause for voluntarily terminating her employment.⁴

² Although the Certified Record purports to include the Board's order dated January 29, 2010, as Item No. 15, the order is not contained as part of that item. The Board's order, however, is included as part of Claimant's "request for reconsideration" dated February 9, 2010, in Item No. 16 of the Certified Record.

³ This Court's scope of review is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704. Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. *Hercules, Inc. v. Unemployment Comp. Bd. of Review*, 604 A.2d 1159 (Pa. Cmwlth. 1992).

⁴ Claimant does not dispute any of the factual findings, and, accordingly, those findings of fact are binding on appeal. *Campbell v. Unemployment Comp. Bd. of Review*, 694 A.2d 1167, 1169 (Pa. Cmwlth. 1997).

Section 402(b) of the Law provides, in part, that a claimant shall be ineligible for compensation for any week in which the claimant's unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. Whether a claimant had cause of a necessitous and compelling nature for leaving work is a question of law subject to this Court's review. *Wasko v. Unemployment Comp. Bd. or Review*, 488 A.2d 388, 389 (Pa. Cmwlth. 1985). A claimant who voluntarily quits her employment bears the burden of proving that necessitous and compelling reasons motivated that decision. *Fitzgerald v. Unemployment Comp. Bd. of Review*, 714 A.2d 1126 (Pa. Cmwlth. 1998), *appeal denied*, 568 Pa. 650, 794 A.2d 364 (1999). A necessitous and compelling cause for voluntarily leaving employment is one that results from circumstances which produced 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. *Mercy Hosp. of Pittsburgh v. Unemployment Comp. Bd. of Review*, 654 A2d 264 (Pa. Cmwlth. 1995). In order to establish cause of a necessitous and compelling nature, a claimant must establish that: (1) circumstances existed that produced real and substantial pressure to terminate employment; (2) like circumstances would compel a reasonable person to act in the same manner; (3) the claimant acted with ordinary common sense; and (4) the claimant made a

reasonable effort to preserve her employment. *Procito v. Unemployment Comp. Bd. of Review*, 945 A.2d 261 (Pa. Cmwlth. 2008).

Claimant argues that the sexual harassment she experienced meets the burden for establishing necessitous and compelling cause for voluntarily terminating her job, especially in light of her attempts to request alternative options to avoid termination.⁵ We disagree.

⁵ In support of her argument, Claimant asserts that she had been subjected to retaliation by her former manager after his promotion in 2008, which is the reason that she resigned her employment. However, Claimant did not challenge any of the Board’s findings of fact, including the finding that Claimant “did not believe that someone who had sexually harassed her in the past should be anyone’s boss and the claimant resigned her employment.” (C.R., Item No. 16, finding of fact 14.) Regardless, had Claimant challenged the findings of fact, we note that the record is devoid of facts that would support findings that Claimant was retaliated against by her former manager. To the contrary, Claimant testified as follows:

R Now since this individual has been promoted, has he—has anything happened? Any type of situation?

C You mean with someone else?

R No, with you, yourself

C The hugging again, you mean?

R Yeah. Anything?

C No, no. I mean, he wrote me up once already. When I was back to work, he wrote me up. My daughter was sick and we was supposed to turn in a phone power list of people we’ve notified for sales. And my daughter was sick and I didn’t turn in a list, so he wrote me up for it.

R Was that something—would that normally [be] what would have happened if a list wasn’t turned in?

C I don’t know. That was the first time I’ve ever had that, and I really—I just signed it. But I really didn’t have any leads because I was with my daughter while she was sick.

...

The findings of fact in this case establish that the last occurrence of sexual harassment against Claimant by her manager occurred approximately ten (10) years ago, and that after Claimant informed her manager, the harassment ceased. Shortly thereafter, Claimant informed the operations manager of the situation. Claimant continued to work with the manager for approximately one and one-half (1½) months until he was transferred to a different location. In 2008, Claimant's former manager was promoted to a position above her, and Claimant informed Employer that she was uncomfortable with her former manager now being her sales manager. Employer determined that her former manager would continue to be the Pennsylvania sales manager. Importantly, the Board found that

R So did you have any reason to believe that anything would occur?

C I think if anything was to occur, I don't believe it would occur again with the hugging behind closed doors. I don't believe that would occur. I believe retaliation would have occurred.

R So you were—is that the reason you resigned?

C I don't feel that someone who sexually harassed me should be my boss, and that is why I resigned.

R So, you mentioned the fear of retaliation. Was the fear of retaliation or . . .

C And that. Yes. Both. I don't feel that anybody who has sexually harassed me in the past should be anybody's boss. And I know what it's like to feel in that situation where you want to say something. You want to stop something, and yet you're afraid for your job. At the time, I was afraid that he was just going to . . .

(C.R., Item No. 12, pp.11-12.) Claimant's testimony, at best, would establish that Claimant had a *fear* of retaliation. A fear of retaliation, in the absence of real retaliation, is insufficient to constitute necessitous and compelling cause to voluntarily terminate one's employment.

Claimant resigned her employment effective July, 2009, because Claimant “did not believe that someone who had sexually harassed her in the past should be anyone’s boss.” (C.R., Item No. 16, finding of fact 14.) The Board also found that “[s]ince his promotion to sales manager in December of 2008, the former manager did not make any inappropriate requests or comments of a sexual nature to the [C]laimant.” (*Id.*, finding of fact 15.)

Considering the totality of the circumstances described above, we cannot conclude that real and substantial pressure to leave employment existed that would compel a reasonable person in this case to voluntarily terminate her employment. While sexual harassment may constitute necessitous and compelling cause to leave employment,⁶ the precipitating events in this case took place ten (10) years before Claimant quit. As the Referee stated in his decision, “[a]lthough it is understandable that [C]laimant would not wish to continue working for [Employer] considering her past experience, [C]laimant has failed to demonstrate *current circumstances* which would produce a pressure to terminate her employment that was both real and substantial and would compel a reasonable person under the circumstances to act in the same manner.” (C.R., Item No. 14 (emphasis added).) In the absence of current circumstances, we cannot conclude

⁶ *Johnson v. Unemployment Comp. Bd. of Review*, 725 A.2d 212 (Pa. Cmwlth. 1999); *Hussey Copper Ltd. v. Unemployment Comp. Bd. of Review*, 718 A.2d 894 (Pa. Cmwlth. 1998).

that Claimant established necessitous and compelling cause to voluntarily terminate her employment.

Accordingly, we affirm the order of the Board.⁷

P. KEVIN BROBSON, Judge

⁷ Claimant also argues that the Court should conclude that necessitous and compelling cause existed for her to voluntarily terminate her employment because Employer agreed when she resigned that it would not contest the claim. An employer and claimant, however, cannot determine a claimant's entitlement to benefits by agreement which is contrary to a Board determination when the Law, as applied to the facts, supports ineligibility of benefits. *See Sill-Hopkins v. Unemployment Comp. Bd. of Review*, 563 A.2d 1288, 1289 (Pa. Cmwlth. 1989).

