

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ivy Smith Motley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 426 C.D. 2009
	:	
Unemployment Compensation	:	Submitted: October 2, 2009
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: December 16, 2009

In this unemployment compensation appeal following a remand from this Court, Ivy Smith Motley (Claimant) represents herself. She seeks review of an order of the Unemployment Compensation Board of Review (Board) which concluded she lacked proper cause for her failure to appear at a referee hearing. Thus, the Board disregarded the merits of Claimant’s testimony on remand and concluded Claimant failed to offer a necessitous and compelling reason for voluntarily quitting her job under Section 402(b) of the Unemployment Compensation Law (Law) (regarding necessitous and compelling cause for voluntarily terminating employment).¹ Because substantial evidence supports the Board’s determination and it is in accordance with the Law, we affirm.

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

Claimant worked for Children & Adult Disability (Employer) as a full-time resident advisor. Claimant alleges a supervisor sexually harassed her over the course of her employment. Claimant further alleges she experienced physical problems, including stress and high blood pressure as a result of the harassment.

Sometime in early 2007, Claimant informed Employer of the alleged harassment. As a result, a human resources representative and the supervisor in question met with Claimant to discuss the allegations. However, Claimant contends Employer did nothing to remedy the harassment following the meeting. In March, 2007, Claimant filed a sexual harassment complaint against the supervisor with the Pennsylvania Human Relations Commission and the U.S. Equal Employment Opportunity Commission.²

In April, 2007, Claimant left Employer on a medical leave of absence. In June, 2007, Claimant signed a “Separation Agreement and Release” voluntarily terminating her employment although continuing work was available. Shortly thereafter, Claimant filed an application for unemployment compensation benefits, which the local service center granted.

Employer appealed, and the referee reversed. At hearing, Employer’s witnesses testified regarding Claimant’s resignation. Claimant, however, did not appear at the hearing. The referee determined:

² The record lacks any evidence regarding the outcome of these complaints.

Although duly notified of the date, time and place of the hearing, [Claimant] failed to appear in order to offer testimony regarding this appeal. The [referee], therefore, based his decision on the sworn testimony of [Employer] and the documents provided by the Service Center.

In the instant case, [Employer] credibly testified that [Claimant] resigned her position through her attorney. [Claimant] had been on a leave of absence and did not return to work.

Certified Record (C.R.), Item 11 at 2.³

Claimant appealed to the Board. The Board determined Claimant “did not appear at the [r]eferee’s hearing and, thus . . . failed to offer sufficient competent credible evidence that she had a necessitous and compelling reason to quit her employment.” C.R., Bd. Decision, 10/12/07, at 2. Ultimately, the Board based its decision on the uncontradicted testimony of Employer’s witnesses.

On Claimant’s further appeal, our Court concluded:

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

³ “Section 502 of the Law [43 P.S. §822], when read together with 34 Pa. Code §101.51[(“Absence of party”)], reveals, in our view, the Legislature’s intention that referees decide unemployment compensation cases on their merits, even in the absence of a party” Ortiz v. Unemployment Comp. Bd. of Review, 481 A.2d 1383, 1386 (Pa. Cmwlth. 1984).

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.

Ivy Smith (Motley) v. Unemployment Comp. Bd. of Review, (Pa. Cmwlth., No. 2228 C.D. 2007, filed June 11, 2008) (McCloskey, S.J.).

Upon remand, the referee, as hearing officer for the Board, conducted a second hearing for the purpose of receiving testimony and evidence on Claimant's reason for not appearing at the previous hearing. Prior to the remand hearing, the Board instructed its referee that the "parties may also provide new or additional testimony and evidence on the merits. If the Board finds that [Claimant] did not have proper cause for her nonappearance at the previous hearing," the Board may not consider Claimant's additional testimony and evidence on the merits. C.R., Bd. Order, 8/28/08, at 1.

On remand, the Board found the following facts. Claimant did not appear at the previous referee hearing because she was lost and arrived after the hearing concluded. The directions attached to the notice of hearing provide:

These directions are only a guide. **You are responsible for finding the best route to the [referee's office] and arriving before the start of your hearing.**

If you are not familiar with the location of the office, it would be in your best interest to make a test trip before the day of your hearing. **Hearings will not start late or be reopened because you became lost, went to the wrong building, were delayed in traffic, or missed the bus as a result of not allowing enough time**

Notes of Testimony, 9/26/08, (N.T.), Ex. 1 (emphasis in original). Claimant, however, did not make a test trip prior to the date of the hearing, and she did not establish that she left her home in enough time to report to the hearing.

Based on the above findings, the Board determined Claimant did not have proper cause for failing to appear at the hearing. In addition, the Board determined Claimant's testimony as to when and whether she contacted the referee's office following the hearing was confusing and contradictory. The Board ultimately concluded Claimant's testimony was not credible and, thus, it did not consider her testimony and evidence on the merits.⁴ Therefore, the Board denied benefits. Claimant now appeals to this Court.⁵

⁴ Nevertheless, the Board noted:

[H]ad it considered the testimony and evidence submitted at the remand hearing, it would resolve the conflicts in testimony in favor of [Employer] and find insufficient credible evidence that [Claimant] was sexually harassed at work. Moreover ... [Claimant] would have failed to provide sufficient medical evidence that her depression gave her a necessitous and compelling reason to quit her employment.

Certified Record (C.R.), Item 20 at 3.

⁵ Our review is limited to determining whether substantial evidence supports the necessary findings of fact, whether the Board committed errors of law, or whether the Board **(Footnote continued on next page...)**

Although her argument is not entirely clear, it appears Claimant argues the Board erred in determining she lacked proper cause for failing to appear at the hearing.

We are not persuaded the Board erred in determining Claimant failed to prove proper cause for failing to appear at the hearing. Section 101.24(a) of the applicable regulations, provides:

If a party who did not attend a scheduled hearing subsequently gives written notice, which is received by the tribunal prior to the release of a decision, and it is determined by the tribunal that his failure to attend the hearing was for reasons which constitute ‘proper cause,’ the case shall be reopened.

34 Pa. Code §101.24(a) (“Reopening of hearing”). If the Board determines, however, a claimant did not have proper cause for failing to attend the referee’s hearing, then it must issue a decision based on the evidence developed in the claimant’s absence. Ortiz v. Unemployment Comp. Bd. of Review, 481 A.2d 1383 (Pa. Cmwlth. 1984).

In determining whether a claimant had proper cause for failing to attend a referee’s hearing, the Court in Savage v. Unemployment Compensation Board of Review, 491 A.2d 947, 950 (Pa. Cmwlth. 1985), concluded “a claimant's

(continued...)

violated constitutional rights. Ductmate Indus., Inc. v. Unemployment Comp. Bd. of Review, 949 A.2d 338 (Pa. Cmwlth. 2008).

own negligence is insufficient ‘proper cause,’ as a matter of law, to justify his failure to appear at a referee's hearing” In Savage, the claimant failed to appear at a referee’s hearing after being given sufficient advanced notice. The claimant alleged he had “proper cause” for failing to attend the hearing because he misread the date on the hearing notice. Id. The Court concluded the claimant’s own negligence was the sole cause of his failure to appear, and such negligence was insufficient proper cause.

For her part, Claimant testified she failed to attend the hearing because there was a severe thunderstorm and she became lost trying to find the referee’s office building. N.T., 9/26/08, at 2, 21. Claimant also testified that when she arrived at the referee’s office building she called the office to let them know that she was there. Id. at 4. However, Claimant testified she never entered the referee’s office building because someone from the referee’s office informed her that the hearing had concluded. Id. Furthermore, Claimant admitted she did not make a test trip prior to the hearing. Id. at 23.

Thus, Claimant’s own testimony supports the Board’s determination she did not have proper cause for failing to attend the referee’s hearing. Savage. Despite the referee’s instructions, quoted above, the record supports the Board’s determination that Claimant failed to follow these directives; thus, she missed the hearing as a result of her own negligence. N.T., 9/26/08, Ex. 1; Savage.

Claimant also argues the Board erred in determining she lacked necessitous and compelling cause to terminate her employment. Specifically,

Claimant contends the Board erred in concluding the supervisor's continuous sexual harassment did not provide her good cause to terminate her employment.

We are also not persuaded the Board erred when it concluded Claimant did not prove a necessitous and compelling reason for voluntarily quitting her employment. In unemployment cases, the claimant must prove cause of a necessitous and compelling nature that motivated the claimant to quit her job. W. & S. Life Ins. Co. v. Unemployment Comp. Bd. of Review, 913 A.2d 331 (Pa. Cmwlth. 2006). The issue of what constitutes a "necessitous and compelling" reason for a voluntary quit under the Law is a legal question subject to appellate review. Craighead-Jenkins v. Unemployment Comp. Bd. of Review, 796 A.2d 1031 (Pa. Cmwlth. 2002). The claimant bears the burden of proving necessitous and compelling reasons for quitting. Id.

Since the Board determined Claimant lacked proper cause for her failure to attend the first hearing, it appropriately did not consider her testimony at the remand hearing. Ortiz; C.R., Item 16. Thus, the Board based its decision regarding her voluntary quit on the evidence of record prior to the remand hearing. Ortiz. To that end, Employer's witness testified Claimant voluntarily terminated her employment through her attorney following a leave of absence. N.T., 8/21/07, at 3-4; Kassab Archbold & O'Brien v. Unemployment Comp. Bd. of Review, 703 A.2d 719 (Pa. Cmwlth. 1997) (holding a claimant who is on a leave of absence must express an intent to return to preserve employment). Accordingly, the record supports the Board's determination Claimant failed to offer sufficient competent credible evidence that she had a necessitous and compelling reason to quit her job.

W. & S. Life Ins.; McCarthy v. Unemployment Comp. Bd. of Review, 829 A.2d 1266 (Pa. Cmwlth. 2003) (holding in unemployment compensation proceedings, the Board is the ultimate fact-finder and is empowered to resolve conflicts in the evidence and to determine the credibility of witnesses.). Furthermore, Employer's testimony supports the Board's determination Claimant voluntarily resigned her employment. Id.

For these reasons, we discern no error in the Board's decision. Accordingly, we affirm.

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 16th day of December, 2009, the order of the Unemployment Compensation Board is **AFFIRMED**.

ROBERT SIMPSON, Judge