IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jan Sklaroff,	:	
Petitioner	:	
	:	No. 44 C.D. 2008
v.	:	Submitted: August 1, 2008
	:	
Unemployment Compensation Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: September 29, 2008

Jan Sklaroff petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the referee determining that Sklaroff was ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(b). The Board concluded that Sklaroff failed to prove that his voluntary resignation from his position as a teacher for the Philadelphia School District (School District) was for cause of a necessitous and compelling nature. Sklaroff contends that the Board ignored his testimony that he resigned due to his belief that he was about to be terminated. He alternatively requests a remand because the School District presented a witness who had no knowledge of the disciplinary investigation that preceded his resignation.[1]

[1]Sklaroff's *pro se* petition for review raised the issue that he had tried to rescind his resignation, but this issue was not argued in the brief and therefore is waived. *Davila v. Unemployment Compensation Board of Review*, 926 A.2d 1287 (Pa. Cmwlth. 2007). Sklaroff did not raise the issue of remand in his petition for review. Counsel for Sklaroff subsequently

The Board found that Sklaroff worked as a full-time teacher for the School District from September 2, 2005 until he resigned on April 13, 2007. On March 6, 2007, a student in Sklaroff's classroom stapled the arm of another student, then had an altercation with school security guards and was removed from the classroom. Two weeks later, Sklaroff was threatened by the same student from the earlier incident, which he reported to the safe school hotline. Sklaroff received a letter from his principal dated March 30, 2007 explaining that the student had filed a complaint against him. The letter instructed Sklaroff to report to the South Regional Office of the School District and to remain there during work hours until an investigatory conference could be scheduled. Sklaroff complied with the letter and remained in active pay status. Investigatory hearings were held April 16 and 19, 2007. According to Sklaroff, on April 19, he signed a letter of resignation that was dated April 13, 2007 and made effective that same day.

At the hearing before the referee, Sklaroff testified that he signed the resignation letter under duress. The union representative had advised Sklaroff that there was a "strong possibility" that he would be terminated. Reproduced Record (R.R.) at 22a. He did not speak to anyone from the School District. The School District witness could testify only that Sklaroff signed the letter and resigned; she had no knowledge of whether he would have been terminated. The referee denied benefits because Sklaroff failed to establish that he had cause of a necessitous and compelling nature for resigning, and the Board affirmed.[2] It resolved any conflicts

---

entered his appearance and filed a motion to include "after-discovered evidence." The Court denied the motion without prejudice to Sklaroff to argue the propriety of a remand in his brief on the merits. Sklaroff has raised and argued the issue of remand in his brief.

[2]The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record.

in testimony in favor of the employer and found that Sklaroff resigned to avoid the mere possibility of a discharge. It also denied Sklaroff's request for a remand as the record was sufficiently complete and there was no good cause for a remand.

Section 402(b) of the Law provides in pertinent part that an employee shall be ineligible for compensation for any week "in which his unemployment is due to voluntarily leaving work without a cause of necessitous and compelling nature[.]" A claimant may be entitled to benefits if he/she can demonstrate that real and substantial circumstances caused him/her to voluntarily leave and that those circumstances would have compelled a reasonable person to act in the same manner. *Taylor v. Unemployment Compensation Board of Review*, 474 Pa. 351, 378 A.2d 829 (1977). Whether a claimant had cause of a necessitous and compelling nature to quit is a question of law reviewable by the Court. *Western & Southern Life Ins. Co. v. Unemployment Compensation Board of Review*, 913 A.2d 331 (Pa. Cmwlth. 2006). The claimant bears the burden of proof. *Taylor*.

A compelling or necessitous cause must be "pressure of real not imaginary, substantial not trifling, reasonable not whimsical, circumstances…." *Taylor*, 474 Pa. at 359, 378 A.2d at 833 (citation omitted). Statements by an employer may be interpreted as a discharge, leading to an involuntary termination of employment, if they contain the "immediacy and finality of firing." *Fishel v. Unemployment Compensation Board of Review*, 674 A.2d 770, 772 (Pa. Cmwlth. 1996). The employer need not use specific words such as "fired" or "discharged"

Select Security, Inc. v. Workers' Compensation Appeal Board (Kobrin), 901 A.2d 1129 (Pa. Cmwlth. 2006). Substantial evidence is defined as such relevant evidence that a reasonable mind would accept as adequate to support a conclusion. *Guthrie v. Unemployment Compensation Board of Review*, 738 A.2d 518, 521 (Pa. Cmwlth. 1999). The Board is the ultimate fact finder and has the authority to resolve evidentiary conflicts and to make all necessary credibility determinations. *Id*. The Board's findings are conclusive on appeal so long as the record, when viewed in its entirety, contains substantial evidence to support the findings. *Taylor*.

to convey the required finality. *Nolan v. Unemployment Compensation Board of Review*, 797 A.2d 1042, 1045 (Pa. Cmwlth. 2002). However, a claimant's mere uncertainty about the future existence of a job will not suffice to create necessitous and compelling cause for the claimant's voluntary separation. *PECO Energy Co. v. Unemployment Compensation Board of Review*, 682 A.2d 49 (Pa. Cmwlth. 1996).

The issues have been raised in different order in the parties' briefs. The Court, however, will address them in the most logical order. Sklaroff contests the Board's finding that he quit to avoid only the mere possibility of discharge. He argues that his testimony as to his belief that he was about to be terminated was not contradicted, but it was ignored by the Board. For example, Sklaroff was removed from his classroom and sent to a remote location, which he described as cold and humiliating. Sklaroff then sat through investigatory hearings where he was not permitted to question his accusers, and he felt that there was a strong possibility that he would be terminated.

Sklaroff cites *Roberts v. Unemployment Compensation Board of Review*, 432 A.2d 646 (Pa. Cmwlth. 1981), as being similar to his situation. The *Roberts* claimant was employed as a licensed practical nurse at a hospital. While on vacation, he received a letter from his employer that was printed on pink paper and bore the heading: "Official Reprimand Form." This notice recounted his past medication errors, as well as two recent infractions. It concluded by stating:

> Following the review of all previous medicine errors, it has been determined that you are not capable of passing medicines safely and in the best interest of patient care, *you will no longer function at Kane Hospital under the job description of a Licensed L.P.N.* as of June 6, 1979.

Id., at 647 (emphasis in original).

The claimant in *Roberts* believed he was discharged so he did not report to work after his vacation ended. When he spoke to his employer five days later, he was informed that his employment had been terminated as a voluntary quit for failure to return to work within three days of the end of his vacation. The Board found as a fact that the claimant interpreted the letter as a discharge, but it concluded that he had voluntarily quit his employment because there was no language in the letter stating that his services were terminated. The Court reversed the denial of benefits and remanded for further proceedings, noting that the specific language of the letter that the claimant would no longer function under the job description of a Licensed L.P.N, coupled with the pink color suggestive of a firing notice, supported the conclusion that the claimant's action was consistent with ordinary common sense and prudence under the circumstances and hence that he lacked a conscious intent to leave his employment. Although acknowledging the distinction between *Roberts* and his case, Sklaroff claims that his resignation was connected directly to the "heavy-handed" treatment that he received from the School District and therefore that the resignation was in lieu of termination.

The Board responds to Sklaroff's argument in Part III of its Brief, stating that it did not disregard his testimony but rather weighed the evidence of record, which is a proper exercise of its role as fact finder. *Hanna v. Public School Employes' Retirement System/Board*, 701 A.2d 800 (Pa. Cmwlth. 1997). Unlike the claimant in *Roberts*, Sklaroff testified only that he felt there was a strong possibility that he would be terminated. The Board noted that the letter from the School District instructed Sklaroff to report to a remote location rather than to his classroom and notified him of an investigatory process, but it did not contain language suggesting that he was being terminated. The Board points out that

Sklaroff ignores his own testimony that he never spoke with anyone from the School District about being terminated.

Sklaroff's closely related argument under heading C in his Brief is that he resigned for reasons of a necessitous and compelling nature. In support, he cites *Western & Southern Life Ins.* where the claimant quit his job due to a hostile work environment and threats against his life by his co-workers and manager. The record revealed that the claimant had made reasonable efforts to resolve his complaints and that he left only after his employer failed to respond. Sklaroff states that he too voiced complaints about unruly students and found no support, but he fails to connect this claim to his resignation.

Sklaroff also compares his situation to *Livingston v. Unemployment Compensation Board of Review*, 702 A.2d 20 (Pa. Cmwlth. 1997). This case involved a truck driver on active status in the Army Reserves who missed his first assigned drill due to a work-related delay. The employer refused to give him time off to report to his unit to see if he was considered absent without leave. Fearing the possible AWOL status, the claimant quit his job so he could report to his unit and clear up his military status. The Court held that the situation was akin to that envisioned by the Supreme Court in *Taylor* when it recognized that a worker may be compelled to leave employment due to a necessitous circumstance or legal obligation that would transform the voluntary termination into an involuntary termination. Sklaroff does not argue that he had a legal obligation that required him to leave his job, so the comparison to *Livingston* is misplaced.

Based upon its review, the Court concludes that the Board did not disregard material testimony and that the record as a whole does not support a determination that Sklaroff's resignation was involuntary. Prior cases have rejected

stronger indications that a claimant would be discharged than those present in this matter. In *Fishel* the Court affirmed the Board's determination of voluntary termination because a statement that termination would be recommended did not possess the required immediacy. Here there is no statement by the employer but rather Sklaroff's subjective belief that he would be fired, which did not create a compelling or necessitous cause for him to resign. *Western & Southern Life Ins.* There is substantial evidence to support the Board's findings. *Taylor*.

Sklaroff's other argument, presented under heading B in his Brief, requests a remand to correct what he characterizes as an attempt by the School District to present inaccurate testimony. He suggests that if he had been permitted to view the School District's investigation file and to cross-examine appropriate School District witnesses, he could have proved that his termination was imminent. The Board argues that Sklaroff waived any right to so called "after discovered evidence" by not fully developing the issue in his Brief, but it more importantly argues that a remand to allow Sklaroff to strengthen his case with evidence would be inappropriate under the circumstances of this case.

The Court will not grant a remand in this matter inasmuch as Sklaroff could have compelled production of witnesses and documents before and during the referee's hearing pursuant to Section 506 of the Law, 43 P.S. §826, and 34 Pa. Code §101.31. Furthermore, the Court will not order a remand to allow a party to adjust the presentation of evidence, *Young v. Workmen's Compensation Appeal Board (Britt & Pirie, Inc. l)*, 456 A.2d 1150 (Pa. Cmwlth. 1983), or to present a witness or witnesses who could have been subpoenaed at the first hearing in a case. *Emery Worldwide v. Unemployment Compensation Board of Review,* 540 A.2d 988 (Pa. Cmwlth. 1988).

It is clear to the Court that the Board did not deliberately disregard or ignore any competent evidence in reaching its decision that Sklaroff failed to meet his burden of proof. It is also clear that Sklaroff is not entitled to a remand to present evidence that he could have presented in the initial hearing in this matter. Accordingly, the Court affirms the Board's order.

DORIS A. SMITH-RIBNER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jan Sklaroff, Petitioner	:	
v.	:	No. 44 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	

ORDER

AND NOW, this 29th day of September, 2008, the order of the Unemployment Compensation Board of Review is affirmed.

DORIS A. SMITH-RIBNER, Judge