

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

E.L. Heim Company, :
Petitioner :
 :
v. : No. 526 C.D. 2009
 : Submitted: September 18, 2009
Unemployment Compensation Board :
of Review, :
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE QUIGLEY

FILED: December 16, 2009

E.L. Heim Company (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that reversed the decision of the Referee denying unemployment compensation benefits to claimant Brian L. Brenizer (Claimant). The question is whether a single incident of a supervisor swearing at an employee in the presence of subordinates of the employee creates a necessitous and compelling cause for the employee to quit his job 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). We reverse.

Employer hired Claimant as a small jobs foreman on April 23, 2006. In April 2008, he was promoted to the position of manager of the mechanical service department. The promotion was on a probationary basis during which he received the same compensation as he received as foreman. On October 3, 2008, Claimant quit his employment and filed for unemployment compensation benefits. The UC Service Center denied benefits.

Claimant filed an appeal, and, after a hearing, the Referee affirmed the denial of benefits on the ground that Claimant's quitting was not due to reasons that were necessitous and compelling as required by Section 402(b) of the Law. The Referee reasoned that, although Claimant's supervisor used profane language on one occasion when reprimanding Claimant in front of subordinates, Claimant did not prove that he had been, and would continue to be, subjected to a hostile work environment.

On further appeal, the Board reversed, concluding from the following findings of fact that Claimant had necessitous and compelling cause to quit his employment, i.e., abusive treatment by his supervisor on September 19, 2008.

5. After being promoted the claimant reported exclusively to the vice president of the mechanical division.

6. Throughout his time as mechanical service manager the claimant had disagreements with the vice president.

* * *

10. The final incident occurred on September 19, 2008.

11. Several employees who normally reported to the claimant were working on a project that was under the control of the vice president.

12. One of those employees contacted the claimant by telephone and stated that he needed a certain piece of

equipment immediately because the equipment he was using had just broken.

13. The project was time sensitive.

14. The claimant attempted to locate the vice president but he was not at work.

15. There was no one else available to take the equipment to the job site so the claimant brought it himself.

* * *

17. The claimant delivered the piece of equipment and checked up on the three employees he supervised.

18. The claimant turned around and saw the vice president.

19. The claimant walked up to the vice president and in front of approximately 20 people, three of which were the claimant's subordinates, the vice president pointed and shook his finger at the claimant and yelled: "Get the f--- off [my] roof and get the f--- off the job right now."

* * *

21. The claimant felt humiliated but he immediately did as instructed.

22. Later that day the claimant met with the vice president and demanded an apology.

23. The vice president refused to do so and indicated that the claimant was the party at fault, accusing him of trying to change the company.

* * *

25. The claimant felt his authority over his subordinates was undermined because of the vice president's behavior.

26. The claimant was scheduled to go on vacation the next day so that vice president told him to do so that they would talk when the claimant returned.

27. After returning from his vacation the claimant met with the vice president and the issue was still unresolved.

28. The two then met with the president and another vice president.

29. The claimant expressed his outrage at the behavior of the vice president on September 19, 2008, and again demanded an apology and assurances that it would never happen again.

30. The employer indicated that it was planning on demoting the claimant back to foreman.

31. The claimant said that he did not want to work under the supervision of the vice president if he did not receive the apology and the requested assurance.

* * *

33. . . . the employer indicated that the claimant could quit, but if he stayed he was being demoted to foreman and that he would remain under the supervision of the vice president.

34. The claimant quit because he did not want to continue under the supervision of the vice president.

(Board's Findings of Fact, Nos. 5-6, 10-15, 17-19, 21-23, 25-31, 33-34.)

Employer now petitions this Court for review, arguing that the Board erred in determining that Claimant had necessitous and compelling cause for quitting his employment.¹ Employer asserts that, even if Claimant's supervisor swore on September 19, 2008, a single occasion, the supervisor's reprimand did not justify Claimant's quitting. Employer states:

Indeed, the record is wholly devoid of any evidence that Claimant was subjected to any inappropriate behavior during the two years that he was a foreman. Rather, the only negative treatment that Claimant alleges he suffered

¹ Our review is limited to determining whether Claimant's constitutional rights were violated, whether an error of law was committed, or whether the necessary factual findings are supported by substantial evidence. *First Federal Savings Bank v. Unemployment Compensation Board of Review*, 957 A.2d 811 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, 970 A.2d 1148 (2009).

was in direct response to his performance in the Mechanical Service Department Manager position. The law requires Claimant to take common sense action to obviate the problem so that he would not have to terminate employment. Rather than resigning, Claimant could have obviated the problem by returning to his foreman position, with no reduction in pay.

(Employer's brief at 14.) We agree with Employer.²

A claimant need not indefinitely subject himself to abusive conduct. *First Federal Savings Bank v. Unemployment Compensation Board of Review*, 957 A.2d 811 (Pa. Cmwlth. 2008), *appeal denied*, ___ Pa. ___, 970 A.2d 1148 (2009); *see also Porco v. Unemployment Compensation Board of Review*, 828 A.2d 426 (Pa. Cmwlth. 2003) (stating that any reasonable person who has been **routinely** subjected to abusive conduct and profanity would be compelled to leave such employment and that an employee need not indefinitely tolerate a hostile work environment). However, in this case, there was only one instance of abusive conduct, and, after a meeting to resolve the matter, Employer decided to return Claimant to the foreman position, where Claimant had never been subjected to abusive conduct. In order to preserve his employment, Claimant should have attempted to work in the foreman position under the supervision of the vice president. Claimant did not do so.

² Under Section 402(b) of the Law, to be eligible for benefits, a claimant who has voluntarily terminated his employment has the burden to demonstrate that his cause for doing so was of a necessitous and compelling nature. *First Federal Savings Bank*. To demonstrate a necessitous and compelling cause for quitting employment, the claimant must establish that circumstances existed which produced real and substantial pressure to terminate employment; that like circumstances would compel a reasonable person to act in the same manner; that he acted with ordinary common sense; and that he made a reasonable effort to preserve his employment. *Id.*

Accordingly, the order of the Board is reversed.

KEITH B. QUIGLEY, Senior Judge

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ORDER

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

KEITH B. QUIGLEY, Senior Judge

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OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY

FILED: December 16, 2009

I respectfully dissent. In our appellate function, this Court must defer to the Board's credibility findings.³ The Board's findings, coupled with its determination of Claimant's credibility in this matter, establish that more than one incident of vulgarity and/or verbal abuse occurred. Further, there is no authority for the requirement that an employee must accept a demotion as a viable

³ The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985). Questions of credibility and the resolution of evidentiary conflicts are not subject to re-evaluation by this Court in its appellate function on judicial review. Id.

alternative to a voluntary quit under circumstances similar to those at issue *sub judice*.

The Majority implies that a mere one instance of abusive employer conduct is insufficient cause for voluntarily termination, without citation to any authority for that proposition.⁴ However, the Board's findings, when read as a whole, establish more than one instance of such conduct.⁵ Board Opinion at Findings 8-19. I note that none of the Board's Findings of Fact have been challenged by Employer in this appeal. Additionally, Claimant's testimony of record, which was found credible by the Board, expressly establishes that there were prior instances of being yelled at by his supervisor, and that there were "other instances of swearing." Reproduced Record (R.R.) at 20a-22a. Pennsylvania's courts have consistently stated that an employee need not be subjected indefinitely to abusive conduct or profane language, and that such conditions may constitute cause of a necessitous and compelling nature for voluntarily terminating employment under the Act. See, e.g., Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282 (Pa. Cmwlth. 1981).

⁴ Contrarily, in Electrical Reactance Corp. v. Unemployment Compensation Board of Review, 82 A.2d 277 (Pa. Super. 1951), the facts indicate that one instance of vulgarity and abusive verbal employer conduct may constitute a sufficient ground upon which to award benefits.

⁵ In its opinion, the Majority includes selected Board findings that it assumedly finds relevant to the disposition of this matter. However, the Majority omits, and fail to address, Board findings 8 and 9, which findings expressly articulate a second instance of Employer conduct relevant to the analysis of this matter.

Further, and independently dispositive of this matter, the Majority cites to the Claimant's opportunity to work as a foreman under the same supervisor as a viable opportunity that Claimant should have pursued as an alternative to voluntarily terminating his employment. Claimant's testimony, however, reveals that while the initial income of his manager position was the same as the foreman income, the manager position would have led to a salaried status with benefits that were not available as a mere foreman. R.R. at 28a. As such, that accommodation offered by Employer can be viewed only as a demotion, as expressly noted by the Board. Board Opinion at Finding 33. This Court has recognized the Supreme Court's articulation of the principle that, where a claimant has voluntarily terminated his own employment for the asserted necessitous and compelling reason of a demotion, an award of benefits depends upon a determination of whether that demotion was justified. Korpics v. Unemployment Compensation Board of Review, 833 A.2d 1217 (Pa. Cmwlth. 2003). In this case, the offered demotion was not justified.

Turning again to the credited testimony of Claimant on the record herein, a review thereof indicates that Claimant had, prior to his termination, completed his probationary period at his new position, was about to receive a raise in pay, and had no prior documented discipline problems. R.R. at 28a. Most tellingly, the record also shows that the incident that led to Claimant's termination,

and to Employer's offered demotion as an alternative thereto, was based not upon any insubordination as argued by Employer, but was a result of Claimant attempting to execute time sensitive duties in response to the needs of his subordinates, at a time when his supervisor could not be located in his office. R.R. at 18a, 22a-24a, 27a-28a. Even if it could be considered misguided or improperly executed, the credited testimony of record leaves no doubt that Claimant was acting in the furtherance of Employer's interests.

With the deference to be properly accorded to the Board's credibility determination regarding Claimant's testimony, as indicated above, I would affirm. Peak.

JAMES R. KELLEY, Senior Judge