

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Scrap Resources, Inc.,	:
	:
Petitioner	:
	:
v.	: No. 567 C.D. 2012
	: Submitted: September 21, 2012
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: November 8, 2012

Consolidated Scrap Resources, Inc. (Employer), petitions for review of the decision and order of the Unemployment Compensation Board of Review (Board), holding that its former employee, Jessica L. Peiffer (Claimant), is not ineligible for unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law.¹ The Board adopted the findings of the Referee and affirmed the Referee’s conclusion that Claimant had shown a

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, §402, *as amended*, 43 P.S. §802(b). Section 402(b) provides, in relevant part, that “[a]n employe 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.” *Id.*

necessitous and compelling reason to quit her job due to sexual harassment and retaliation for a complaint that occurred in the workplace. We affirm.

The facts found by the Board and the evidence found credible by the Board established the following.² Claimant was employed full-time by Employer for approximately one and a half years, through October 14, 2011, as a weigh master, working at first at Employer's non-ferrous scale, and subsequently at the steel (ferrous) scale located 300 yards from the non-ferrous scale. (Record Item (R. Item) 13, Referee's Decision/Order, Findings of Fact (F.F.) ¶¶1-3, R. Item 12, Referee Hearing Transcript (H.T.) at 5-6.) In July, 2011, several months after Claimant began to work for Employer, Claimant's immediate supervisor (Supervisor) began to engage in conduct that offended Claimant, including making comments about Claimant's underwear, touching Claimant's hair and shoulders, and stating to Claimant that she was pretty, he liked her personality, and he was physically attracted to Claimant. (R. Item 13, F.F. ¶4, R. Item 12, H.T. at 7-9.) Claimant testified that on multiple occasions, she objected directly to her Supervisor with regard to his advances towards her; she testified that she told her Supervisor, who was the father of her best friend, that she did not have any type of feeling for him, and was not attracted to him. (R. Item 12, H.T. at 8.) Also in July, 2011, Claimant's Supervisor called Claimant into his office, and showed her computer pictures of both partially naked and fully naked women, and asked Claimant what she thought of the women and the lingerie the women wore. (R. Item 13, F.F. ¶5, R. Item 12, H.T. at 10.) When Claimant reported to the Facilities Manager that her Supervisor was showing her inappropriate pictures, the Facilities

² The Board is the ultimate fact finder and is empowered to make credibility determinations. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

Manager at first joked, “that’s what we pay him for,” but later told Claimant that he would speak to Claimant’s Supervisor about it. (R. Item 13, F.F. ¶6, R. Item 12, H.T. at 11.)

In August, 2011, after Claimant exited from the bathroom, Claimant’s Supervisor, together with another manager, remarked to Claimant that they could see “everything” through the vent into the bathroom. (R. Item ¶7, R. Item 12, H.T. at 12). Claimant testified that the manager led her around the corner from the bathroom door to the place where the vent was located, and instructed her to look through the vent; when she did, she could see that everything inside the bathroom, including the toilet, was visible from the vent. (R. Item 13, F. F. ¶8, R. Item 12, H.T. at 12.) Claimant understood that the manager and her Supervisor had been viewing her through the vent, and she complained to the Facilities Manager, and requested that the vent be covered; the Facilities Manager did not cover the vent. (R. Item 13, F.F. ¶¶9, 11, R. Item 12, H.T. at 12-13.) Claimant testified that after she reported the bathroom vent incident to the Facilities Manager, her Supervisor became angry and retaliated against her by parking his car in front of hers so that she could not leave for lunch, and refusing to give her truck driver numbers she required in order to do her job. (R. Item 13, F.F. ¶¶ 21-22, R. Item 12, H.T. at 14.) Claimant reported to the Facilities Manager that her Supervisor was interfering with her ability to do her job, and again the Facilities Manager told Claimant that he would talk to her Supervisor. (*Id.*) Claimant testified that her Supervisor continued to sexually harass her, and in early September, 2011, he stopped by her apartment uninvited, and later in the month slapped Claimant’s buttocks. (R. Item 13, F.F. ¶¶ 13-14, R. Item 12, H.T. at 14.)

On September 23, 2011, Claimant informed her Supervisor that she was considering quitting her job due to his inappropriate behavior and comments. (R. Item 13, F.F. ¶ 15, R. Item 12, H.T. at 15.) Claimant was absent from work from September 26, 2011 until October 1, 2011.³ On September 25, 2011, she filed an application for unemployment compensation benefits. (R. Item 1, Claim Record.) On September 28, 2011, Claimant and her mother met with the Facilities Manager regarding the conduct of Claimant's Supervisor. (R. Item 13, F.F. ¶16.) That same day, the Facilities Manager notified Employer's Human Resource Administrator (HRA), and the HRA scheduled a meeting with Claimant for two days later:

17. On September 30, 2011, the [HRA] met with the [C]laimant and questioned the [C]laimant about her concerns and the conduct of her superior. The [C]laimant informed the [HRA] of the conduct in the workplace including the offensive comments about her bra straps and underwear, touching and brushing her hair and the conduct and comments about the bathroom vent. The [HRA] informed the [C]laimant she would conduct an investigation and respond and that if the [C]laimant experienced any retaliation, she should contact the [HRA]. The HRA declined the [C]laimant's request to suspend her superior and reassigned the [C]laimant to work at the non-ferrous scale.

(R. Item 13, F.F. ¶17.)

³ According to Employer, as stated in its response to the Request for Separation and Wage Information form, Claimant called out sick on September 26, 2011, called off for no stated reason on September 27, 2011, called off for a doctor's appointment on September 28, 2011, called off for personal reasons on September 29, 2011, missed work due to the September 30, 2011 meeting scheduled by the HRA, and worked half a day on October 1, 2011. (R. Item 2, Employer Separation Information w/Attachments.)

Claimant testified that at her meeting with the HRA, she requested that her Supervisor be moved or temporarily suspended during the investigation, but the HRA instead offered to transfer Claimant back to the non-ferrous scale located in another building. (R. Item 12, H.T. at 16.) Claimant agreed to return to work on October 5, 2011, on the condition that she would not be required to have contact with her Supervisor. (R. Item 13, F.F. ¶18.) When she arrived at work that day, she found her Supervisor sitting in her chair, in her work area at the non-ferrous scale; her Supervisor moved directly in front of Claimant, squeezing past her as he left the work area, and whipped papers around in a manner which displayed an attitude toward Claimant. (R. Item 13, F.F. ¶¶19, 23, 26, R. Item 11, H.T. at 16-17.) Claimant testified:

He also was holding the door open, and I was waiting at the bottom of the steps for him to come down to leave the office, and instead he just stood there holding the door open, so I thought he was just holding it for me. And as I started to walk up the steps he actually ran down and almost knocked me off the steps, because they are very narrow.

(R. Item 12, H.T. at 17.)

Claimant complained to both the Facilities Manager and the HRA, via email, on that same day, and indicated that she was upset by her Supervisor's presence in her work area, and did not want to be subject to further harassment or retaliation; the HRA did not respond to her email. (R. Item 13, F.F. ¶¶ 24-25.) After October 5, 2011, Claimant's Supervisor continued to visit and remain in Claimant's work area after the start of her work shift; on October 13, 2011, Claimant suffered an anxiety attack at work. (*Id.*, F.F. ¶¶ 26, 29.) Also on that date, a Thursday, the HRA informed Claimant by telephone that she would meet

with her on the following Tuesday to discuss the results of the investigation. (*Id.*, F.F. ¶30.) Claimant testified that she wanted to quit, but decided to try to work one more day; however, on October 14, 2011, Claimant resigned her employment due to working conditions. (R. Item 13, F. F. ¶31, R. Item 12, H.T. at 18.)

After the Unemployment Compensation Service Center denied Claimant's application for benefits, Claimant appealed, and the Referee conducted a hearing at which Claimant and Employer's HRA testified.

At the hearing, the HRA testified as to Employer's Non-Harassment Policy regarding sexual harassment. Employer's policy states:

It is the Company's policy to prohibit sexual harassment and other types of harassment of an employee by another employee, supervisor or customer on the basis of age... Any person who violates this policy will be subject to disciplinary action up to and including discharge.

While it is not easy to define harassment, it certainly includes slurs, epithets, threats, derogatory remarks, unwelcome jokes, teasing, unwanted touching, sexual advances, offensive conduct of a physical, verbal or graphic nature which is directed against someone due to the aforementioned personal characteristics.

Any person who believes that he or she has been subjected to any form of harassment should tell the other person that the conduct is unwelcome and must cease immediately. If the conduct persists, the complaining person may file a complaint with a supervisor, who shall conduct an internal investigation of the complaint. Where necessary, because of the circumstances surrounding the incident of harassment, the employee may file a complaint with a company officer, rather than a supervisor. In addition, any such incident must be reported to human resources. The company will promptly respond to the complaint. Any retaliation, by the original offender or any other employee, against an

employee who filed a complaint under this policy will be grounds for immediate termination.

(R. Item 2, Employer Separation Information w/Attachments.)

The HRA testified that she first became aware of Claimant's concerns of sexual harassment on September 28, 2011, when the Facilities Manager contacted her following his meeting with Claimant and her mother. (R. Item 12, H.T. at 33.) She stated that during their initial meeting, Claimant did not mention any comments by Claimant's Supervisor regarding Claimant's underwear or the showing of inappropriate pictures on the computer. (*Id.*, H.T. at 34-35.) The HRA referred to a memo she prepared, which she intended to present to Claimant at the meeting scheduled to discuss the results of her investigation, but instead mailed to Claimant after Claimant resigned. The memo is dated October 13, 2011, and indicates that (i) discipline has been levied where appropriate; (ii) the bathroom vent has been covered; (iii) Claimant's contact with her Supervisor will be limited to what is necessary for both to do their jobs; (iv) Employer has acted on the complaints of Claimant that they were able to corroborate; and (v) Employer takes these issue seriously, and that any future harassment complaints should be reported directly to the HRA. (*Id.*, H.T at 40, Employer Exhibit 3, Memo dated October 13, 2011.) The HRA explained that in order to do his job, Claimant's Supervisor is required to go to the non-ferrous scale location, to which Claimant had been reassigned, each morning to do paperwork and pick up cash and checks, to return at the end of each day to secure cash and deliver daily paperwork, and, occasionally, to return throughout the day if they run out of checks or need cash. (R. Item 12, H.T. at 41-42.) She testified that after interviewing all of the individuals involved, she determined that the only inappropriate behavior on the part of Claimant's Supervisor that could be corroborated was the brushing of

Claimant's hair; the discipline levied on Claimant's Supervisor for this behavior was a three-day suspension without pay, loss of a week's vacation, loss of Christmas bonus, and mandatory harassment training. (*Id.*, H.T. at 52.) The HRA testified that she determined that Claimant was not being truthful about what had occurred in the workplace. (*Id.*, H.T. at 53.)

On December 30, 2011, the Referee issued a decision finding Claimant eligible for benefits and reversing the Service Center's determination. The Referee found that Claimant quit her employment due to sexual harassment and retaliation for a complaint. (R. Item 13, F. F. ¶34.) The Referee reasoned that Claimant does not lack credibility, and was the only witness at the hearing with first-hand knowledge of the incidents. (R. Item 13, Referee's Decision/Order at 3.) The Referee stated that the record indicates that Claimant was subjected to repeated sexual harassment by her Supervisor that included offensive verbal comments and physical conduct, which continued after she voiced her objections. (*Id.*) The Referee further noted that even after Claimant complained to the Facilities Manager, an individual with authority over her Supervisor, the offensive conduct did not cease. (*Id.*) The Referee stated that despite reassignment to another area, Claimant continued to be required to interact with the offender, and the offender engaged in actions that Claimant considered to be retaliation; despite Claimant's further complaint to both the Facilities Manager and the HRA, the harassment and retaliation continued, causing Claimant an anxiety attack. (*Id.*) The Referee concluded that Employer has not demonstrated that the proposed remedy provides Claimant a workplace where she can physically and mentally work without fear of harassment and retaliation, and under these circumstances,

there was a necessary and compelling reason for Claimant to voluntarily leave her employment. (*Id.*)

Employer appealed the Referee's decision to the Board. The Board, following its review of the record, concluded that the Referee's determination was correct, adopted and incorporated the Referee's findings and conclusions in their entirety and affirmed the Referee's decision. (R. Item 17, Board's Order.)

Employer timely filed the instant petition for review appealing the Board's order to this Court.⁴ Employer contends that Claimant did not establish a necessary and compelling reason for voluntarily quitting her job, and that she failed to satisfy her burden to show that she made a reasonable, good faith effort to preserve her employment and avoid having to quit. We vehemently disagree.

A claimant seeking benefits after voluntarily quitting her job has the burden to demonstrate that she had a necessitous and compelling reason for leaving that employment. *Pennsylvania Gaming Control Board v. Unemployment Compensation Board of Review*, 47 A.3d 1262, 1265 (Pa. Cmwlth. 2012); *Collier Stone Co. v. Unemployment Compensation Board of Review*, 876 A.2d 481, 484 (Pa. Cmwlth. 2005); 43 P.S. §802(b). To prove a necessitous and compelling reason for leaving employment, the claimant must show circumstances that produced real and substantial pressure to terminate employment and would compel a reasonable person to act in the same manner, and must also show that she acted with ordinary common sense and made a reasonable effort to preserve her

⁴ Our scope of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Collier Stone Co. v. Unemployment Compensation Board of Review*, 876 A.2d 481, 483 n.2 (Pa. Cmwlth. 2005); *Comitalo v. Unemployment Compensation Board of Review*, 737 A.2d 342, 344 (Pa. Cmwlth. 1999).

employment. *Pennsylvania Gaming Control Board*, 47 A.3d at 1265; *Collier Stone Co.*, 876 A.2d at 484; *Borough of Coaldale v. Unemployment Compensation Board of Review*, 745 A.2d 728, 730 (Pa. Cmwlth. 2000); *Comitalo v. Unemployment Compensation Board of Review*, 737 A.2d 342, 344 (Pa. Cmwlth. 1999). Whether or not a claimant had a necessitous and compelling reason for terminating employment is a question of law subject to this Court's review. *Pennsylvania Gaming Control Board*, 47 A.3d at 1265; *Comitalo*, 737 A.2d at 344. Sexual harassment can constitute a necessitous and compelling reason to leave employment. *Collier Stone Co.*, 876 A.2d at 484; *Borough of Coaldale*, 745 A.2d at 731; *Comitalo*, 737 A.2d at 344.

The findings of fact, adopted by the Board, clearly establish that once the sexual harassment began, Claimant dutifully followed Employer's established procedures in every possible way, by objecting directly to her harasser, and, when his conduct continued, by repeatedly reporting his conduct to a supervisor, to no avail. Employer's policy specifically directs a supervisor to conduct an internal investigation of the complaint. However, the Facilities Manager who had been informed, beginning in July, 2011, that Claimant's Supervisor was making remarks about Claimant's underwear, inappropriately touching Claimant, calling Claimant into his office to view pictures of semi-naked and naked women, and peering at Claimant through a vent while she used the bathroom, did *nothing* except to indicate to Claimant that he would *speak* to Claimant's Supervisor. Indeed, the Referee's findings of fact establish that after Claimant reported this conduct to the Facilities Manager, her Supervisor commenced retaliatory measures, and continued to sexually harass her. It was not until Claimant and her mother visited the Facilities Manager, on September 28, 2011, that a report was made to the HRA,

and a formal investigation commenced. Claimant returned to work on the condition that she would not be required to have contact with her Supervisor, only to find him confronting her in her work area. She complained to the HRA via email, received no response, and continued to work until October 14, 2011.

Employer argues that Claimant calculatedly walked away from her job because she disliked Employer's chosen course of investigation and quit *after* Employer took prompt and effective steps to end the conduct about which she complained (Petitioner's Br. at 13, 16.) However, the HRA admitted, at the hearing and in her memorandum to Claimant, that Employer's proposed remedy would have forced Claimant to have daily contact with the individual who had been her harasser, and was continuing to harass her. (R. Item 12, H.T. at 41-42.) Obviously, Employer utterly failed to provide Claimant a workplace where she could work without fear of further harassment and/or retaliation. We find that Claimant's unwillingness to continue to work in contact with her harasser was reasonable and does not show any lack of good faith effort to preserve employment. *Gavlick Personnel Services, Inc. v. Unemployment Compensation Board of Review*, 706 A.2d 406, 408 (Pa. Cmwlth. 1998) (promise of future transfer away from harasser to office which did not yet exist was not a sufficient accommodation where claimant would have to work with harasser in the interim); *Mutual Pharmaceutical Co., Inc. v. Unemployment Compensation Board of Review*, 654 A.2d 37, 41 (Pa. Cmwlth. 1994) (claimant had shown necessitous and compelling reason to quit her job where employer failed to transfer her to shift where she would not have contact with harasser). "[T]here is a certain level of conduct that an employee will not be required to tolerate and ... the Court will not place all responsibility upon an employee to resolve his or her work dilemma.

Ultimately the employer bears the responsibility for eliminating harassment against employees in the workplace.” *Comitalo*, 737 A.2d at 345 (claimant had demonstrated necessitous and compelling reason to quit where employer did not take immediate action to prevent further harassment).

We find that the Board correctly adopted the findings of the Referee and correctly affirmed the Referee’s conclusion that Claimant had shown a necessitous and compelling reason for leaving her job with Employer. Accordingly, we affirm the order of the Board.

JAMES GARDNER COLINS, Senior Judge

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	:
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ORDER

AND NOW, this 8th day of November, 2012, the order of the Unemployment Compensation Board of Review in the above matter is affirmed.

JAMES GARDNER COLINS, Senior Judge