

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Steve Tynan, :
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 Petitioner :
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 v. : No. 656 C.D. 2011
 : Submitted: October 7, 2011
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 Unemployment Compensation :
 Board of Review, :
 Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE KELLEY

FILED: December 2, 2011

Steve Tynan (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) reversing the decision of a referee and denying unemployment compensation benefits pursuant to the provisions of Section 402(b) of the Unemployment Compensation Law (Law).¹ We affirm.

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:

An employe shall be ineligible for compensation for any week—

* * *

(Continued....)

Claimant filed a claim for unemployment compensation benefits with the Allentown UC Service Center upon the termination of his employment as a fleet administrator for Mid-Atlantic Lubes, Inc. (Employer). The Service Center representative issued a determination denying him benefits pursuant to Section 402(b) of the Law on the basis that he had voluntarily quit his employment with Employer because there was not enough work, that his days were spent doing busy work rather than the sales position for which he had been hired, and that he resigned to seek work that would fulfill his experience.²

Claimant appealed this determination and a hearing was conducted before a Referee on December 3, 2010. See N.T. 12/3/10³ at 1-8; Reproduced Record (RR) at 68a-75a. Employer did not appear at the hearing. See id. On December 7, 2010, the Referee issued a Decision/Order in which he determined that Claimant was eligible for benefits under Section 402(b), and reversed the Service Center representative's decision. On December 8, 2010, Employer appealed the Referee's order to the Board.⁴

On February 28, 2011, the Board issued a Decision and Order reversing the Referee's determination that Claimant was eligible for benefits.

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is "employment" as defined in this act.

² The Service Center representative's decision also determined that there was a fault overpayment of benefits pursuant to Section 804(a) of the Law, 43 P.S. § 874(a). This determination is not at issue in this appeal.

³ "N.T. 12/3/10" refers to the transcript of the hearing conducted before the Referee on December 3, 2010.

⁴ In the appeal documents, Employer requested a remand for another hearing before the Referee. See Certified Record (CR) Item No. 13 at 4-5.

Specifically, the Board made the following relevant findings of fact: (1) Claimant's position with Employer was to go out and bring customers in; (2) Employer provided Claimant with a box of 12,000 cards worth 15% off and he was to go to retail establishments and give them out to employees of the businesses; (3) Claimant admitted that he performed these duties and it was "ok for a while" but that, eventually, he started working at 7:00 a.m. and he had nothing to do at 8:00 a.m.; (4) Claimant agreed that his job with Employer was created for him and that he took a pay cut to take the position; (5) Claimant also felt that the work environment was hostile as there was verbal abuse, yelling, and screaming but he did not tell anyone about the environment; (6) Claimant saw the district manager throw an employee up against the building and yell "get your F-ing ass—your head out of your ass"; (7) Claimant did not tell the owner because he knows the owner personally and they were friends; (8) Claimant was unhappy that he was trying to find work and there would be managers sleeping in the office; (9) Claimant complained that he did not have enough work to do and was told by Employer "well then maybe you should leave"; (10) Claimant admitted that he could overlook a lot of stuff if he was stimulated and not bored; and (11) Claimant voluntarily quit his employment. Board Decision and Order at 1-2.

Based on the foregoing, the Board determined that Claimant was ineligible for benefits pursuant to Section 402(b) of the Law. Board Decision and Order at 2-3. Specifically, the Board stated the following, in pertinent part:

Based on the record before the Board, the Board concludes that the claimant is ineligible for benefits. Here, it is clear that the claimant was unhappy with the work environment. However, the claimant admittedly never informed the owner of the company about any of the problems that he observed. Claimant also admitted that he would have been able to tolerate the situation if he

was busy. While the claimant clearly was unhappy about not having enough work, and he did discuss this with employer the Board concludes that this simply does not rise to the level of necessitous and compelling. The claimant is ineligible for benefits under Section 402(b) of the Law....

Id. at 3. Accordingly, the Board issued an order reversing the Referee's decision and denying Claimant benefits. Id. Claimant then filed the instant petition for review.⁵

In this appeal, Claimant contends⁶: (1) the Board exceeded its authority by reversing the Referee's determination that he was eligible for benefits; (2) the Board erred in determining that he did not have necessitous and compelling reason for voluntarily resigning his employment with Employer and that the Board's findings in this regard are not supported by substantial evidence.

Claimant first contends that the Board exceeded its authority by reversing the Referee's determination that he was eligible for benefits. Relying on Treon v. Unemployment Compensation Board of Review, 499 Pa. 455, 453 A.2d 960 (1982), Claimant argues that the Board exceeded its authority in making credibility determinations and findings of fact contrary to those of the Referee regarding the reasons for Claimant's separation from his employment with Employer. We do not agree.

⁵ This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994).

⁶ We consolidate the claims raised by Claimant in this appeal in the interest of clarity.

As this Court has recently noted:

In Treon, the Board rejected a referee's finding that was based on the consistent, uncontradicted testimony of one witness. *Treon*, 499 Pa. at 458-459, 453 A.2d at 961. The Pennsylvania Supreme Court held the Board could not disregard a referee's findings of fact based on consistent, uncontradicted testimony without stating its reasons for doing so. *Id.* at 461, 453 A.2d at 962-963. However, the court explicitly limited its holding, noting "[i]n this case ... we are concerned not with findings made by the Board, but with findings made by the referee which the Board failed to adopt." *Id.* at 460, 453 A.2d at 962. Further, "[t]he Board certainly had the right to disbelieve [the claimant's] testimony, even though that testimony was uncontradicted." *Id.* Thus, our Supreme Court found error in the Board's unexplained failure to adopt a crucial finding of the referee that was based on uncontradicted evidence.

Chapman v. Unemployment Compensation Board of Review, 20 A.3d 603, 612 (Pa. Cmwlth. 2011).⁷

In the Claimant Questionnaire completed and signed by Claimant, and submitted to the UC Service Center for benefits, Claimant stated that the reason for

⁷ See also Oliver v. Unemployment Compensation Board of Review, 5 A.3d 432, 440-441 (Pa. Cmwlth. 2010) ("Assuming that Claimant did preserve this issue, it is not clear that the testimony of Claimant was uncontradicted. First, in Claimant's original appeal of the denial of benefits by the [UC] Service Center she stated, "I did not realize this child had run back inside until my Director [Schon] brought it to my attention. Appeal of Denial of Claim, April 17, 2009, at 1. In her testimony before the referee, Claimant testified that she tripped over her shoe strings and then recovered and picked up her roll book. As she began to play with the children, she realized that the child was missing. Claimant's statements are inconsistent and contradict one another. Second, Schon testified that Claimant told her that she had six children when in fact she had five. Schon's testimony directly contradicts Claimant's testimony that she was looking for the missing child as soon as she started playing with the children after the alleged fall. Because Claimant's testimony was inconsistent and contradicted by Schon regarding Claimant's knowledge of the missing child, the Board did not have to provide a reason for reversing the referee. *Treon.*").

his separation from work was “Not enough work – management agreed it’s [sic] was best to resign”, and “Hired for sales position; lack of work available”. CR Item No. 3 at 1; RR at 10a. In the Employment Separation Questionnaire completed and signed by Claimant, and submitted to the UC Service Center for benefits, Claimant stated that the reason for his separation from work was “Lack of work – the day’s [sic] were doing busy work. It was in my best interest to resign to find employment that could fulfill my experience.” CR Item No. 3 at 2; RR at 12a.

In addition, on the face of the Petition for Appeal that he completed, signed, and filed from the UC Service Center’s determination that he was ineligible for benefits, Claimant stated that “I didn’t quit, was asked to resign or I would [have] been laid off, due to lack of work.” CR Item No. 7 at 2; RR at 30a. Finally, in an e-mail attached to the petition, Claimant stated:

I was hired for a position that was created (Fleet Administrator) during the past year the position was down sizing [sic] based on the company mission. I was asked to seek employment outside Jiffy Lube on good terms. There wasn’t enough work to support the position.

CR Item No. 7 at 4; RR at 33a.

In this appeal, Claimant argues that the Board was required to state its reasons for not adopting the Referee’s findings based on Claimant’s testimony at the hearing that there was yet another reason underlying his separation from employment; namely, that he was subjected to a hostile work environment. However, because Claimant’s testimony was inconsistent and contradicted by his own prior statements, the Board did not have to provide a reason for failing to adopt the Referee’s findings of fact under Treon. Chapman; Oliver. In short, Claimant’s allegation of error in this regard is patently without merit.

Claimant next contends that the Board erred in determining that he did not have necessitous and compelling reason for voluntarily resigning his employment with Employer, and that the Board's findings in this regard are not supported by substantial evidence. Again, we do not agree.

We initially note that, in general, a claimant has the burden of proving entitlement to unemployment compensation benefits. Jennings v. Unemployment Compensation Board of Review, 675 A.2d 810 (Pa. Cmwlth. 1996). Where a claimant without any action by employer resigns, leaves or quits employment, that action amounts to voluntary leaving for purposes of unemployment compensation benefits. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 565 A.2d 127 (1989). A claimant who voluntarily quits his employment also bears the burden of proving that the termination was caused by reasons of a necessitous and compelling nature. Du-Co Ceramics Company v. Unemployment Compensation Board of Review, 546 Pa. 504, 686 A.2d 821 (1996); Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977); Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003).

Although the Law does not define what constitutes "cause of a necessitous and compelling nature", our Supreme Court has described it as follows:

“[G]ood cause” for voluntarily leaving one’s employment (i.e. that cause which is necessitous and compelling) results from circumstances which produce 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.

Taylor, 474 at 358-359, 378 A.2d at 832-833.

In addition, in establishing that a voluntary quit was reasonable, a claimant must establish that he acted with ordinary common sense in quitting his job, that he made a reasonable effort to preserve his employment, and that he had no other real choice than to leave his employment. PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 58 (Pa. Cmwlth. 1996). If a claimant does not take all necessary and reasonable steps to preserve his employment, he has failed to meet the burden of demonstrating necessitous and compelling cause. Id.

It is well settled that mere dissatisfaction with wages, work assignments, working conditions, or personality conflicts are not necessitous and compelling cause to terminate one's employment. Spadaro v. Unemployment Compensation Board of Review, 850 A.2d 855 (Pa. Cmwlth. 2004); Creason v. Unemployment Compensation Board of Review, 554 A.2d 177 (Pa. Cmwlth. 1989); Gackenbach v. Unemployment Compensation Board of Review, 414 A.2d 770 (Pa. Cmwlth. 1980). Moreover, "[m]ultiple causes, which as individual causes are not necessitous or compelling, do not in combination become necessitous and compelling." Spadaro, 850 A.2d at 860.

As noted above, based on the evidence presented, the Board concluded that "[i]t is clear that the claimant was unhappy with the work environment. However, the claimant admittedly never informed the owner of the company about any of the problems that he observed. Claimant also admitted that he would have been able to tolerate the situation if he was busy. While the claimant clearly was unhappy about not having enough work, and he did discuss this with employer the Board concludes that this simply does not rise to the level of necessitous and compelling...." Board Decision and Order at 3. These

determinations are amply supported by Claimant's testimony at the hearing before the Referee. See N.T. 12/3/10 at 3-7; RR at 70a-74a.⁸

Moreover, the Board's findings support its determination that Claimant is not eligible for benefits pursuant to Section 402(b) of the Law. Spadaro, 850 A.2d at 860 (“[T]he Board found that Claimant told his supervisor that he quit. The Board also determined that Claimant later told the president of the company that he could not take the supervisor anymore. A review of the record reveals that there is nothing to support Claimant's position that Morosko made his working conditions intolerable or that Morosko acted in a profane or abusive manner toward Claimant. Mere dissatisfaction with one's working conditions is not a necessitous and compelling reason for terminating one's employment.”) (citation omitted); Porco, 828 A.2d at 429 (“[T]he sales manager here was the perpetrator, and Porco admits that he did not report his conduct to upper level management. Porco, therefore failed to exhaust all alternatives to preserving his employment relationship, and, consequently, he has not established that he had cause of a necessitous and compelling nature to voluntarily leave his position.”) (footnote omitted); Creason, 554 A.2d at 179 (“[T]here is no evidence of record which would allow us as a matter of law to conclude that Claimant's

⁸ The Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. As the ultimate fact finder, the Board may accept or reject the testimony of any witness, in whole or in part. Grief v. Unemployment Compensation Board of Review, 450 A.2d 229 (Pa. Cmwlth. 1982). Thus, to the extent that Claimant invites this Court to reweigh the evidence presented to the Board in this appeal, we will not accede to Claimant's request.

resignation was for necessitous and compelling reasons. Rather, Claimant's resignation was merely due to *potential* personal conflicts and a dissatisfaction with working conditions and wages. Thus, we must affirm the Board's denial of benefits.") (emphasis in original); Gackenbach, 414 A.2d at 771 ("When there is no imminent threat of termination from employment but only a mere possibility of its future occurrence, resignation because of a desire to keep an 'unsatisfactory' evaluation from becoming part of the individual personnel file is not a necessitous and compelling reason for termination justifying the receipt of benefits."). As a result, Claimant's allegations of error in the instant appeal are patently without merit.

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 2nd day of December, 2011, the order of the Unemployment Compensation Board of Review, dated February 28, 2011 at No. B-513977, is AFFIRMED.

JAMES R. KELLEY, Senior Judge