

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Linda Freeman, :
Petitioner :
 :
v. : No. 750 C.D. 2008
 : Submitted: August 15, 2008
Unemployment Compensation :
Board of Review, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: October 14, 2008

Linda Freeman (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review holding that Claimant was ineligible for benefits under the Unemployment Compensation Law (Law).¹ In doing so, the Board agreed with the Referee's determination that Claimant voluntarily quit her employment without cause of a necessitous and compelling nature and affirmed the Referee's denial of benefits under Section 402(b) of the Law, 43 P.S. §802(b).² Finding no error in the Board's finding that Claimant quit her employment without a necessitous and compelling reason, we affirm.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §§751-914.

² Section 402(b) provides 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." 43 P.S. §802(b).

Claimant was last employed by Essis and Sons (Employer) as a full-time accounts payable clerk. Although the parties disagree about the circumstances surrounding Claimant's separation from Employer, it is uncontested that Claimant's employment ended following a disagreement with her immediate supervisor, Richard Wilson, on November 6, 2007. Claimant applied for unemployment compensation benefits following the incident, claiming that she had been discharged. Employer responded that Claimant had voluntarily quit her job.

The Lancaster UC Service Center recognized the conflict regarding the reason for Claimant's separation. Accordingly, it evaluated her application under Sections 402(b) and 402(e)³ of the Law, which preclude benefits where a claimant quits or is discharged for willful misconduct. The UC Service Center concluded that Claimant did not quit but, rather, Employer discharged Claimant due to a personal conflict with her supervisor. Certified Record, Item No. 6 (C.R. ___). Finding also that Claimant did not engage in willful misconduct, the UC Service Center found her eligible for benefits. Employer appealed, and the matter was assigned to a Referee. At hearing, the Referee began by noting that he, as did the UC Service Center, would consider both Sections 402(b) and 402(e) of the Law in deciding Employer's appeal.

Richard Wilson, Employer's controller and Claimant's supervisor, testified on behalf of Employer. Wilson testified that on the morning of November 6, he received a check for a refund of a double payment from one of Employer's vendors. Wilson showed the check to Claimant and asked her to pull the file when

³ Section 402(e) states that an employee is ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. §802(e).

she returned to her office. Approximately five minutes later, Wilson proceeded to Claimant's office because she still had not produced the file. Wilson noticed that Claimant was working on a different invoice and asked her if she had pulled the file he requested. According to Wilson, Claimant slammed the paperwork she was working on down on the desk and pushed her chair back "in a violent belligerent manner," almost striking her coworker Nicole Evans. Notes of Testimony, January 10, 2008, at 8 (N.T. ___). Wilson asked Evans to leave the room and the confrontation continued. In Wilson's words,

I asked [Claimant], what is your problem, and she got belligerent in nature in her voice. It was a hostile violent response. And I took the piece of paper out of her hand, I sat it down and I said I want you to leave, you come back tomorrow. And she – oh, and when I said what is your problem, she pointed her finger in my face and said you don't like it when I don't look at you when you talk to me. ... So, and I said better yet, call me in the morning.

Id. Wilson testified that when Claimant began gathering her personal belongings he said "I am not dismissing you. I made it very clear. I said I am not dismissing you." N.T. 9. Claimant responded, "when you say call me in the morning, I know what that means." *Id.*

Wilson testified that for the next two days, Wednesday, November 7, and Thursday, November 8, Claimant did not report to work or call in as she had been instructed. When Claimant came to work on Friday, November 9, to pick up her paycheck, Wilson asked her if they could talk because he was "still thinking that we can survive this." N.T. 10. According to Wilson,

I said [to Claimant] all I want to do is talk to you. She says I will talk to Fred [Essis, the owner], you just get my check. And

I'm saying does this mean you're not coming back, she says I just said get my check.

Id. Claimant gave Wilson her key to the accounting office in exchange for her check and then left the premises. Believing that Claimant had quit, Wilson promoted Nicole Evans to replace Claimant as Employer's full-time accounts payable clerk.

Wilson testified that Claimant returned on Wednesday, November 14, for a meeting with Wilson and the owner of the company, Fred Essis. Wilson recalled that Claimant asked for her job back but her request was denied because the position had been filled.

Testifying next for Employer was Nicole Evans, who was present in Claimant's office at the time of the confrontation on November 6. Evans testified that Wilson asked Claimant to retrieve some information, and that Claimant pushed her chair back and "slammed her papers down, and said I'll get them for you right now." N.T. 14. Evans then left the room at Wilson's request.

Employer also presented testimony from Noell Kline, Employer's accounts receivable clerk. Kline testified that her office and Claimant's office are approximately ten feet apart and separated by a Plexiglas window. Kline testified as follows regarding the exchange she overheard between Claimant and Wilson on November 6:

I heard [Wilson] ask [Claimant] for paper, or a folder. And the next thing I heard, she slammed her hands on the desk. And there was, I guess, an altercation where, you know, he asked [Claimant] to leave. And I specifically heard him say I am not letting you go, you are not fired. On several occasions I heard him say I am not, you are not fired. Just call me in the morning and hopefully we can get this resolved. And then she just

started packing her things up. And he said it on several occasions, you are not, I am not letting you go, please call.

N.T. 16-17. Kline also recalled hearing Claimant say, “I know what happens when you tell me to call you in the morning, that means you’re letting me go.” N.T. 17.

Claimant testified on her own behalf and offered a markedly different version of the events that transpired on November 6. Claimant testified that Employer required its accounting employees to stand by the fax machine when invoices were being received. Claimant was doing so on the morning of November 6 when Wilson approached her about a check Employer received as a refund for an overpayment. Claimant waited for the faxes to finish and returned upstairs to her desk. According to Claimant, she was in the process of organizing other papers on her desk when Wilson appeared at her door asking if she had retrieved the file. She said, “no, I just got back to my office. I’m getting it,” and moved her papers aside but did not slam them down. N.T. 19. Claimant testified that she pushed her chair back as she normally did to access the file cabinet. Claimant described Wilson’s tone of voice as rushed, and that after Evans left the room Wilson slammed the door shut, leaned across her desk and through clenched teeth said, “don’t you ever embarrass me like that in front of an employee again.” N.T. 20. Claimant testified that Wilson returned to his office and came back a few minutes later and slammed her door closed. At that point he said, “I don’t know what your problem is, I don’t know why you don’t like it here. If you hate it that much, leave.” N.T. 20-21. Claimant testified that Wilson told her three or four times to “leave, just leave now.” N.T. 21. Believing she was dismissed, Claimant gathered her belongings and left. She did not recall Wilson saying, “I am not dismissing you.” N.T. 22. Claimant did recall Wilson saying, “call me tomorrow to see whether or not you still have a job.” N.T. 22.

Claimant testified that she did not return to Employer's premises until Friday, November 9, when she picked up her paycheck. She declined Wilson's invitation to discuss her employment "[b]ecause I was scared to go in and talk with him by himself." N.T. 23. Claimant preferred to wait until owner Fred Essis returned the following Monday. Claimant gave Wilson her key, collected her check, and left.

Claimant testified that she met with Wilson and owner Fred Essis on Monday, November 12.⁴ Claimant discussed the events of November 6 and 9 with Essis. Essis excused Wilson from the meeting and summoned his son and co-owner, Joe Essis, to the meeting. The three discussed Claimant's situation and Fred Essis informed Claimant that he would call her with a final decision after he met with Wilson. According to Claimant, Fred Essis called her the following day, Tuesday, November 13, and informed her that she was being dismissed because of a "personal conflict" with Wilson but was not being fired. N.T. 26. Claimant conceded that she had already filed for unemployment benefits on Monday, November 12, before her meeting with Essis. N.T. 27, 30.

Noell Kline testified on rebuttal that Wilson never slammed Claimant's door and that the door to Claimant's office was never closed during her confrontation with Wilson on November 6. Claimant disputed this testimony on rebuttal and maintained that Wilson slammed her door closed during the first part of their encounter and then closed the door when he returned to her office a few minutes later. N.T. 35.

The Referee resolved the conflicts in the testimony in favor of Employer, and found that Claimant voluntarily quit her job by withholding her

⁴ The Referee found that this meeting occurred on Wednesday, November 14.

services when work was available. Applying Section 402(b) of the Law, 43 P.S. §802(b), the Referee held that Claimant did not establish cause of a necessitous and compelling nature for doing so and denied benefits. On appeal, the Board found, as fact, that Claimant voluntarily quit her employment. The Board concluded that this was a voluntary quit case governed by Section 402(b) and that Claimant was ineligible for benefits because she failed to establish a necessitous and compelling reason for quitting her job. The Board reasoned as follows:

The Board concludes that the claimant did not report back to the employer as required. The employer reasonably believed that sending the claimant home following a confrontation would diffuse [sic] the situation. The claimant was instructed to follow up with a phone call to the employer. However, the claimant failed to do so. The claimant explained at the hearing that she did not call the employer as required subsequent to being sent home because she was scared. The Board discredits this assertion.

Board Opinion at 2-3. Claimant now petitions for this Court's review.

Claimant raises several interrelated issues.⁵ Claimant challenges several of the Board's findings of fact as not supported by substantial evidence and suggests that the Board failed to make certain necessary findings. Claimant maintains that she did not voluntarily quit her job, but was terminated by Employer, and therefore the Board erred by failing to require Employer to prove willful misconduct as required under Section 402(e). Finally, Claimant argues that

⁵ Our review is "limited to a determination of whether constitutional rights have been violated, errors of law committed, or whether essential findings of fact are supported by substantial evidence." *Iaconelli v. Unemployment Compensation Board of Review*, 892 A.2d 894, 896 n.2 (Pa. Cmwlth. 2006).

she had necessitous and compelling reasons to quit her job should this Court agree with the Board's initial determination that this is a Section 402(b) case.⁶

Claimant's first issue relates to the following findings of fact by the Board:

5. [Claimant] appeared upset, slammed down paperwork on her desk and pushed her chair back in an aggressive manner.
6. [Wilson] asked [Claimant] what was her problem. At this, [Claimant] pointed her finger in his face and told him he doesn't like it when she doesn't look at him when he's talking to her.
7. [Wilson], in an effort to diffuse [sic] the situation, sent [Claimant] home and told her to call him in the morning.
8. [Claimant] began to collect belongings in her office; [Wilson] told her she was not dismissed.
9. [Employer] was clear in telling [Claimant] she was not discharged.
13. [Claimant] returned [Employer's] key, thereby voluntarily quitting her employment.

Board Opinion at 1-2. Claimant baldly asserts that these findings are not supported by substantial evidence. She also claims that there are "missing necessary Findings of Fact which have not been made by the Board." Claimant's Brief at 12.

⁶ On August 8, 2008, Claimant filed a motion for oral argument with this Court. We denied Claimant's motion on August 22, 2008, because Claimant does not raise any novel issues of law and the issues presented can be decided on the extant record.

In addressing Claimant’s argument, we are mindful that “[s]ubstantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion.” *Popoleo v. Unemployment Compensation Board of Review*, 777 A.2d 1252, 1255 (Pa. Cmwlth. 2001). Additionally, “[w]here there is a conflict in testimony, credibility determinations and the resolution of evidentiary conflicts are within the [Board’s] discretion and are not subject to reevaluation on judicial review.” *Graham v. Unemployment Compensation Board of Review*, 840 A.2d 1054, 1059 (Pa. Cmwlth. 2004).

It is not necessary at this juncture to relate each of the challenged findings back to the notes of testimony. Suffice it to say that all of the challenged findings are amply supported by Wilson’s testimony, which we described in detail earlier in this opinion. Furthermore, Findings of Fact 5, 7, and 9 were corroborated by the testimony of Nicole Evans and Noell Kline. In support of her argument that there are “missing findings,” Claimant cites to her own testimony, which the Board implicitly rejected by accepting Employer’s version of the pertinent events.⁷ In short, Claimant’s substantial evidence challenge is nothing more than an attempt to re-argue the weight and meaning of the evidence, which is beyond appellate review.

Claimant next argues that the Board erred by not considering Section 402(e) of the Law, which governs the eligibility of employees who are discharged. Claimant contends that she was discharged and, therefore, the Board erred in

⁷ We note that because Claimant has not formally argued that the Board capriciously disregarded evidence, such an argument would be waived. See *Leon E. Wintermyer, Inc. v. Workers’ Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 203, 812 A.2d 478, 487 (2002) (“[R]eview for capricious disregard of material, competent evidence is an appropriate component of appellate consideration *in every case in which such question is properly brought before the court.*”) (emphasis added).

finding that she voluntarily quit her employment. In support, Claimant cites to Wilson's repeated request that she "leave now" during their confrontation on November 6, and his request on November 9 that she exchange her key for her paycheck. Claimant believes that Wilson's language had the requisite "immediacy and finality of a 'firing.'" *Bell v. Unemployment Compensation Board of Review*, 921 A.2d 23, 26 (Pa. Cmwlth. 2007). We disagree.

Claimant's position is premised upon a selective view of the record and her own testimony. "Whether a claimant's separation from employment [is] voluntary or a discharge is a question of law for [the court] to determine *from the totality of the record.*" *Iaconelli v. Unemployment Compensation Board of Review*, 892 A.2d 894, 896 (Pa. Cmwlth. 2006) (emphasis added). Although Wilson did tell Claimant to "leave now" after their initial confrontation, it is clear from his own credited testimony that he intended for Claimant to leave for the day in order to defuse the situation. More importantly, Wilson expressly told Claimant that she was not discharged and that she should call in the next morning. This testimony was corroborated by Noell Kline. Claimant did not call in or report to work the next day or the following day. When she collected her paycheck on the third day, November 9, Claimant had already effectively abandoned her employment. Nevertheless, Wilson asked her if she was coming back to work, and Claimant did not answer affirmatively.⁸ At that point it was reasonable for Wilson

⁸ Claimant testified as follows:

[Employer's Counsel]: I'd like to talk to you a bit about Friday, November 9th, 2007. Isn't it true that when you came in to pick up your check on that, you refused to answer Mr. Wilson's direct question regarding whether you were coming back to work?

[Claimant]: I didn't refuse to answer it ma'am. When he asked me that, so this means you're not coming back, I said I did not say that. I said we need to talk

(Footnote continued on the next page . . .)

to believe that Claimant did not intend to return to work and that her important accounts payable position should be filled. In sum, based on the entire record in this case, we hold that there was substantial evidence to support the Board's determination that Claimant was not discharged but, rather, voluntarily quit her job.⁹

Having determined that Claimant voluntarily terminated her employment, we turn to her alternative argument that the Board erred in finding her ineligible for benefits under Section 402(b) of the Law because she quit "without cause of a necessitous and compelling nature." 43 P.S. §802(b). Pursuant to Section 402(b), "[a]n employee seeking unemployment compensation after voluntarily terminating employment has the burden of proving cause of a necessitous and compelling nature for the voluntary quit." *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). Although the Law does not define the terms "necessitous and compelling," this Court has held that an employee must prove that:

- (1) circumstances existed which produced real and substantial pressure to terminate employment;
- (2) such circumstances would compel a reasonable person to act in the same manner;

(continued . . .)

with Fred. I did not say I was not coming back. I did not say I was coming back.
I said we would talk with Fred. I wanted to talk with Fred.

N.T. 30.

⁹ Once the Board concluded that Claimant voluntarily terminated her employment, it was unnecessary for the Board to conduct an analysis under Section 402(e) of the Law, 43 P.S. §802(e). There is simply no merit to Claimant's argument that the Board somehow erred by not considering an irrelevant statutory provision.

(3) the claimant acted with ordinary common sense; and, (4) the claimant made a reasonable effort to preserve her employment.

Id. Claimant argues that she took reasonable steps to preserve her employment on November 9 by informing Wilson that she wanted to speak with Fred Essis, and then by calling Essis and meeting with him the following week.

Again, Claimant's claim is belied by the record. Despite being instructed to do so, Claimant failed to call in on November 7 and November 8 and advise Employer of her intent to return to work. On November 9, Claimant refused to answer a direct question from her supervisor about whether she intended to come back to work. While she may have wanted to speak with Fred Essis upon his return to the office, her refusal to inform management of her intent to remain employed by Employer demonstrates that she did not take reasonable steps to preserve her employment. Claimant's conversations with Fred Essis on November 12 and 14 are really of no moment because by then Claimant had already abandoned her employment. In sum, we agree with the Board that Claimant failed to demonstrate cause of a necessitous and compelling nature for terminating her employment.

For all of the foregoing reasons, we affirm the Board's adjudication.

MARY HANNAH LEAVITT, Judge

