

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Tina M. Smith, :
Petitioner :
 :
v. : No. 835 C.D. 2011
 : Submitted: October 7, 2011
Unemployment Compensation Board :
of Review, :
Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge¹

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: January 9, 2012

Tina M. Smith (Claimant) petitions, *pro se*, for review of an adjudication of the Unemployment Compensation Board of Review (Board) denying her benefits under Section 402(b) of the Unemployment Compensation Law (Law)² because she voluntarily quit work without cause of a necessitous and compelling nature. In doing so, the Board affirmed the Referee. Claimant contends that the failure of Hickory Hill Trucking (Employer) to pay her in a

¹ This case was decided before Judge Butler's term ended on January 2, 2012.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b). It provides, in relevant part, that an employee is ineligible for benefits 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).

timely manner gave her a sufficient reason for quitting. Discerning no error by the Board, we affirm.

Claimant was employed as a bookkeeper in Employer's office. She worked there from March 9, 2010, through August 6, 2010; she earned \$8.00 per hour and was paid biweekly. August 6, 2010, was a regularly scheduled pay day. Because of its financial problems, Employer asked Claimant not to cash her paycheck for three or four days. Claimant left work and filed for unemployment compensation benefits. The UC Service Center denied her claim, and she requested a hearing before a Referee.

At the hearing,³ Claimant testified that on Friday, August 6th, Joette Mateer, the office manager, asked her not to cash her paycheck until Monday or Tuesday. Claimant agreed to the request. Claimant stated that her work day ended at 5:00 p.m. and in spite of waiting an extra hour, Mateer still had not produced her check. Claimant left in tears. She tried to call Mateer that evening, but no one answered the phone. On Saturday morning she contacted Mateer, who told her to come to the office for the paycheck. Claimant returned to the office and found her paycheck taped to the front door, and it was dated for Thursday, August 12th. Because Claimant had several bills paid by automatic deduction, her checking account became overdrawn when her paycheck was not timely deposited.

Claimant did not inform Employer that she was quitting. However, she did state to Mateer that with her "situation with rent and bills to pay" she "couldn't work that way anymore." Certified Record, Notes of Testimony,

³ Claimant was represented by counsel at the hearing.

November 10, 2010, at 7 (N.T. ___). Claimant also stated that she did not “plan to work for \$8 with no health benefits for the rest of [her] life.” N.T. 11.

In her job, Claimant saw Employer’s books and checking account statements, and they were overdrawn on several occasions. Once, she received a paycheck drawn not on Employer’s checking account, but on Mateer’s personal account. Claimant testified that she had to ask for her pay check; it was not just given to her. She admitted that August 6th was the first occasion she did not receive her paycheck on the day it was due. She also admitted that she had never before been asked to delay cashing her paycheck or had a paycheck returned for insufficient funds.

Mateer testified. She admitted asking Claimant not to cash her paycheck until the Monday or Tuesday following August 6th. Claimant never informed Mateer that she had automatic withdrawals made from her bank account and that a delay in cashing her paycheck could result in an overdraft. Mateer was also unaware Claimant was upset over the request and did not even know that Claimant had left the office until she heard Claimant drive away. Claimant left without her paycheck, which Mateer explained only took a minute to write. Mateer was not sure when Claimant left the office, but she thought it was at lunchtime. Later that day, she realized Claimant had not returned.

Mateer testified that Employer was still in business and has been able to pay its wages. She acknowledged that times are difficult in the trucking industry. Employer has outstanding and unpaid receivables, which has created a cash flow problem.

Anthony Worrell also testified. He works for Employer as a managerial consultant. He entered the office on August 6th as Claimant was

leaving. He stated that Claimant picked up her purse and went out the door without saying a word. It was noon, so he thought she left for lunch. A few hours later, he realized she had not returned.

Worrell explained that because of the economy it is common for trucking companies to experience cash flow problems. Not only is there less work, but brokers are slower to pay their bills. Employer asked him once or twice to delay cashing his check, and he complied with the request. He understands how the industry works and did not have a problem with the request.

The Referee found that Claimant was asked by Mateer, on one occasion, to withhold cashing her paycheck for four or five days and that Claimant agreed to do this. The Referee also found that Mateer did not know that Claimant was upset by the request. Likewise, Claimant did not inform Mateer that Claimant could potentially incur overdrafts due to automatic withdrawals from her checking account. The Referee found that Claimant quit her employment because she was upset by the request to withhold her paycheck. He also found that Employer had continuing work available for Claimant.

Based on these factual findings, the Referee concluded that one isolated request by Employer to delay cashing a paycheck did not establish a necessitous and compelling reason for Claimant to quit. Claimant agreed to the request; did not tell Mateer it would cause her a financial hardship; and quit without giving Employer an opportunity to address the situation. As such, unemployment compensation benefits were denied.

Claimant appealed to the Board. The Board adopted and incorporated the Referee's findings and conclusions and affirmed without further comment. Claimant now appeals to this Court.⁴

Claimant argues that the Board erred. Claimant's argument is one paragraph long. In it she argues that she was justified in quitting because Employer required her to lie to other employees and did not remit the amounts it withheld from employee paychecks to the proper government authorities. In her statement of the case, she claims that she was expected to tell truck drivers that their paychecks had been mailed, when Employer had not done so. She asserts that drivers quit after not being paid, and this caused her to distrust Employer.

None of these claims were made by Claimant at the hearing before the Referee or in her appeal to the Board.⁵ This Court will not consider matters that are raised for the first time in a petition for review to this Court. *Chapman v. Unemployment Compensation Board of Review*, 20 A.3d 603, 611 (Pa. Cmwlth. 2011). Thus, these claims are waived for purposes of appeal. *Id.* See also Pa. R.A.P. 1551(a) ("No question shall be heard or considered by the court which was not raised before the government unit" unless it involves the validity of a statute,

⁴ Our scope of review is limited to a determination of whether constitutional rights were violated, an error of law was committed or whether necessary findings of fact were supported by substantial evidence. *Shrum v. Unemployment Compensation Board of Review*, 690 A.2d 796, 799 n.3 (Pa. Cmwlth. 1997). Whether the Claimant had cause of a necessitous and compelling nature to quit is a conclusion of law subject to review by this Court. *Wivell v. Unemployment Compensation Board of Review*, 673 A.2d 439, 441 (Pa. Cmwlth. 1996).

⁵ In Claimant's appeal to the Board, she claimed that Employer was aware of her financial situation and she made a good faith attempt to remedy the situation by agreeing to hold the paycheck for one or two days. However, when she received the paycheck it was dated for six days after it was due. We note that according to Claimant's own testimony, she agreed to hold the paycheck for at least four days and quit prior to ever receiving it.

the jurisdiction of the court, or could not have been raised through the exercise of due diligence before the government unit).

The one argument that Claimant has made consistently to the Referee, the Board, and to this Court is that she quit for a necessitous and compelling reason, *i.e.*, her fear she would not be paid in a timely manner or that future paychecks would be returned for insufficient funds. We will address that issue.

It is the claimant that has the burden of establishing that necessitous and compelling reasons existed for quitting her employment. *Empire Intimates v. Unemployment Compensation Board of Review*, 655 A.2d 662, 664 (Pa. Cmwlth. 1995). To meet this burden the claimant must establish “that she acted with ordinary common sense in quitting her job, that she made a reasonable effort to preserve her employment, and that she had no other real choice than to leave her employment.” *Id.* Acting with “common sense” includes notifying an employer of the problem prior to quitting, so that the employer is given an opportunity to resolve the issue. *Unclaimed Freight Company v. Unemployment Compensation Board of Review*, 677 A.2d 377, 379 (Pa. Cmwlth. 1996).

In *Emgee Engineering Co. v. Unemployment Compensation Board of Review*, 373 A.2d 779, 782 (Pa. Cmwlth. 1977), we explained that quitting is appropriate where there were “several instances” in which an employer did not pay the claimant in a timely manner in spite of the claimant’s complaints. More recently, in *Shupp v. Unemployment Compensation Board of Review*, 18 A.3d 462, 465 (Pa. Cmwlth. 2011), we held that “several instances of tardy wage payments” coupled with a complaint to the employer establish a necessitous and compelling reason for quitting. We explained that the employee must complain about the late

payments, so that “the employer is afforded a reasonable opportunity to address the employee’s complaints.” *Id.*

Generally, we have concluded that there needs to be repeated conduct by employer and not just an “isolated” event. *Koman v. Unemployment Compensation Board of Review*, 435 A.2d 277, 280 (Pa. Cmwlth. 1981). However, we did find the refusal to pay wages for one day of work a permissible reason for quitting, where the employee attempted to resolve the problem and the employer refused to pay. *LaTruffe v. Unemployment Compensation Board of Review*, 453 A.2d 47, 48 (Pa. Cmwlth. 1982).

Here, there was one instance where Claimant was not paid in a timely manner. The evidence credited by the Board was that Claimant did not complain to the Employer and did not even inform Employer that she was quitting. Claimant has not challenged any of the factual findings of the Board. Further, “[m]atters of credibility and evidentiary weight are within the province of the Board....” *BK Foods, Inc. v. Unemployment Compensation Board of Review*, 547 A.2d 873, 875 (Pa. Cmwlth. 1988). Therefore, we conclude that Claimant failed to establish necessitous and compelling cause for terminating her employment.

Accordingly, the order of the Board is affirmed.

MARY HANNAH LEAVITT, Judge

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ORDER

AND NOW, this 9th day of January, 2012, the order of the Unemployment Compensation Board of Review dated February 25, 2011, in the above-captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge