

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

|                           |   |                        |
|---------------------------|---|------------------------|
| Michele Valeriano,        | : |                        |
| Petitioner                | : |                        |
|                           | : |                        |
| v.                        | : | No. 2787 C.D. 2010     |
|                           | : | SUBMITTED: May 6, 2011 |
| Unemployment Compensation | : |                        |
| Board of Review,          | : |                        |
| Respondent                | : |                        |

**BEFORE:**   **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge  
              **HONORABLE P. KEVIN BROBSON**, Judge  
              **HONORABLE ROCHELLE S. FRIEDMAN**, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY**  
**PRESIDENT JUDGE LEADBETTER**                      **FILED: July 13, 2011**

Michele Valeriano (Claimant) petitions *pro se* for review of the order of the Unemployment Compensation Board of Review (Board) that denied her unemployment compensation benefits 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).<sup>1</sup> Claimant challenges the Board's conclusions that she failed to establish a necessitous and compelling reason to quit her job and failed to make a reasonable effort to preserve her employment, rendering her ineligible for benefits under Section 402(b) of the Law. We reverse.

Claimant was employed by the Muhlenberg School District

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<sup>1</sup> Section 402(b) of the Law provides in pertinent part that an employee 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 ...."

(Employer) as a full-time custodian from August 15, 2008 until she resigned effective May 1, 2010. The Allentown UC Service Center determined that she was ineligible for unemployment benefits under Section 402(b) of the Law for the week ending May 15, 2010. Claimant appealed, and the referee held a hearing. The relevant facts, as found by the referee and the Board, and the undisputed evidence in the record reveal the following events leading to Claimant's separation from employment.

Claimant sustained an injury to her left leg at work on August 2009 and continued to work in a light-duty position. Claimant reinjured her left leg on February 23, 2010 and was advised by her physician, Dr. Joseph R. Hassan, to remain out of work until March 8, 2010. She informed Employer of her inability to perform her job duties and provided Employer supporting medical documentation. On March 5, Dr. Hassan again restricted her from returning to work until her follow-up appointment on April 6. Claimant then provided Employer medical documentation and sought workers' compensation benefits. The workers' compensation panel physician, Dr. Margaret Atwell, released Claimant to return to a sedentary position involving no lifting, pushing or pulling over 15 pounds and no repetitive bending, twisting, kneeling or squatting. Exhibit C-1; Certified Record (C.R.), Item No. 17. On March 11, Employer's insurance carrier issued a denial of Claimant's workers' compensation claim. Exhibit C-3; C.R., Item No. 17.

In a letter dated April 6, 2010 and sent to the School District's superintendent, Claimant requested "emergency disability leave ... due to the injuries [she had] sustained and the inability to perform [her] current duties." Exhibit E-1; C.R., Item No. 12. On April 28, 2010, she resigned, stating that she

would "no longer be able to complete [her] custodial duties as the expectations of the school ha[d] over taken [her] physical abilities." C.R., Item No. 3.

At the hearing, Claimant submitted a copy of page 1 of "Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)," which contained Sections I, II and III completed by Employer, Claimant and Dr. Hassan, respectively. Claimant also submitted a fax cover sheet, indicating that the copy was faxed to Kelly Bright in Employer's administration office on April 6, 2010. Exhibit C-4 and C-5; C.R., Item No. 12. Claimant testified that her duties increased over time after her return to the light-duty position following the August 2009 initial work injury and that she was still able to work in a sedentary position and applied for a teacher's assistant position with Employer. She further testified that Employer did not respond to her April 6 leave request under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 - 2654, and that she resigned because she "did not wish to be injured any further," which would render her "unemployable." Notes of Testimony (N.T.) at 8.

Employer's department manager, Gregory Schneider, described Claimant's testimony as "pretty much accurate" and testified that Employer does not provide short-term disability leave to its employees and that her absence following her reinjury "was not excused time away from work." N.T. at 12 and 14.

The referee found that Claimant completed an application for FMLA leave, although Employer had no record of receiving the application. The referee further found that she resigned from her position due to a health reason after she received no response to her FMLA leave application from Employer and that she was available for suitable work within her medical restrictions and able to perform such work as of May 9, 2010. The referee granted her benefits under Section

402(b) and Section 401(d)(1) of the Law, 43 P.S. § 801(d)(1), which requires an employee to be "able to work and available for suitable work" to be eligible for unemployment benefits.<sup>2</sup>

On appeal, the Board adopted most of the referee's findings. The Board found that Claimant provided Employer medical documentation to support her inability to work and that "[o]n April 6, 2010, the claimant advised the employer that she was still unable to return to work and requested emergency disability leave." Board's Findings of Fact Nos. 7 and 9. The Board further found that "[t]here was some confusion over the next three weeks concerning the status of the claimant's request for leave and whether the claimant had completed the proper forms" and that "[t]he claimant, however, was never told that her job was in jeopardy." *Id.* at 10 and 11. The Board additionally found that "[o]n April 28, 2010, the claimant voluntarily quit her position citing her inability to perform her duties because of her medical problems," that continuing work was available, and that she was "able and available for sedentary work during the weeks at issue." *Id.* at Nos. 12 - 14.

The Board concluded that Claimant did not have a necessitous and compelling reason to quit her position. The Board stated:

There clearly was some confusion about the status of the claimant's leave request. The claimant, who was never told that her job was in jeopardy simply quit ..., rather than resolve the issue. The claimant has not shown that it would have been futile to do so. Thus, she did not make a good faith effort to maintain the employment

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<sup>2</sup> The Law is not intended to provide health and disability benefits for an ill employee who is not physically able and available to participate in the work force. *Genetin v. Unemployment Comp. Bd. of Review*, 499 Pa. 125, 451 A.2d 1353 (1982). To be eligible for benefits, therefore, an employee must demonstrate that he or she is available and able to perform suitable work.

relationship.

Board's Decision at 2-3. The Board determined that Claimant was eligible for benefits under Section 401(d)(1) but ineligible for benefits under Section 402(b) of the Law. The Board subsequently reinstated its decision after reconsideration at Claimant's request. Claimant's appeal to this Court followed.

Claimant argues that the Board's conclusion that she did not have a necessitous and compelling reason to terminate her employment is not supported by the record. She maintains that she acted in good faith to preserve her employment by applying for an alternative sedentary position and requesting FMLA leave three weeks before she resigned. The Board counters that its findings are supported by the record and that Claimant is ineligible for benefits because she resigned without inquiring about the status of her request for FMLA leave when her job was not in jeopardy.

To be eligible for benefits under Section 402(b) of the Law, a claimant must prove that the separation from employment was for a necessitous and compelling reason. To meet that burden, the claimant must demonstrate circumstances which placed a real and substantial pressure upon him or her to terminate employment that would compel a reasonable person to act in the same manner. *Smithley v. Unemployment Comp. Bd. of Review*, 8 A.3d 1027 (Pa. Cmwlth. 2010). In addition, the claimant must demonstrate that he or she acted with ordinary common sense and made a reasonable effort to preserve employment but had no real choice other than to leave employment. *W. & S. Life Ins. Co. v. Unemployment Comp. Bd. of Review*, 913 A.2d 331 (Pa. Cmwlth. 2006). Whether the claimant's termination of employment was for a necessitous and compelling reason is a question of law subject to this Court's plenary review. *Id.*

As the Board found, Claimant cited her inability to perform her job

duties due to health problems as a reason for her resignation. Health problems can constitute a necessitous and compelling reason to terminate employment. *Ridley Sch. Dist. v. Unemployment Comp. Bd. of Review*, 637 A.2d 749 (Pa. Cmwlth. 1994). To establish a necessitous and compelling health reason, the claimant must: (1) offer competent evidence of an adequate health reason justifying termination of employment; (2) have informed the employer of health problems; and (3) be able and available to perform work which is not inimical to his or her health, if a reasonable accommodation is made by the employer. *Id.*

After careful review of the record, we conclude that Claimant had a necessitous and compelling health reason to leave her employment. Her physician, Dr. Hassan, directed her to stay out of work through April 6 after she reinjured her left leg on February 24, 2010, while working on a light-duty position. Board's Findings of Fact Nos. 4 and 6. Claimant informed Employer of her inability to return to work and provided Dr. Hassan's notes and other supporting medical documentation in February and March 2010. *Id.* at Nos. 5 and 7; Exhibits C-1 and C-2. She was able and available to perform sedentary work within her physical restrictions, as indicated by Dr. Atwell. *Id.* at 14; Exhibit C-1; C.R., Item No. 17. She resigned after Employer denied her workers' compensation claim and did not respond for three weeks to her request for disability leave. *Id.* at 8 and 10. These facts found by the Board are sufficient to establish a necessitous and compelling health reason for terminating her employment under *Ridley Sch. Dist.*<sup>3</sup>

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<sup>3</sup> Because Claimant terminated her employment due to a necessitous and compelling health reason, not to avoid an imminent discharge, the Board's finding that Employer did not tell her that her job was in jeopardy is irrelevant to her eligibility for benefits under Section 402(b) of the Law. *Compare Pa. Liquor Control Bd. v. Unemployment Comp. Bd. of Review*, 648 A.2d 124 (Pa. Cmwlth. 1994) (the Court concluded that the claimant's separation from employment was a **(Footnote continued on next page...)**)

The record also establishes that Claimant made a reasonable effort to preserve her employment. In *Genetin v. Unemployment Compensation Board of Review*, 499 Pa. 125, 130-31, 451 A.2d 1353, 1356 (1982), the Pennsylvania Supreme Court held:

Where an employee because of a physical condition, can no longer perform his regular duties, he must be available for suitable work, consistent with the medical condition, to remain eligible for benefits. However, once he has communicated his medical problem to the employer and explained his inability to perform the regularly assigned duties, an employee can do no more. The availability of a position, the duties expected to be performed by one serving in that capacity, and the desirability of that individual for service in that capacity are managerial judgments over which the employee has no control. As long as the employee is available where a reasonable accommodation is made by the employer, that is not inimical to the health of the employee, the employee has demonstrated the good faith effort to maintain the employment relationship required under the Act. ... To insist upon the employee's initiating the quest for an alternative position, would require a meaningless ritual that does not further the objectives of the Act.

In this matter, Employer was aware of Claimant's health problems. Claimant was available and able to perform suitable work within her physical restrictions, as the Board found. Employer did not dispute that Claimant inquired about alternative positions and applied for a teacher's assistant position. Employer, however, did not offer her any suitable work<sup>4</sup> and did not even respond to her April

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**(continued...)**

discharge for willful misconduct, not a voluntary quit, because she resigned in order to avoid an imminent discharge for a disciplinary reason).

<sup>4</sup> On this point, it may be noted that on the Employer's Questionnaire, Employer checked the box to indicate that there was no continuing work available within Claimant's limitations.

6 letter requesting disability leave before she resigned on April 28, 2010.<sup>5</sup> Claimant's undisputed testimony shows that she visited the Administration office several times and provided all the requested documentation. She testified: "I kept asking [Kelly Bright in the Administrative Office][,] Is there anything else you need? Is there anything else you need? And the answer was no." N.T. at 20.

Because the Board's findings and the undisputed evidence in the record demonstrate that Claimant had a necessitous and compelling reason to terminate her employment and made a reasonable effort to preserve her employment, the Board's order is reversed.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge

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<sup>5</sup> Under the FMLA, "[w]hen an employee requests FMLA leave, *or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason*, the employer must notify the employee of the employee's eligibility to take FMLA leave *within five business days*, absent extenuating circumstances." 29 C.F.R. § 825.300(b)(1) (emphasis added). Moreover, this Court stated in *Hinds v. Unemployment Compensation Board of Review*, 474 A.2d 422, 424 n.4 (Pa. Cmwlth. 1984), an employee "is not required to request either a medical leave of absence or a change in [his or] her work assignment to prove a necessitous and compelling reason for ... terminating [his or] her job." Therefore, even if Claimant did not submit a properly completed application for FMLA leave to Employer or did not inquire about the status of her application before she resigned, she cannot be denied benefits on that basis.



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| Unemployment Compensation | : |                    |
| Board of Review,          | : |                    |
|                           | : |                    |
| Respondent                | : |                    |

**ORDER**

AND NOW, this 13<sup>th</sup> day of July 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is REVERSED.

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**BONNIE BRIGANCE LEADBETTER,**  
President Judge