

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan J. Kristoff,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1124 C.D. 2012
	:	SUBMITTED: October 26, 2012
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

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

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: January 23, 2013

Susan J. Kristoff (Claimant)¹ petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed the Referee’s denial of benefits under Section 402(b) of the Unemployment Compensation Law (Law),² and determination that Claimant received a fault overpayment in the amount of \$11,295 under Section 4005 of the

¹ Claimant appeared *pro se* at the hearing, but was represented by counsel for her appeal.

² Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

Emergency Unemployment Compensation Act of 2008 (EUC Act),³ beginning with the compensable week ending May 28, 2011. After review, we affirm.

The facts, as found by the Referee and adopted by the Board, are as follows:

1. The claimant was last employed as a nurse with Assisted Living Concepts at a rate of \$8.25 per hour from May 26, 2011 through May 27, 2011, her last day of work.
2. The claimant only worked two shifts of work for this employer.
3. After working these two shifts the claimant informed the employer that she was voluntarily terminating her employment because she had issues with respect to the care of residents at her work location.
4. The claimant did not raise any issues or concerns with the employer prior to the voluntary termination of her employment.
5. At the time the claimant filed claims for benefits she told the Service Center that she had become unemployed because her assignment was temporary and that she had in essence been laid off due to a lack of work.
6. Continuing work was available to the claimant subsequent to May 27, 2011 had the claimant not voluntarily terminated her employment.
7. The claimant was paid benefits in the amount of \$11,295 during claim weeks ending May 28, 2011 through February 18, 2012.

Referee's Decision, March 23, 2012, Findings of Fact Nos. 1-7 at 1. The Referee determined that Claimant failed to provide sufficient evidence to show that the concerns she had with her work rose to the level of necessitous and compelling

³ Title IV of the Supplemental Appropriations Act of 2008, Act of June 30, 2008, P.L. 110-252, *as amended*, Section 4005, 26 U.S.C. § 3304 Note.

reasons which left her with no alternative but to voluntarily terminate her employment. The Referee determined that Claimant was ineligible for benefits under Section 402(b) of the Law. The Referee further concluded that Claimant was subject to a fraud overpayment of EUC benefits because she voluntarily left her employment and admitted at the hearing that continuing work was available to her thereafter, yet she reported to the UC Service Center that she was hired only for a temporary assignment and became unemployed due to lack of work. The Board adopted the Referee's findings and conclusions and affirmed. This appeal followed.

Claimant raises two issues on appeal; 1) whether she had necessitous and compelling reason to quit her employment; and 2) whether the Board's failure to make a finding as to Claimant's state of mind requires a reversal of the finding of a fault overpayment.

With respect to her first issue, Claimant argues that she accepted the position with Employer to be a "med nurse" and that nothing in her interview led her to believe she was required to perform cleaning duties. Claimant asserts that because she spent most of her time cleaning, it left her no time to "make rounds and check the patients." March 22, 2012 Hearing, Notes of Testimony (N.T.) at 4. Claimant argues that this "lack of time did not permit her adequate time to perform the necessary functions of her job . . . [which] could have placed her [nursing] license at issue." Claimant's Brief, at 12. Claimant also argues that the conditions at the work place were "deplorable." *Id.* Claimant contends that she made a reasonable effort to preserve the employment relationship by telling Employer: "[T]here was things that I just didn't feel was right ... your residents aren't being checked, these family members – people there, you know, and things. I just didn't

feel it was right.” N.T. at 6. Contending that, “she could not risk her nursing license” and that “[n]othing ... she could have said would have remedied the situation,” Claimant argues she had necessitous and compelling reasons to quit her employment. Claimant’s Brief at 12.

A voluntary quit is not an absolute bar to benefits where a claimant can establish necessary and compelling reasons for leaving employment. *Monaco v. Unemployment Comp. Bd. of Review*, 523 Pa. 41, 47, 565 A.2d 127, 130 (1989). An employee who claims to have left his or her employment for a necessitous and compelling reason 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; (3) he or she acted with ordinary common sense; and (4) he or she made a reasonable effort to preserve her employment. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657, 661 (Pa. Cmwlth. 2006). However, “[m]ere dissatisfaction with one’s working conditions does not constitute cause of a necessitous and compelling nature for terminating one’s employment.” *Id.* (citation omitted).

Claimant asserts that she was compelled to terminate her employment because she was required to perform onerous housekeeping duties that prevented her from performing her nursing duties, that the residents were not being properly cared for, and that the conditions at the workplace were so “deplorable” she feared losing her nursing license. However, in documents submitted to the unemployment compensation authorities, Claimant stated that, “I did not quit. I was told by the person I was to replace that she was not quitting.” Claimant Questionnaire; Certified Record (C.R.), Item 3. When questioned by the Referee

about whether she told the UC Service Center about Employer's unilateral changes in her job duties and the conditions and lack of care of the residents as reasons for leaving her employment, Claimant testified that "I didn't - - I just told them that, you know, that other girl wasn't leaving and she told me that that night." N.T. at 6. Under further questioning by the Referee as to why she only told the UC Service Center that the person she was hired to replace was not leaving, Claimant explained that she did not know if it was "common knowledge" that the other employee had changed her mind. *Id.*

Finally, while Claimant testified that she was not hired by Employer to perform housekeeping duties and that these duties were so "onerous" they prevented her from performing her nursing duties and potentially placed her at risk of losing her nursing license, it is clear that the Referee chose not to credit this testimony. Indeed, the Board adopted the Referee's findings that Claimant "simply came to several conclusions regarding her work circumstance at that time and informed the employer that she was voluntarily terminating her employment." Referee's Decision, at 2.⁴ As the ultimate fact-finder, the Board is empowered to make credibility determinations and may accept or reject the testimony of any witness in whole or in part. *McCarthy v. Unemployment Comp. Bd. of Review*, 829 A.2d 1266 (Pa. Cmwlth. 2003). We agree with the Referee that Claimant's "blanket allegation that the employer was not properly caring for residents" and her "dissatisfaction with cleaning duties" failed to meet the burden of establishing a necessitous and compelling reason to voluntarily terminate her employment. *See*

⁴ Claimant also testified that the job description in the newspaper listed "light housekeeping" as part of her duties; that she did not raise her concerns with Employer before she quit because she "didn't want to make a big issue out of it," and that if she hadn't called to tell Employer she was quitting, she could have continued to work. N.T. at 3, 5, and 7.

Brunswick Hotel. We conclude that Claimant failed to prove that she had cause of a necessitous and compelling reason to voluntarily terminate her employment and, therefore, was ineligible for benefits under Section 402(b) of the Law.

Next, Claimant argues that she should not be subject to a fraud overpayment because the Board failed to make any findings with respect to her state of mind and therefore did not meet the burden of proving that she intentionally and improperly made misleading statements to the unemployment compensation authorities, citing *Chisko v. Unemployment Compensation Board of Review*, 934 A.2d 172 (Pa. Cmwlth. 2007). In her petition for appeal from the overpayment of benefits determination, Claimant stated: “I was directed by Valerie Korzi, Human Resources, Memorial Medical Center [and] also by Heidi Garland, Director of Case Management that my position (Full time) was reclassified to part time. I was directed . . . to call and sign up for unemployment.” C.R., Item 6. In her brief, Claimant explains that these statements referred to her position as a nurse with a previous employer, Conemaugh Memorial Medical Center, who had reclassified her position from full-time to part-time and told her she could still qualify for unemployment benefits. According to Claimant, somehow this statement was inadvertently given as the reason she left employment with Employer. Claimant contends that “many of her statements to the Service Center were indistinguishable as to each employer” and were used by the Referee to find that she intentionally misled the unemployment compensation authorities. Claimant’s Brief at 15. For example, Claimant asserts that she did not tell the UC Service Center that her position with Employer was only temporary and had been completed. Claimant maintains that the Board did not clarify these alleged inaccurate statements nor did it elicit testimony regarding her state of mind.

Claimant submits that the reason she left her job with Employer was due to the deplorable conditions of the center and the onerous housekeeping duties, which were a “substantial change” from the duties she was initially hired to perform. She claims that because she did not intentionally mislead the unemployment compensation authorities, and there were no findings as to her state of mind, the fraud overpayment must be reversed.

In the Notice of Determination of Overpayment of Benefits, Claimant was found to have received a total of \$11,295 in benefits under the EUC Act “to which [she] was not entitled because [she] failed to report that [she] had voluntarily quit [her] job.” C.R., Item 5 at 3. Claimant had ample opportunity to explain why she gave various reasons for voluntarily leaving her employment to the UC Center and Employer in order to clarify any alleged confusion she may have “inadvertently” created. The fact remains that once again, the Referee (and ultimately, the Board) did not believe Claimant’s testimony and determined that she had voluntarily terminated her employment, “yet characterized her separation as a layoff.” Referee’s Decision at 3. The Board clearly considered Claimant’s state of mind and found that she knowingly misrepresented the reasons for her separation from employment. Thus, the evidence in the record, accepted by the Board, supports the Board’s determination that Claimant intentionally misled the unemployment compensation authorities and was subject to a fraud overpayment. Accordingly, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
Judge

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Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 23rd day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge