IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Toni M. Cavaliere,	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1240 C.D. 2012
Respondent	:	Submitted: November 30, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: January 4, 2013

Toni M. Cavaliere (Claimant) challenges the reversal by the Unemployment Compensation Board of Review (Board) of the referee's grant of benefits and the Board's determination that Claimant was ineligible to receive unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law).[1]

The facts, as found by the Board, are as follows:

> 1. Metrocorp employed the claimant from July 6, 2010, through December 8, 2011, finally as a full-time director of marketing earning $78,000.00 per year.
>
> 2. When the employer promoted the claimant to director of marketing, it informed the claimant that she may hire two individuals for her department.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e).

3. Although the claimant filled one vacant position, a hiring freeze prevented her from filling the other.

4. The claimant suffered emotional stress from fulfilling the obligations of two positions and from feeling humiliated by the employer's publisher and president at meetings with coworkers.

5. In July 2011, the claimant began seeing a psychologist to help cope with her work-related emotional stress, but never notified the employer of this treatment.

6. On September 22, 2011, the claimant met with the publisher and president and stated that she 'could no longer work under these circumstances' and would quit if she were not treated better.

7. In October 2011, the employer granted permission to claimant to fill the second vacant position, which the claimant did not fill until December 5, 2011.

8. From December 5 through December 8, 2011, the claimant worked from home because she suffered panic attacks, but never notified the employer of the medical reason for working from home.

9. On December 7, 2011, the claimant's physician sent an e-mail to the employer's president notifying him that the claimant was under his care for emotional problems caused by her work environment and advising that she may not work until December 12, 2011, but failed to identify his name or practice.

10. On December 7, 2011, the employer's president responded to the claimant's physician, requesting that the physician call the president on December 8, 2011, to discuss the claimant.

11. The claimant quit by an e-mail from her counsel on December 12, 2011.

Board Opinion, June 11, 2012, (Opinion), Finding of Fact Nos. 1-11 at 1-2; Reproduced Record (R.R.) at R1a-R2a.

> The Board determined:
>
> Here, the claimant quit because of health problems. The claimant credibly testified that she suffered work-related emotional stress. However, the claimant failed to notify the employer of her health problems. The claimant notified the publisher and president that she was overwhelmed with work, but never that she was seeing a psychologist. The publisher and president accommodated the claimant by allowing her to hire another employee and reduce her workload, which the claimant did. However, the new hire did not start until December 5, 2011, while the claimant worked from home, so the claimant never worked with this new hire to see if the additional assistance adequately reduced her work-related emotional stress. Additionally, while the claimant worked from home from December 5 through 8, 2011, she never informed the employer that it was because of her health problems or that she had recently begun to see her physician. Finally, to the extent that the claimant's physician's e-mail to the employer's president operated as a notification that she was under his care, it should not have been excluded as hearsay. Although the physician notified the president that the claimant was under his care, the physician provided inadequate information to allow the president to trust the veracity of the e-mail and failed to further contact the president until December 12, 2011, after the claimant quit. Because the claimant never worked with her new hire to determine whether that accommodation reduced her work-related emotional stress and because the claimant failed to adequately notify the employer that she suffered a medical problem allowing further accommodation, she failed to establish a necessitous and compelling reason to quit. Therefore, unemployment compensation must be denied.

Opinion at 2-3; R.R. at R2a-R3a.

Claimant contends that the Board erred as a matter of law when it held that she was ineligible for benefits because she quit her job without notifying Metrocorp (Employer) of her health problems. Claimant also challenges the Board's finding that she was ineligible for unemployment compensation benefits because she failed to pursue reasonable accommodations by Employer for her medical condition.[2]

Whether a termination of employment is voluntary is a question of law subject to this Court's review. The failure of an employee to take all reasonable steps to preserve employment results in a voluntary termination. Westwood v. Unemployment Compensation Board of Review, 532 A.2d 1281 (Pa. Cmwlth. 1987). An employee voluntarily terminating employment has the burden of proving that such termination was necessitous and compelling. The question of whether a claimant has a necessitous and compelling reason to terminate employment is a question of law reviewable by this Court. Willet v. Unemployment Compensation Board of Review, 429 A.2d 1282 (Pa. Cmwlth. 1981). Good cause for voluntarily leaving one's employment 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. Philadelphia Parking Authority v.

[2] This Court's review in an unemployment compensation case is limited to a determination of whether constitutional rights were violated, errors of law were committed, or essential findings of fact were not supported by substantial evidence. Lee Hospital v. Unemployment Compensation Board of Review, 637 A.2d 695 (Pa. Cmwlth. 1994).

Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1995). Mere dissatisfaction with one's working conditions is not a necessitous and compelling reason for terminating one's employment. McKeown v. Unemployment Compensation Board of Review, 442 A.2d 1257 (Pa. Cmwlth. 1982).

For an employee's health to be considered a bona fide reason to quit employment, a claimant must (1) provide competent testimony that adequate health reasons exist to justify the voluntary quit, (2) have informed the employer of the health problems, and (3) be available to work if reasonable accommodations are possible. A claimant who quits for health reasons must communicate the health problems to the employer so that the employer may attempt to accommodate the problem. Lee Hospital, 637 A.2d at 698-699.

> 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 an employment position, the duties expected to be performed by one serving 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 inimicable to the health of the employee, the employee has demonstrated the good faith effort to maintain the employment relationship required under the Act [Law].

Genetin v. Unemployment Compensation Board of Review, 499 Pa. 125, 130-131, 451 A.2d 1353, 1356 (1982).

Initially, Claimant contends that the Board erred as a matter of law when it held that she failed to properly notify her employer of her health problems before quitting her job.

Claimant testified before the referee that she was subjected to "ridicule, humiliation, belittling" at Employer's weekly sales meetings. Notes of Testimony, February 27, 2012, (N.T.) at 9; R.R. at R18a. She explained what occurred at the meetings:

> As soon I began speaking both Ms. Conicella [Employer's publisher] and Mr. Lipson [Employer's president] would jump in, fire questions at me in an interrogating manner, make statements that nothing was getting done in the marketing department, they were frustrated with our performance, they made accusations that things – projects were late, that projects were not done properly in some instances. My decisions made the magazine look stupid. It got to me to the point that it seemed as though that they waited each week to find something negative with the way that I was running the department, the way that I was doing things to publicly humiliate me and I say this because not once did I ever have a meeting for them to tell me what I was doing wrong or that I was doing a poor job.

N.T. at 9; R.R. at R18a.

Claimant communicated her emotional distress to Employer in a meeting on September 22, 2011. Employer attempted to accommodate her by funding another position.[3]

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[3] When Claimant was promoted to director of marketing, she was informed that she could hire two individuals for her department. One person was hired, but Employer instituted a hiring freeze that prevented her from filling the other position. After the September 22, 2011, **(Footnote continued on next page…)**

Claimant provided no other notification to Employer that she suffered any health problems. Claimant did not inform Employer that she was treating with a psychologist or that she worked at home from December 5, through December 8, 2011, because of health problems. Claimant's physician did email Employer on December 8, 2011, and stated, "Toni is under my care for emotional problems which have been caused by her work environment. I have advised her to not work starting immediately until Monday, December 12, when she will be reevaluated." Email from Mike, December 8, 2011, at 1. However, the physician did not identify himself by name or practice as the email only identified him by his first name. When Employer's president responded to the email and requested that he speak with the physician, the physician did not respond.

After Employer became aware of Claimant's problems in September, 2011, it authorized her to hire another person for her department. Employer was unaware until the time Claimant resigned that she had any health problems which would prevent her from performing her job. In fact, Marian Conicella (Conicella), Employer's publisher, testified that if Claimant had come to her with some medical documentation of her problems, Conicella "would have gone to the HR department with her so we could put it officially through the system the way it should be done." N.T. at 21; R.R. at R30a.

(continued…)

meeting, Employer authorized Claimant to fill the vacancy. The new employee did not start work with Employer until December 5, 2011. The record does not indicate why the employee did not start until that date.

Because Claimant failed to inform Employer of her continued health problems, Employer had no opportunity to make a reasonable accommodation in light of Claimant's medical condition. The Board did not err when it determined that Claimant failed to notify Employer of her health condition.

Claimant also asserts that Employer's accommodation to hire an additional worker in the marketing department did nothing to stop the hostility she experienced at the workplace. However, in Claimant's explanation of what took place at the weekly sales meetings, she did not comment on her allegations that Employer properly or improperly criticized her for incomplete, late, or uncompleted projects. Claimant's allegations only rise to the level of supervisory criticism which this Court has held does not constitute a necessitous and compelling reason for quitting a job. Krieger v. Unemployment Compensation Board of Review, 415 A.2d 160 (Pa. Cmwlth. 1980).

Claimant also contends that the Board erred as a matter of law when it found that Claimant failed to pursue reasonable accommodations with Employer. Claimant believed her return was not reasonable because she believed the ridicule and belittling would continue and any return would be futile. An employee does not have to pursue a reasonable accommodation with Employer if the effort would be futile, Beattie v. Unemployment Compensation Board of Review, 500 A.2d 496 (Pa. Cmwlth. 1985).

This Court does not agree that Claimant established that informing Employer of her situation would be futile. When Claimant confronted Employer in

September, Employer agreed to fill the single vacancy in the marketing department to reduce Claimant's workload.

Further, Claimant admitted that the ridicule was at least in part a result of the performance of her department. With an additional person, the department, theoretically at least, could accomplish more. That person did not yet start when Claimant stopped going to work, so the Board was unable to make any findings as to the effect of the hire. Clearly, though, because Employer hired another employee and would have been willing to go through the Human Resources Department, if Claimant had come to it with some sort of medical documentation, the record evidence does not support Claimant's contention that seeking a later accommodation from Employer would have been futile.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

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Toni M. Cavaliere, Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1240 C.D. 2012

O R D E R

AND NOW, this 4th day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge