

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Stephanie A. Lawson,	:
	:
Petitioner	:
	:
v.	: No. 1352 C.D. 2012
	: Submitted: November 21, 2012
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
 HONORABLE ROBERT SIMPSON, Judge
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: January 29, 2013

Stephanie A. Lawson (Claimant) petitions for review of the decision and order of the Unemployment Compensation Board of Review (Board), holding that she is ineligible for unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law¹ because she voluntarily quit her job without a necessitous and compelling reason. We affirm.

Claimant was employed full-time as an office manager by Main Line Healthcare (Employer) from 1996 until January 20, 2012, at an annual salary of

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, §402, *as amended*, 43 P.S. §802(b). Section 402(b) provides, in relevant part, 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” *Id.*

\$57,000. (Record Item (R. Item) 13, Referee’s Decision and Order, Findings of Fact (F.F.) ¶¶1, 2; R. Item 12, Referee’s Hearing Transcript (H.T.) at 4, 7.) Claimant was on a medical leave of absence from September 27, 2011 until January 9, 2012. (R. Item 13, F.F. ¶3; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 4-5.) This medical leave was initially for wrist surgery, but was extended for depression and anxiety. (R. Item 12, H.T. at 4-5.) Prior to her medical leave, Claimant had had “some issues” with her supervisor, and Claimant contended that Employer improperly contacted her doctors while she was on leave. (R. Item 12, H.T. at 4-5.)

Claimant’s physician in releasing her to return to work directed that Claimant work only a part-time schedule for the first two weeks. (R. Item 13, F.F. ¶4; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 5 & Claimant Ex. 1.) When Claimant advised Employer of this restriction, Employer told her that it did not know whether it could accommodate the part-time schedule. (R. Item 13, F.F. ¶4; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 5.) Employer also advised Claimant that it would be placing her on a performance improvement plan that could result in termination if the performance issues were not corrected. (R. Item 13, F.F. ¶5; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 5.)

On January 9, 2012, before resolution of Claimant’s part-time restriction, Employer offered Claimant a severance package under which she would continue to be paid and receive health insurance coverage for 18 weeks. (R. Item 13, F.F. ¶6; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 5.) Claimant “felt I needed to take” that severance package “given the circumstances plus I also have a young daughter that I am responsible for and I didn’t feel I was ready to go back, you know on an improvement plan based on the reasons for my

leave.” (R. Item 12, H.T. at 5.) On January 27, 2012, Claimant signed a Separation Agreement and Release of Liability (Separation Agreement) under which her employment terminated effective January 20, 2012. (R. Item 13, F.F. ¶8; R. Item 12, H.T. Claimant Ex. 2.) Under the Separation Agreement, Claimant received severance payments equal to her salary for 18 weeks after that date, a total of \$19,730.30, and continued to receive health insurance coverage from employer until May 31, 2012. (R. Item 13, F.F. ¶7; R. Item 12, H.T. at 6-7 & Claimant Ex. 2 at 1-2.) In exchange for these severance payments, Claimant released her claims against Employer for alleged violation of her rights in contacting her physicians during her medical leave and for any violation of state or federal anti-discrimination laws. (R. Item 12, H.T. Claimant Ex. 2 at 5-6.) In addition, Employer agreed in the Separation Agreement that it “will not contest a finding by the state that you are eligible for unemployment compensation benefits.” (R. Item 12, H.T. at 5 & Claimant Ex. 2 at 3.)

Claimant applied for benefits on January 22, 2012, stating that she had quit her job to accept an employer severance compensation incentive. (R. Item 2, Internet Initial Claims Application.) After the Unemployment Compensation Service Center denied Claimant’s application for benefits, Claimant appealed, and the Referee conducted a hearing at which Claimant, represented by counsel, testified. Employer did not appear at the Referee’s hearing. (R. Item 12, H.T. at 1.) On April 13, 2012, the Referee issued a decision affirming the Service Center’s determination and finding Claimant ineligible for benefits. The Referee found that Claimant had voluntarily resigned from her job in exchange for the severance payments and was not in imminent danger of being discharged, and concluded that

she had not shown a necessitous and compelling reason for terminating her employment. (R. Item 13, Referee’s Decision at 2 & F.F. ¶¶ 7-8.)

Claimant appealed the Referee’s decision to the Board. The Board adopted the Referee’s findings and conclusions and affirmed the Referee’s decision denying benefits. (R. Item 18, Board Decision and Order.) The Board also noted that Claimant had admitted in her unemployment compensation filing that she quit her job to accept the severance incentive “due to the mere ‘potential’ to be terminated.” (R. Item 18, Board Decision and Order.) Claimant filed the instant petition for review appealing the Board’s order to this Court.²

In this appeal, Claimant does not dispute that she voluntarily resigned her employment. (Petitioner’s Brief at 5, 7.) A claimant seeking benefits after voluntarily quitting her job has the burden to demonstrate that she had a necessitous and compelling reason for doing so. *Davila v. Unemployment Compensation Board of Review*, 926 A.2d 1287, 1289 (Pa. Cmwlth. 2007); *Nolan v. Unemployment Compensation Board of Review*, 797 A.2d 1042, 1046 (Pa. Cmwlth. 2002). To prove a necessitous and compelling reason for leaving employment, the claimant must show circumstances that produced real and substantial pressure to terminate employment and would compel a reasonable person to act in the same manner, and must also show that she acted with ordinary common sense and made a reasonable effort to preserve her employment. *Pennsylvania Gaming Control Board v. Unemployment Compensation Board of*

² Our scope of review is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; *Wright-Swygert v. Unemployment Compensation Board of Review*, 16 A.3d 1204, 1207 n.3 (Pa. Cmwlth. 2011); *Davila v. Unemployment Compensation Board of Review*, 926 A.2d 1287, 1289 n.3 (Pa. Cmwlth. 2007).

Review, 47 A.3d 1262, 1265 (Pa. Cmwlth. 2012); *Davila*, 926 A.2d at 1289 n.4. Whether or not a claimant had a necessitous and compelling reason for leaving employment is a question of law subject to this Court’s plenary review. *Davila*, 926 A.2d at 1289; *Nolan*, 797 A.2d at 1046.

Claimant’s resignation was part of a settlement of claims that she had against Employer concerning its handling of her medical condition and medical leave. (R. Item 12, H.T. Claimant Ex. 2 at 5-6; R. Item 2, Internet Initial Claims Application at 4.) That, however, does not make her resignation involuntary or constitute a necessitous and compelling reason for leaving employment. *Lee v. Unemployment Compensation Board of Review*, 33 A.3d 717, 721 (Pa. Cmwlth. 2011) (“when a claimant agrees to execute a resignation/release in order to settle a workers’ compensation claim, the claimant terminates her employment voluntarily without necessitous and compelling cause”); *see also Willis v. Unemployment Compensation Board of Review*, 500 A.2d 1293 (Pa. Cmwlth. 1985) (agreement to retire early as part of settlement of discrimination claim concerning discharge was voluntary termination without necessitous and compelling grounds); *White v. Unemployment Compensation Board of Review*, 387 A.2d 943, 945 (Pa. Cmwlth. 1978) (settlement of claim under which claimant received backpay in exchange for agreement not to seek reinstatement was voluntary termination of employment which disqualified claimant from receiving benefits).

Claimant argues that she had necessitous and compelling grounds to accept the Separation Agreement and leave her employment because she reasonably believed that she would be discharged by Employer following review under Employer’s performance improvement plan. (Petitioner’s Brief at 8-9.) Fear of discharge constitutes a necessitous and compelling reason to accept a

voluntary severance agreement where the claimant shows that her job was imminently threatened. *Wright-Swygert v. Unemployment Compensation Board of Review*, 16 A.3d 1204, 1207-08 (Pa. Cmwlth. 2011); *Johnson v. Unemployment Compensation Board of Review*, 869 A.2d 1095, 1103-04, 1113-14 (Pa. Cmwlth. 2005), *abrogated in part on other issue*, *Diehl v. Unemployment Compensation Board of Review*, ___ Pa. ___, __ A.3d ___, 51 MAP 2011, 2012 WL 6720878 (December 28, 2012); *Staub v. Unemployment Compensation Board of Review*, 673 A.2d 434, 437 (Pa. Cmwlth. 1996). However, the mere possibility of discharge and fear of discharge, without any showing that the claimant's employment is likely to be imminently terminated, do not constitute necessitous and compelling grounds for resigning in exchange for a severance package. *Johnson*, 869 A.2d at 1114; *PECO Energy Co. v. Unemployment Compensation Board of Review*, 682 A.2d 58, 61 (Pa. Cmwlth. 1996); *Staub*, 673 A.2d at 437. “[U]ncertainty and speculation about the future existence of a job does not create necessitous and compelling cause.” *PECO Energy Co.*, 682 A.2d at 61 (quoting *Department of the Navy v. Unemployment Compensation Board of Review*, 650 A.2d 1138 (Pa. Cmwlth. 1994)).

The Board found that Claimant had not shown that termination of her employment was imminent or was more than a mere possibility. (R. Item 18, Board Decision and Order; R. Item 13, Referee's Decision at 2.) This determination is amply supported by the record. Claimant admitted that she accepted the Separation Agreement because she was concerned about the “potential to be terminated” and a “possible discharge.” (R. Item 2, Internet Initial Claims Application at 3 (emphasis added); R. Item 3, Claimant Questionnaire at 1 (emphasis added).) In response to the question “Did your employer tell you that

you would be discharged if you did not resign?,” Claimant answered “No” and “Only as a possible issue to motivate me to take the severance [sic].” (R. Item 3, Claimant Questionnaire at 1.)

While Claimant was concerned that she would not satisfy the requirements of the performance improvement plan that Employer was imposing, she did not introduce any evidence as to what that plan involved or why she would be unable to meet its requirements. The only items in the record concerning whether the performance improvement plan would result in Claimant’s termination, statements that “it was going to be extremely hard for her to survive this performance improvement plan” and “a performance improvement plan under those circumstances is a -- it’s just leading up to the termination,” are Claimant’s attorney’s unsworn assertions, not evidence. (R. Item 12, H.T. at 6.) The fact that Claimant was under a disciplinary plan and believed that she could not meet Employer’s standards for continued employment was not sufficient without more to establish necessitous and compelling reasons for her resignation. *Johnson*, 869 A.2d at 1114 (employee who accepted severance package because she was on Step 3 of a five-step disciplinary plan for attendance violations and believed that her family health problems would cause continued attendance violations and discharge did not show necessitous and compelling cause where there was no evidence of imminent discharge); *PECO Energy Co.*, 682 A.2d at 62 (employee who accepted voluntary retirement package because she believed that she would lose her job as a result of inability to meet her employer’s performance standards did not show necessitous and compelling cause where no employer representative had told her she would lose her job); *Gackenbach v. Unemployment Compensation Board of Review*, 414 A.2d 770, 771 (Pa. Cmwlth. 1980) (resignation because of

“unsatisfactory” job performance rating was not for necessitous and compelling cause where there was no imminent threat of discharge).

Claimant also argues that Employer refused to accommodate her medical restrictions on her return to work. (Petitioner’s Brief at 8-9.) Medical problems can constitute a necessitous and compelling reason to leave employment. *Genetin v. Unemployment Compensation Board of Review*, 499 Pa. 125, 128, 451 A.2d 1353, 1355 (1982); *Johnson*, 869 A.2d at 1118; *Lee Hospital v. Unemployment Compensation Board of Review*, 637 A.2d 695, 698 (Pa. Cmwlth. 1994). Claimant, however, did not show and the Board did not find that Employer refused to accommodate her restrictions. Claimant showed only that Employer did not know whether it could provide her the temporary part-time schedule requested by her doctor. (R. Item 13, F.F. ¶4; R. Item 3, Claimant Questionnaire at 1; R. Item 12, H.T. at 5.) No attempt was made by Claimant to pursue this and determine whether she could temporarily work a part-time schedule because Claimant chose instead to accept the Separation Agreement before that issue was resolved. (R. Item 12, H.T. at 5.)

Furthermore, neither Employer’s agreement that it would not contest Claimant’s claim for unemployment benefits nor its failure to appear or introduce evidence at the Referee’s hearing (R. Item 12, H.T. at 1, 5 & Claimant Ex. 2 at 3) constitute grounds for reversing the Board’s decision. An employer’s agreement to not contest unemployment benefits does not make the claimant eligible for benefits. *DeFelice v. Unemployment Compensation Board of Review*, 649 A.2d 485, 487-88 (Pa. Cmwlth. 1994); *Turner v. Unemployment Compensation Board of Review*, 381 A.2d 223, 224 (Pa. Cmwlth. 1978). “It is for the referee and Board to determine a claimant’s eligibility for benefits in unemployment compensation

cases by determining the facts and applying the law. It is not for an employee and employer to determine eligibility for benefits by agreement.” *Turner*, 381 A.2d at 224. Because the burden of proving necessitous and compelling cause for leaving employment is on the claimant and not on the employer, the failure of the employer to put forth any evidence does not absolve a claimant who resigned in exchange for a severance package of her burden to show likely or imminent termination. *Johnson*, 869 A.2d at 1104-05.

For the foregoing reasons, we affirm the Board’s denial of benefits.

JAMES GARDNER COLINS, Senior Judge

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Board of Review,	:
	:
Respondent	:

ORDER

AND NOW, this 29th day of January, 2013, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

JAMES GARDNER COLINS, Senior Judge