

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Maritza Acevedo-Estes,	:
	:
Petitioner	:
	:
v.	: No. 563 C.D. 2013
	: Submitted: October 18, 2013
Unemployment Compensation	:
Board of Review,	:
	:
Respondent	:

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE P. KEVIN BROBSON, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: January 28, 2014**

Maritza Acevedo-Estes (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 Law<sup>1</sup> because she voluntarily quit her job without a necessitous and compelling reason. Concluding that the Board did not err, we affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, §402, *as amended*, 43 P.S. §802(b). Section 402(b) provides that a claimant is ineligible for compensation if her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. *Id.*

Claimant was employed full-time as a customer service representative by Care Plus Oxygen (Employer), from June 27, 2011 through October 24, 2012, and she worked from 8:30 AM to 5:00 PM, Monday through Friday. (Record Item (R. Item) 11, Referee's Decision and Order, Findings of Fact (F.F.) ¶¶1, 3; R. Item 10, Referee Hearing Transcript (H.T.) at 2-3.) Claimant applied for unemployment benefits on October 25, 2012, stating that she had been discharged for tardiness, and that the reason for her last incident of lateness was her condition of sleep apnea and inability to wake up on time. (R. Item 2, Internet Initial Claims Application.) The Unemployment Compensation Service Center denied Claimant's application for benefits, finding that Claimant voluntarily quit because she walked off the job after being told she had to be on time to work. (R. Item 5, Notice of Determination.)

Claimant appealed,<sup>2</sup> and the Referee conducted a hearing at which Claimant and Gail Petorak, Claimant's supervisor, testified. Claimant acknowledged that she was late for work once or twice a week; however, she indicated that she always provided doctors' notes to explain her lateness. (R. Item 10, H.T. at 3-4.) Claimant testified that on the day that she left her employment, she reported late for work, and was approached by Ms. Petorak, who had just returned from a week's vacation. Ms. Petorak told Claimant that she had heard

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<sup>2</sup> In her appeal from the Service Center's determination, Claimant stated that she was appealing because her supervisor was continuing to threaten her with termination of employment and write her up for lateness, even though she always gave the supervisor doctors' notes proving she had sleep apnea, insomnia, and depression, and indicated that the depression was caused by her hostile work environment. (R. Item 6, Claimant's Petition for Appeal from Notice of Determination.) Claimant stated further that various employees were cursing and using crude language, making fun of her religious beliefs, taking long lunches when the manager was not at work, and asking her to lie for them. (*Id.*)

that Claimant had been late for work all of the previous week. Claimant replied that she had only been late twice during the previous week, and she told Ms. Petorak that she was “getting tired of the threats” (of letting her go due to excessive lateness), that the threats made her nervous and upset, and that she was leaving because she could not believe that Ms. Petorak would take the word of another employee over her word. (R. Item 10, H.T. at 3, 5-6.) Claimant testified that she began to cry, she felt as though she was going to have a nervous breakdown, and she took her things and left. (R. Item 10, H.T. at 6.)

In response to questions from the referee, Claimant stated that she did not think it was wrong to be questioned about her tardiness, but that she had provided medical reasons for her lateness, and had no control over it. (R. Item 10, H.T. at 6-7.) Claimant stated that she had not asked for her job back, and was looking for work elsewhere. The referee questioned Claimant as to whether she had ever requested leave under the Family and Medical Leave Act; Claimant indicated that she had not done so because such leave was unpaid, and she had money problems. (R. Item 10, H.T. at 8.) The referee suggested to Claimant that a second-shift job might be better for her, and Claimant agreed, but stated that new medication she was taking was starting to help her condition. (R. Item 10, H.T. at 7-8.)

Ms. Petorak testified that it was not her intent to terminate Claimant’s employment on the day Claimant walked out, and she stated that she told Claimant “you were late today and, you know, you really need to come to work on time; the other co-workers are starting to say and talk about it and I just want you to know about that.” (R. Item 10, H.T. at 10.) Ms. Petorak testified that Claimant responded that she wanted to be treated fairly, and Ms. Petorak told Claimant it

was unfair to the other employees for her to be late so often; Ms. Petorak stated that Claimant then said she knew that Ms. Petorak was just doing her job, but Claimant went downstairs and started cleaning out her desk. (*Id.*) Ms. Petorak testified that she offered three times to take a walk with Claimant, to allow her to “vent,” and “say what she needed to do,” but that Claimant refused and walked out. (*Id.*) Ms. Petorak testified that she received a text from Claimant later that day indicating that Claimant was going to speak to Employer’s Regional Manager, to ask him to allow her to collect unemployment until she finds another job. (R. Item 10, H.T. at 11.)

Ms. Petorak testified that in July 2012, after another occasion when she had spoken to Claimant about being late, Claimant packed up her desk and said she was leaving; later that day, Claimant agreed to return, to talk with Ms. Petorak, and told Ms. Petorak that it was possible she had Multiple Sclerosis, but lacked the financial means to have an MRI. Ms. Petorak stated that she assured Claimant that Employer would give her time off to see doctors, and help her and work with her within Employer’s guidelines. (R. Item 10, H.T. at 13.) Ms. Petorak testified that Claimant decided at that time that she would continue working, and signed off on Employer’s attendance and punctuality policy. (*Id.*) Claimant declined the opportunity to ask questions of Ms. Petorak at the hearing.

On December 7, 2012, the Referee issued a decision affirming the Service Center’s determination and finding Claimant ineligible for benefits. The Referee found that Claimant had been verbally reprimanded multiple times regarding tardiness and had signed off on Employer’s tardiness policy, but that she had voluntarily quit because she felt she was being treated unfairly. (R. Item 11, F.F. ¶¶ 5-6.) The referee determined that Claimant did not show cause of a

necessitous and compelling nature for voluntarily separating from her employment when continuing work was available. (R. Item 11, Reasoning.) The referee noted that Claimant testified that her multiple incidents of tardiness were attributable to her sleep apnea, and stated that Claimant had acknowledged that she was aware that she could apply for Family and Medical Leave Act leave, but elected not to do so. (*Id.*)

Employer appealed the Referee's decision to the Board, alleging that her work environment was hostile, she was constantly threatened with being fired for tardiness, and she was subjected to constant harassment and discrimination because of her illness, despite the fact that she had made her supervisor aware of her sleep apnea, insomnia, and depression. (R. Item 12, Claimant's Petition for Appeal from Referee's Decision.)

The Board affirmed the referee's decision, adopting and incorporating her findings and conclusions. (R. Item 13, Board's Order.) Claimant, *pro se*, filed the instant petition for review appealing the Board's order.<sup>3</sup> Claimant's petition for review states that although her supervisor was aware of her medical condition of sleep apnea, anxiety, and depression, she continually threatened and harassed her, and states that she voluntarily terminated her employment to preserve her mental health, given the hostile work environment. (Petition for Review at 1, 3.)

In her brief in this Court, represented by counsel, Claimant argues, first, that she demonstrated a health problem sufficient to justify her voluntary

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<sup>3</sup> 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; *Pennsylvania Gaming Control Board v. Unemployment Compensation Board of Review*, 47 A.3d 1262, 1264 n.4 (Pa. Cmwlth. 2012); *Nolan v. Unemployment Compensation Board of Review*, 797 A.2d 1042, 1045 n.4 (Pa. Cmwlth. 2002).

termination. She states that she made Employer aware of this health problem, and was available to continue working, but Employer failed to propose a reasonable accommodation such as a later start time.

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. *Pennsylvania Gaming Control Board v. Unemployment Compensation Board of Review*, 47 A.3d 1262, 1265 (Pa. Cmwlth. 2012); *Nolan v. Unemployment Compensation Board of Review*, 797 A.2d 1042, 1046 (Pa. Cmwlth. 2002); 43 P.S. §802(b). A claimant must demonstrate that (i) circumstances existed which produced a real and substantial pressure to terminate employment; (ii) such circumstances would compel a reasonable person to act in the same manner; (iii) she acted with ordinary common sense; and (iv) she made a reasonable effort to preserve the employment. *Brunswick Hotel & Conference Center, LLC v. Unemployment Compensation Board of Review*, 906 A.2d 657, 660 (Pa. Cmwlth. 2006). 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. *Pennsylvania Gaming Control Board*, 47 A.3d at 1265; *Nolan*, 797 A.2d at 1046.

Health 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); *Lee Hospital v. Unemployment Compensation Board of Review*, 637 A.2d 695, 698 (Pa. Cmwlth. 1994). To establish health problems as a necessitous and compelling reason for leaving employment, the claimant must: (i) offer competent testimony that adequate health reasons existed to justify the voluntary termination; (ii) have adequately informed the employer of the health reasons for leaving employment; and (3) be available to

work if reasonable accommodations can be made. *Lee Hospital*, 637 A.2d at 698. Failure to meet any one of these requirements bars a claim for unemployment compensation. *Id.*

Here, Claimant did not show that she left her employment for medical reasons. The Board found that Claimant voluntarily quit her employment because she felt she was being treated unfairly. That finding is supported by the record. Claimant gave scant testimony concerning the nature or severity of her medical problems; she stated only that she had sleep apnea and insomnia, and these conditions were the cause of her lateness. However, she also stated that she left her employment not because of her medical problems but because she was tired of being threatened with dismissal due to excessive tardiness, and because she could not believe that Ms. Petorak would accept the word of another employee over Claimant's word on the subject of her tardiness. Claimant further testified that in fact, her alleged condition seemed to be improving as a result of medicine she was taking. (R. Item 10, H.T. at 8.) There was no evidence that Claimant was unable to continue her employment because of her sleep apnea and insomnia, other than Claimant's self-serving declaration.

Indeed, the record includes evidence that Claimant provided reasons for her tardiness that were unrelated to sleep apnea and insomnia; a series of emails from Ms. Petorak to another employee regarding Claimant recount various voice mail and text messages received by Employer from Claimant dating from July 2011, and continuing through October, 2012. These voice mail and text messages indicate variously that Claimant would be reporting to work late, or would not be reporting to work at all because: she had just awakened and was not feeling well; she was ill; she had car problems; she needed antibiotics; she had fallen at a

restaurant and injured herself and her physician had advised her not to go to work; and that she was too depressed to get out of bed, and “between not sleeping and personal issues” she just felt awful. (R. Item 9, Employer’s Request to Include Additional Information at the Hearing.) Claimant asserted that she always provided doctors’ notes excusing her lateness; however, there are no doctors’ notes or any other medical evidence in the record. Attached to Claimant’s Petition for Review is a prescription ordering a polysomnography, dated approximately five weeks prior to the day Claimant left her employment.

Moreover, even if Claimant had shown that her sleep apnea and insomnia prevented her from arriving at work on time, the evidence would still fail to support a finding of necessitous and compelling cause for terminating her employment. Here, Ms. Petorak offered, three times, to walk and talk with Claimant so that they could discuss her issues, but Claimant refused, packed up her things, and left work. Claimant never gave Employer an adequate opportunity to offer accommodations that could permit her to continue working, and made it clear that she was no longer available to work. Sufficient notice to the employer requires that the claimant inform the employer of the nature of the health problems prior to leaving employment so that the employer can attempt to accommodate the claimant’s health issues. *Bailey v. Unemployment Compensation Board of Review*, 653 A.2d 711, 713-14 (Pa. Cmwlth. 1995); *Lee Hospital*, 637 A.2d at 699; *Blackwell v. Unemployment Compensation Board of Review*, 555 A.2d 279, 281-82 & n.6 (Pa. Cmwlth. 1989).

Claimant also argues that the referee provided inadequate assistance to Claimant at the hearing, failing to develop the record as to whether Claimant had necessitous and compelling reason to leave her employment. After examining the



record, we conclude that Claimant received a proper hearing. Claimant acknowledged at the hearing that she understood her right to be represented by an attorney or duly authorized representative, to give testimony and evidence, and to question her supervisor. She was questioned repeatedly by the referee as to the circumstances of her voluntary termination. She offered no medical evidence, and she declined the opportunity to ask questions of Ms. Petorak. We have stated that a referee is under no obligation to advise a *pro se* claimant specific evidentiary questions or points of law. *Rohrbach v. Unemployment Compensation Board of Review*, 450 A.2d 323, 324 (Pa. Cmwlth. 1982).

The Board properly concluded that Claimant left her employment due to dissatisfaction with job conditions, i.e., she did not feel it fair to be questioned about her twice-weekly tardiness. The Board is the ultimate fact finder and its findings of fact are binding on this Court where they are supported by substantial evidence, even if there is other contrary evidence. *Bruce v. Unemployment Compensation Board of Review*, 2 A.3d 667, 671-72 (Pa. Cmwlth. 2010). Claimant took no steps to preserve her employment and failed to meet her burden of demonstrating a necessitous and compelling cause to leave. This Court has determined that normal workplace strains and pressures such as dissatisfaction with working conditions, reprimands, personality conflicts, and resentment of supervisory criticism do not, absent unjust accusations, abusive conduct or profane language, constitute real and substantial pressure to terminate employment. *Ann Kearny Astolfi DMD PC v. Unemployment Compensation Board of Review*, 995 A.2d 1286 (Pa. Cmwlth. 2010).

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

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JAMES GARDNER COLINS, Senior Judge

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Board of Review,	:
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**ORDER**

AND NOW, this 28<sup>th</sup> day of January, 2014, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby AFFIRMED.

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JAMES GARDNER COLINS, Senior Judge