

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kathryn A. Lundberg,	:
Petitioner	:
v.	:
	No. 29 C.D. 2021
	SUBMITTED: September 20, 2021
Unemployment Compensation	:
Board of Review,	:
Respondent	:

BEFORE: HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE LEADBETTER**

FILED: October 14, 2021

Claimant, Kathryn A. Lundberg, petitions for review of the order of the Unemployment Compensation Board of Review (UCBR) affirming the order of the referee that determined that she is ineligible for benefits under Section 402(b) of the Unemployment Compensation Law (Law)¹ because she resigned from her job without a necessitous and compelling reason. We affirm.

The pertinent findings of fact are as follows. (Referee's Decision and Order, Findings of Fact Nos. 1-4.) Claimant worked for Employer, Lancaster General Hospital, as a registered nurse from May 20, 2019, through her last day of work on April 10, 2020. On April 7, 2020, Claimant became concerned due to the

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *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.*

presence of a positive COVID-19 patient near the recovery room, where she was then stationed. Claimant did not discuss her concerns with Employer and on April 10, 2020, notified her manager that she was quitting without providing a reason.

Claimant applied for unemployment compensation benefits but was found ineligible by the Pennsylvania Department of Labor & Industry under Section 402(b). Claimant filed a timely appeal, and a hearing was conducted before the referee at which Claimant appeared with counsel and testified.² Claimant's testimony lends additional color to the circumstances attendant to her decision to resign, but is consistent with the findings of the referee. The referee issued his decision in which he determined that Claimant had voluntarily left work without cause of a necessitous and compelling nature for so doing and, therefore, was ineligible for benefits. Claimant appealed the referee's order to the UCBR. The UCBR concluded that the referee's decision was proper under the Law, explaining: “[C]laimant admitted that she did not notify [E]mployer of her concerns before resigning and did not credibly establish that doing so would have been futile.” (UCBR Order of Dec. 23, 2020.) Thus, the UCBR adopted and incorporated the referee's findings of fact and conclusions of law and affirmed the referee's decision.

On appeal, Claimant argues that she had a necessitous and compelling reason for her voluntary resignation because working conditions at Employer during the outbreak of COVID-19 constituted a safety hazard. Claimant offers several contentions as to why she and others were at risk: her claimed comorbidity of asthma; the failure of Employer to enforce COVID-19 protocols; the lack of sufficient personal protective equipment (PPE), because of which Claimant used the same un-sanitized mask for “days on end”; the presence of COVID-19 positive

² Employer was notified of the hearing but did not appear.

patients near areas in which she worked; the failure of Employer to direct her to be tested when she had COVID-like symptoms; and the risk that her 66-year old father, whom she visited often, might contract the disease. (Claimant Br. at 12-13.)

To show a necessitous and compelling reason under Section 402(b) of the Law, a claimant must show 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) the claimant acted with ordinary common sense; and (4) the claimant made a reasonable effort to preserve her employment. *Solar Innovations, Inc. v. Unemployment Comp. Bd. of Rev.*, 38 A.3d 1051, 1056 (Pa. Cmwlth. 2012). Whether the reason for Claimant's concerns were inadequate safety measures by Employer or fears related to her and/or her father's health, or both, Claimant's burden to make a reasonable effort to preserve her employment required her to give notice to Employer as to her concerns and health conditions and allow Employer the opportunity to modify her work conditions. This is the case even where there is a real and serious safety concern, *see Iaconelli v. Unemployment Compensation Board of Review*, 423 A.2d 754, 756 (Pa. Cmwlth. 1980), or where a claimant has a medical condition which endangers her, *see St. Clair Hospital v. Unemployment Compensation Board of Review*, 154 A.3d 401 (Pa. Cmwlth. 2017). Once communicated, an employer must have a reasonable opportunity to make accommodations with respect to the work conditions and/or medical condition. *See Blackwell v. Unemployment Comp. Bd. of Rev.*, 555 A.2d 279, 281-82 & n.6 (Pa. Cmwlth. 1989).

Claimant's brief argues that she was "not in any position to inform management and seek alternative accommodations in her employment," because "there was no management available due to the constant COVID-19 meetings" and

“Claimant’s own direct report [sic] [was] unaware of a positive COVID-19 patient being directly next door to Claimant.” (Claimant Br. at 14.) Claimant states that a request for accommodation “simply could not have been made.” (*Id.*) However, these assertions do not fairly characterize Claimant’s testimony. At one point she was asked if she had an available manager with whom to discuss her concerns and she replied, “Not, not really. We did have a manager but she was busy almost the entire shift with meetings about COVID.” (Notes of Testimony at 9.) Nonetheless, she also testified about several conversations, one with the assistant manager and the nursing supervisor, as well as conversations with her manager, including the occasion when she quit but did not explain why. Claimant simply never testified that she believed it would have been futile to express her concerns or ask for an accommodation, let alone explain any reason for such a belief. Claimant’s failure to give Employer notice of her concerns or an explanation of her reasons for resigning at the time she did so negated any opportunity for Employer to ameliorate the situation.

While one can sympathize with Claimant’s fears in the face of the chaos attendant to the early stages of the COVID-19 pandemic, the law does not excuse her of the duty to inform Employer of her safety concerns and health problems and afford Employer the opportunity to mitigate and/or accommodate them. Therefore, we must affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita

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ORDER

AND NOW, this 14th day of October, 2021, the order of the Unemployment Compensation Board of Review is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge Emerita