

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 30, 2024

CV-23-0820

In the Matter of the Claim of
NICOLE L. SMITH,
Appellant.

ROSWELL PARK CANCER
INSTITUTE CORPORATION,
Respondent.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,
Respondent.

Calendar Date: April 30, 2024

Before: Clark, J.P., Aarons, Pritzker, Lynch and Ceresia, JJ.

Sanders & Sanders, Cheektowaga (*Harvey P. Sanders* of counsel), for appellant.

Letitia James, Attorney General, New York City (*Dennis A. Rambaud* of counsel),
for Commissioner of Labor, respondent.

Lynch, J.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed October 12, 2022, which ruled that claimant was disqualified from receiving unemployment insurance benefits because she voluntarily separated from employment without good cause.

Claimant, a medical records associate who worked in person for the employer, a comprehensive cancer care hospital, was advised by the employer in late August 2021

and again on September 13, 2021 that, to remain employed at its healthcare facility, she was required by mandate of the Department of Health to be vaccinated for COVID-19 by September 27, 2021 (*see* 10 NYCRR former 2.61 [c]). Although claimant's worksite was a building on the hospital campus that was separate from the main hospital, claimant came into regular contact with other hospital staff and patients. Claimant submitted to the employer a request for medical exemption from the vaccine mandate on October 3, 2021, signed by her treating medical doctor, which listed her diagnosis for psoriasis; the employer denied the medical exemption because the exemption form did not identify any contraindications or precautions that would have prevented claimant from receiving the vaccine. Claimant's subsequent request for a religious exemption from the vaccine mandate was provisionally approved, pending a legal determination, but was later denied in November 2021 based upon the absence of a religious exemption in the state mandate (*see* 10 NYCRR former 2.61 [c], [d]; *Matter of Parks [Commissioner of Labor]*, 219 AD3d 1099, 1100-1101 & n 1 [3d Dept 2023]). The employer extended the deadline to get the vaccine to December 6, 2021 and, on that day, claimant applied for an accommodation, requesting weekly COVID-19 testing in lieu of the vaccine; the employer denied that request on the ground that personnel working in a healthcare facility were required to be vaccinated under the state mandate unless granted a medical exemption, and she was suspended without pay on December 7, 2021. She subsequently filed a claim for unemployment insurance benefits.

The Department of Labor issued an initial determination finding that claimant was ineligible for unemployment insurance benefits and, after a hearing, an Administrative Law Judge (hereinafter ALJ) affirmed the denial of benefits, finding that claimant had voluntarily separated from her employment without good cause. The ALJ found that claimant had provoked her own discharge by refusing to comply with the vaccine mandate in the absence of a medical exemption. The Unemployment Insurance Appeal Board affirmed, adopting the ALJ's findings and conclusions,¹ prompting this appeal.

We affirm. "Whether a claimant has good cause to leave employment is a factual issue for the Board to resolve and its determination will be upheld if supported by substantial evidence" (*Matter of Antonaros [Commissioner of Labor]*, 223 AD3d 1077,

¹ During the hearing, the ALJ expanded the inquiry from misconduct, the basis for the initial determination, to voluntary separation, and afforded the parties additional time to address that issue. Given the finding that claimant had voluntarily separated from her employment without good cause, the ALJ and the Board did not address the issue of misconduct.

1077 [3d Dept 2024] [internal quotation marks and citations omitted]). "Provoked discharge is a narrowly drawn legal fiction designed to apply where an employee voluntarily engages in conduct which transgresses a legitimate known obligation and leaves the employer no choice but to discharge him or her," and whether an employee has provoked a discharge is also a factual issue for the Board (*Matter of Rosseychuk [City of New York-Commissioner of Labor]*, 137 AD3d 1435, 1436 [3d Dept 2016] [internal quotation marks, ellipsis, brackets and citations omitted]).

Contrary to claimant's argument, she did not demonstrate that the vaccine mandate did not apply to her. "Covered entities" under the mandate include hospitals and treatment centers (10 NYCRR former 2.61 [a] [1] [i]) and the mandate applied to all "[p]ersonnel," defined as "all persons employed . . . by a covered entity . . . including but not limited to employees . . . who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease" (10 NYCRR former 2.61 [a] [2]). The vaccine requirement was not limited to those performing patient care and claimant's own testimony established that she had daily contact with coworkers who would go into the main hospital building. The ALJ and the Board credited the testimony of the employer's manager of employee labor relations that claimant, while assigned to an outbuilding on the hospital campus, came into contact with patients, coworkers and visitors.

Moreover, it is undisputed that claimant was advised of the vaccine mandate and provided ample time in which to comply and that she was afforded an opportunity to apply for a medical exemption, the only exemption recognized by the mandate (*cf. Matter of Antonaros [Commissioner of Labor]*, 223 AD3d at 1078-1079). She was further provided a full opportunity on multiple hearing dates to submit documentation substantiating her claims that she had been advised not to get the vaccine or that the vaccine would be detrimental to her health based upon her preexisting health conditions or medications. Claimant testified that she declined to comply with the vaccine for medical reasons, citing her numerous medical conditions including psoriasis, infertility and a blood clot in her foot and medications she was taking including antibiotics and steroids, relying on articles, television and media reports and her own research. Although directly asked several times, claimant did not testify that she had been advised by a medical provider against the vaccine based upon her medical conditions, treatment or medications. The medical exemption form signed by claimant's treating physician merely listed her diagnosis of psoriasis, and did not advise against the vaccine or indicate that it was contraindicated for or would be detrimental to her medical conditions. As such, the record fully supports the ALJ's finding, adopted by the Board, that "claimant failed to

provide any documentation substantiating that she was advised by a doctor or medical professional to not get the COVID-19 vaccine." To the extent that claimant argues that, for medical reasons, she should have been granted an accommodation allowing weekly testing rather than the vaccine, this request was likewise not supported by credible medical documentation or testimony. Under these circumstances, substantial evidence supports the Board's conclusion that claimant provoked her discharge and, thereby, voluntarily left her employment without good cause and was disqualified from receiving unemployment insurance benefits (*see Matter of Parks [Commissioner of Labor]*, 219 AD3d at 1102; *see also Matter of Moquete [Commissioner of Labor]*, 224 AD3d 1074, 1075 [3d Dept 2024]).

Clark, J.P., Aarons, Pritzker and Ceresia, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court