

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

|                           |                                 |
|---------------------------|---------------------------------|
| Haydee Ferraro,           | :                               |
| Petitioner                | :                               |
|                           | :                               |
| v.                        | : No. 1136 C.D. 2010            |
|                           | : Submitted: September 17, 2010 |
| Unemployment Compensation | :                               |
| Board of Review,          | :                               |
| Respondent                | :                               |
|                           | :                               |

BEFORE: HONORABLE DAN PELLEGRINI, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE PELLEGRINI

FILED: October 19, 2010

Haydee Ferraro (Claimant) has filed a petition for review from an order of the Unemployment Compensation Board of Review (Board) affirming the decision of the Referee denying her unemployment compensation benefits because she voluntarily terminated her employment without cause of a necessitous and compelling nature pursuant to Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> For the reasons that follow, we affirm the Board.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, *as amended*, 43 P.S. §802(b). That section provides:

An employe shall be ineligible for compensation for any week –

(Footnote continued on next page...)

Claimant was employed by Independence Blue Cross (Employer) as a full-time senior claims processing analyst from April 1998 through her last day on October 30, 2009. Claimant voluntarily terminated her employment when Employer offered and Claimant accepted a voluntary early retirement package. Claimant filed for unemployment compensation benefits with the Allentown UC Service Center, which denied her claim finding that Claimant had knowledge that her job would not be affected if she did not accept Employer's plan to voluntarily terminate employment; continuing work was available to Claimant had she not accepted Employer's plan to voluntarily separate; the continuing work was suitable for Claimant based on her past work history and wages; and Employer offered a three-year enhancement to Claimant's pension to voluntarily separate from her employment. Because it was more reasonable for Claimant to continue working than to accept Employer's plan, Claimant did not show a necessitous and compelling reason for voluntarily separating from her employment. Claimant filed an appeal requesting a hearing before a Referee.

At the hearing, Employer did not appear. Claimant testified that she worked for Employer until October 30, 2009, when she and about 840 other employees were offered an early retirement package and were told that if they did not take the package, the next step was to be laid off without the incentive to the

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**(continued...)**

- (b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature irrespective of whether or not such work is in "employment" as defined in this act.

package which was to add three years of age to the calculation of their retirement benefits and three years to their service. Of the 840 employees offered the incentive package, 530 employees accepted. Regarding her department, there were 12 people in her unit when the package was offered and four people, including her, took the offer. She stated the employees were getting bombarded with emails stating that the company was in bad financial shape and that the employees were not going to have jobs. She stated that this was an involuntary termination and offered an email into evidence from Daniel Dougherty (Dougherty), Director of Human Resources, allegedly indicating the same. She further offered an internal email from Dougherty responding to another employee's question as to how unemployment applications were to be filled out relative to their pension to which he responded, "involuntary retirement." She believed that if she did not accept the incentive program, she would have been discharged because there was very little work available due to automation and outsourcing. If she had not accepted the incentive retirement program, continuing work would not have been available to her.

Claimant stated that she attempted to talk to her supervisor about the situation, but she just told her to attend the company meeting to get information. She attended the meeting at which time Employer told her and other employees that it was highly recommended that the employees take the package "because they were downsizing, they were in such bad financial shape...that they were going to continue downsizing until they felt they were at a good place and that the next step was going to be a layoff without the incentives." (March 15, 2010 Hearing

Transcript at 11-12.) She stated that after she left her job, no one was hired to fill her position.<sup>2</sup>

The Referee found that Employer presented 840 employees, including Claimant, with information regarding an early retirement package, and after Claimant received this information, she spoke with her supervisor who did not provide Claimant with specific information that her job would be eliminated if she chose not to accept the package. At the time Claimant was offered the early retirement package, 12 individuals worked in her unit of which four accepted the retirement package, including Claimant, leaving eight workers who continued working. The Referee determined that Claimant terminated her employment by accepting the voluntary early retirement package even though Employer did not inform Claimant that her specific position would be eliminated if she rejected the package. “Based on testimony presented at the hearing, the claimant was not told by her employer that her specific position would be eliminated effective a particular date. Absent such information, the claimant’s terminating her employment to accept a voluntary early retirement package does not constitute a necessitous and compelling reason to voluntary leave her work.” (Referee’s March 17, 2010 decision at 2.) The Referee then denied Claimant benefits under Section

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<sup>2</sup> Claimant offered into evidence a decision of a Referee for a co-worker, Kathleen Yamas (Yamas), who also accepted the package. The Referee found in favor of Yamas because she believed that her job would be affected by future layoffs and would result in her loss of health insurance. She also had a co-worker, Tina Ramadan (Ramadan), testify. Ramadan testified that she left her employment on October 3, 2009, under the same circumstances as Claimant, filed for unemployment, and was denied benefits by the UC Service Center. However, on appeal, the Referee reversed that decision, which was offered into evidence.

402(b) of the Law. Claimant appealed to the Board, which affirmed the Referee's decision. This appeal by Claimant followed.<sup>3</sup>

Claimant contends that the Referee used an incorrect standard in finding her ineligible for benefits when she required Claimant to show that her specific position would be eliminated before finding a necessitous and compelling reason for her voluntary termination. Rather, Claimant argues that the standard set forth in *Renda v. Unemployment Compensation Board of Review*, 837 A.2d 685 (Pa. Cmwlth. 2003),<sup>4</sup> is the standard which the Referee should have relied on, and the Referee should have determined whether continuing work was available, whether Claimant reasonably believed continuing work was available, and whether Claimant's fears about her job were well-founded.

In determining whether a necessitous and compelling cause exists in the context of corporate downsizing, this Court in *Renda* held that the relevant inquiry is “whether the fact-finder determined the circumstances surrounding a

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<sup>3</sup> Our scope of review of the Board's decision is limited to determining whether an error of law was committed, constitutional rights were violated or findings of fact were supported by substantial evidence. *Frazier v. Unemployment Compensation Board of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

<sup>4</sup> Claimant also relies on *Eby v. Unemployment Compensation Board of Review*, 629 A.2d 176 (Pa. Cmwlth. 1993), for the proposition that because no continuing work was available and she believed that her termination was imminent, her voluntary termination was for a necessitous and compelling reason. However, *Eby* is clearly distinguishable from this case because in *Eby*, the claimant received a letter stating that “she was in a group that has identified work to be eliminated” and based on that letter, she reasonably believed she would be laid off. That is not the case here.

claimant's voluntary quit indicated a likelihood that fear about the employee's employment would materialize, that serious impending threats to her job would be realized, and that her belief her job is imminently threatened is well-founded." *Id.*, 837 A.2d at 692. Citing *Staub v. Unemployment Compensation Board of Review*, 673 A.2d 434, 437 (Pa. Cmwlth. 1996), we went on to state:

"[S]peculation pertaining to an employer's financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause." *Staub*, 673 A.2d at 437.<sup>5</sup>

*[W]here at the time of retirement suitable continuing work is available, the employer states that a layoff is possible but not likely, and no other factors are*

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<sup>5</sup> We stated in *Renda*:

[T]his court denied benefits where a claimant's speculative concerns over future employment prompted her voluntary termination. *Mansberg v. UCBR*, 829 A.2d 1266 (Pa. Cmwlth. 2003) (claimant voluntarily quit despite employer's statement that lost jobs would be "filtered" to other sections of company); *PECO Energy Co. v. UCBR*, 682 A.2d 49 (Pa. Cmwlth. 1996) (claimant accepted early retirement package based on "postulations" of "what he felt could happen"); *Staub* (claimant accepted early retirement incentive based on his belief that employer's "poor financial condition" would result in layoff); *Dep't of Navy v. UCBR*, 650 A.2d 1138 (Pa. Cmwlth 1994) (claimant "believed" his job would be eliminated); *Peoples First Nat'l Bank v. UCBR*, 632 A.2d 1014 (Pa. Cmwlth. 1993) (employer indicated a layoff was "possible," but employer "didn't think so"); *Flannery v. UCBR*, 557 A.2d 52 (Pa. Cmwlth. 1989) (claimant accepted advanced retirement package based on his belief layoff was "inevitable," despite availability of continuing work).

*Renda*, 837 A.2d at 692. In both *Renda* and *Staub*, the Referees found that the employers made continuing work available to the claimants.

*found ... that remove an employee's beliefs from the realm of speculation, a claim for unemployment benefits fails despite the offer to leave.* (Emphasis added.)

*Id.*

As to whether continuing work was available for Claimant and whether Claimant believed continuing work was available, Employer was not at the hearing and Claimant alleged continuing work would not have been available to her. However, in *Johnson v. Unemployment Compensation Board of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005), this Court held that it is not the employer's burden to come forth with evidence regarding the continued availability of work. If the employer chooses to do so, it is a factor to be considered by the Board in determining whether the claimant's reason for terminating her employment was necessitous and compelling. However, if an employer chooses not to put forth evidence regarding continuing work, the claimant is not automatically granted unemployment compensation benefits because the burden still remains on the claimant to prove a necessitous and compelling reason for voluntarily terminating employment.

Here, even though Employer did not provide any evidence of continuing work, it was only one factor for the Referee to consider. In the Referee's reasoning, she specified that Employer never informed Claimant that her specific position would be eliminated if she rejected the package. Further, based on Claimant's testimony at the hearing, Claimant never testified that she was told by Employer that her specific position would be eliminated. In fact, Claimant

testified that eight of the 12 workers in Claimant's unit did not accept the package and continued working for Employer. Because there was no evidence presented that Claimant could rely upon that her specific job was going to be eliminated and her own testimony indicated that there was continuing work available for her, i.e., her own job, it was not reasonable for Claimant to believe that her job was going to be eliminated. Consequently, Claimant's argument is without merit.

As to Claimant's fears about the loss of her job, Claimant testified that Employer offered 840 employees the early retirement package of which 530 employees accepted. However, in her unit of 12 employees, only four employees, including herself, accepted. That meant that only one-third of her unit quit while the remainder, two-thirds, stayed employed. Also, while she stated that she was bombarded with emails regarding the dire situation of the company, she did not offer one of those emails into evidence. What Claimant did offer into evidence was a copy of the "Voluntary Early Retirement Program Frequently Asked Questions For Associates" which indicated that the package was voluntary, and if it was accepted by an employee by a certain date and the employee was terminated later, Employer's standard severance package would apply.<sup>6</sup> Because the Referee

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<sup>6</sup> Claimant's Exhibit #1 provided:

**9. If I don't take the Voluntary Early Retirement Program now and I am involuntarily terminated later, can I still get the Voluntary Early Retirement Program benefits?**

No, the Voluntary Early Retirement Program is only being offered for a specific period of time. If you do not elect to participate in the program during the window period and you are involuntarily terminated later, IBCs standard severance package would apply.

(Footnote continued on next page...)

did not find that Claimant provided any testimony or other evidence which indicated that she believed her job was going to be terminated, Claimant failed to prove that she was fearful of losing her job.

Accordingly, because Claimant failed to prove a necessitous and compelling reason to voluntarily terminate her employment, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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(continued...)

**11. What if I decide to participate in the Voluntary Early Retirement Program after the time period expires? Can I still elect to take it?**

No. If you fail to turn in your election by the date stated in the package, you will not be eligible to participate in the Voluntary Early Retirement Program.

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|                           | : |                    |

**ORDER**

AND NOW, this 19<sup>th</sup> day of October, 2010, the order of the Unemployment Compensation Board of Review, dated May 5, 2010, at No. B-499378, is affirmed.

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DAN PELLEGRINI, JUDGE