IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cheryl A. Stine, Petitioner	:	
	:	No. 1953 C.D. 2010
v.	:	
	:	Submitted: January 21, 2011
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: June 21, 2011

Cheryl A. Stine (Claimant) petitions for review of the August 24, 2010, order of the Unemployment Compensation Board of Review (Board), which affirmed a referee's determination that Claimant is ineligible for benefits pursuant to section 402(b) of the Unemployment Compensation Law (Law).[1] We reverse.

Claimant was employed by Verizon (Employer) as a storekeeper. (Finding of Fact No. 1.) On February 27, 2009, Employer announced a voluntary program known as the Income Security Plan (ISP), which provided that eligible employees would receive a lump sum payment in return for leaving their employment

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, as amended, 43 P.S. §802(b). Section 402(b) provides that an employee is ineligible for compensation for any week in which her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.

by March 27, 2009.[2] (Findings of Fact Nos. 2, 6–8.) The ISP was open to eight employees, including Claimant, based on union seniority; Claimant had the lowest seniority. (Finding of Fact No. 4.)

On February 27, 2009, Employer informed Claimant that her job was in a work group targeted for reduction, and Employer offered Claimant the opportunity to elect to leave by accepting the ISP. (Finding of Fact No. 9.) Although the ISP documents stated that the plan was voluntary, (Finding of Fact No. 10), Employer announced that, should the ISP fail to reach its target, an involuntary reduction in the workforce would result. (Finding of Fact No. 11.) Employer stated that acceptance of the ISP would be by order of seniority, (Finding of Fact No. 10), that two storekeeper positions were targeted and capped by Employer, and that the last date to accept the ISP was March 12, 2009. (Finding of Fact No. 13.) (Reproduced Record (R.R.) at 18a, 35a-37a.) Claimant elected to take the ISP on March 11, 2009, and she left her employment on March 27, 2009. (Finding of Fact No. 14.)

The local service center denied Claimant's application for benefits pursuant to section 402(b) of the Law. Claimant appealed, and a referee conducted a hearing on June 7, 2010. Claimant appeared and was represented by counsel; Employer did not appear.

Claimant testified that she had the least amount of seniority among the eight storekeepers and that her supervisor and union representative told her that she was going to be permanently laid off if no other storekeepers accepted the ISP. (R.R.

[2] The ISP would pay an employee $1,100 for each year of accredited service, up to a maximum of $33,000, as well as an expense allowance of $750 for each year of accredited service, up to a maximum of $3,750. (Findings of Fact Nos. 5, 6.)

at 36a-37a, 41a-42a.) Claimant testified that she was one of two storekeepers who took the ISP and that, if she had not taken the ISP, she would have lost her job:

> C. … [T]wo of us—me and Laurie Plonck (phonetic) took the packages.
>
> ….
>
> R. And the seniority list places you at …
>
> C. The bottom.
>
> R. The very bottom. I see. Okay. And, you, and you say Laurie.
>
> C. Plonck.
>
> R. That's one of the other people…
>
> C. Yes.
>
> R. …who took it?
>
> C. Laurie Plonck.
>
> R. Okay. And was [the ISP] only being offered to two storekeepers maximum?
>
> C. Yes.
>
> ….
>
> R. Now if you had not taken advantage of this plan, what would've happened …?
>
> C. I would've lost my job, permanently laid off.
>
> ….
>
> R. … [H]ow did you determine that you would be one of the people to go?

> C. Per my supervisor telling [me] that I was definitely going, because I was the last person. If nobody took the packages, me and Doug (phonetic) at that time; he would've got laid off too then.
>
> R. … [W]hy did you take the plan? What if two other people took the plan?
>
> C. If two other people had took [*sic*] the plan then I still would've been there.

(R.R. at 35a-37a.) In addition, Claimant submitted Exhibit 4, which contains a handwritten list of employees ranked in order of seniority, and which indicates that one other employee accepted the ISP. (R.R. at 18a.) Claimant testified that she wrote the seniority list, (R.R. at 36a), and she repeated that only she and another employee accepted the ISP. (R.R. at 40a-41a.)

After reviewing the record, the referee concluded that Claimant was ineligible for benefits pursuant to section 402(b) of the Law. In addition to the findings summarized above, the referee made these two findings:

> 15. Of the two designated surplus storekeeper positions targeted and capped by the Employer, Claimant's own 'seniority list' indicates two volunteers had already elected to take the Plan, both senior to Claimant.
>
> ….
>
> 19. Claimant's petition for appeal states, in relevant part, that 'I can take the package now or in two years receive a package for separation.'

(Findings of Fact Nos. 15, 19.) The referee reasoned as follows:

> …[T]he Referee finds that the Claimant voluntarily accepted the ISP Plan from the Employer. Although the Claimant alleges that she was least senior to the eight (8) eligibles, *of which two senior eligibles accepted the Plan*, the Claimant has not credibly testified that she would have been subject to discharge by the Employer or layoff by Employer if she had not accepted the Plan. The Claimant's own words on her petition for appeal indicates [*sic*] that Claimant could have waited another two years for the issuance of another separation plan by the Employer, which the Referee notes was voluntary in nature.[3] *The Claimant's own evidence, where the Claimant indicated her ranking of seniority on an exhibit, indicates that the Claimant was one of two positions targeted and capped by Employer. However, the Claimant's own evidence indicates that two senior storekeepers had taken advantage of the plan, therefore, eliminating the need for the Claimant to accept the Plan.* The Referee finds that the Claimant's voluntary termination and the evidence presented by the Claimant does not merit an award of benefits.

(R.R. at 58a.) (Emphasis added.) Claimant appealed the referee's decision to the Board. The Board acknowledged receipt of Claimant's brief but did not respond to

[3] Contrary to the quote set forth in Finding of Fact No. 19, Claimant's handwritten petition for appeal actually states that "I [illegible word] took the pkg now or in two years received a package for separation." (R.R. at 16a.) This sentence is ambiguous, was taken out of context by the referee, and its meaning cannot be discerned by examining the petition for appeal as a whole. The referee did not elicit any testimony from Claimant to explain its meaning. See Unemployment Compensation Board of Review v. Houp, 340 A.2d 588 (Pa. Cmwlth. 1975) (holding that clear and unequivocal admissions may support a finding of fact). Moreover, at the hearing, the referee properly focused on and developed the material issues surrounding Claimant's employment situation in February and March of 2009, and not events that may or may not occur two years in the future.

the arguments therein;[4] without further comment, the Board affirmed and adopted the referee's findings of fact and conclusions of law.

On appeal to this Court,[5] Claimant contends that the Board's decision is unsupported by substantial evidence and that the Board capriciously disregarded relevant evidence in finding that she did not leave her employment for reasons of a necessitous and compelling nature.

Under section 402(b) of the Law, an individual is not eligible for unemployment compensation benefits if her unemployment is due to voluntarily leaving work without cause of necessitous and compelling nature. Smithley v. Unemployment Compensation Board of Review, 8 A.3d 1027 (Pa. Cmwlth. 2010). In determining whether a workforce reduction/downsizing situation constitutes a necessitous and compelling reason for a claimant to quit:

> the critical inquiry is whether the fact-finder determined the circumstances surrounding a claimant's voluntary quit indicated *a likelihood that fears 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*.

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[4] Claimant contended in her brief to the Board that, for the following reasons, the referee erred by finding that she quit her employment without cause of a necessitous and compelling nature: (1) Finding of Fact No. 15 is unsupported by substantial evidence because the evidence showed that only Claimant and another employee had accepted the ISP; (2) Finding of Fact No. 19, stating that Claimant could have taken the ISP now or in two years, was taken out of context and is contrary to the record; and (3) the referee disregarded evidence showing Claimant was facing an involuntary lay off. (R.R. at 70a-71a.)

[5] Our scope of review is limited to determining whether constitutional rights were violated, whether errors of law were committed, or whether findings of fact are supported by substantial evidence. Procyson v. Unemployment Compensation Board of Review, 4 A.3d 1124 (Pa. Cmwlth. 2010).

> '[S]peculation pertaining to an employer's financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause.'
>
> [W]here at the time of retirement suitable continuing work is available, the employer states that a layoff is possible . . . and no other factors are found . . . that remove an employee's beliefs from the realm of speculation, a claim for unemployment benefits fails despite the offer to leave.

Id., 8 A.3d at 1030 (emphasis added), quoting Renda v. Unemployment Compensation Board of Review, 837 A.2d 685, 692 (Pa. Cmwlth. 2003).

This Court recently applied the preceding test in Wright-Swygert v. Unemployment Compensation Board of Review, ___ A.3d ___ (Pa. Cmwlth., No. 930 CD 2010, filed March 3, 2011), where the claimant was told by her employer that she was going to lose her job and was encouraged by the employer to take a voluntary early retirement plan. We concluded in Wright-Swygert that the claimant was eligible for benefits because she had a reasonable belief that her job was imminently threatened and that she would be laid off. In contrast, in Diehl v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 2010), petition for allowance of appeal granted, ___ Pa. ___, ___ A.3d ___ (No. 750 MAL 2010, filed May 25, 2011), the claimant testified that he was told by his employer that, if he did not accept the retirement package, an employee other than the claimant would be laid off. The Diehl Court held that the claimant was not entitled to benefits because he failed to present specific, direct evidence of communications or actions by the employer indicating that his job was imminently threatened. Similarly, in Smithley, we held the claimant was ineligible for benefits because she admitted that she accepted a retirement package knowing that continuing work was available due to her

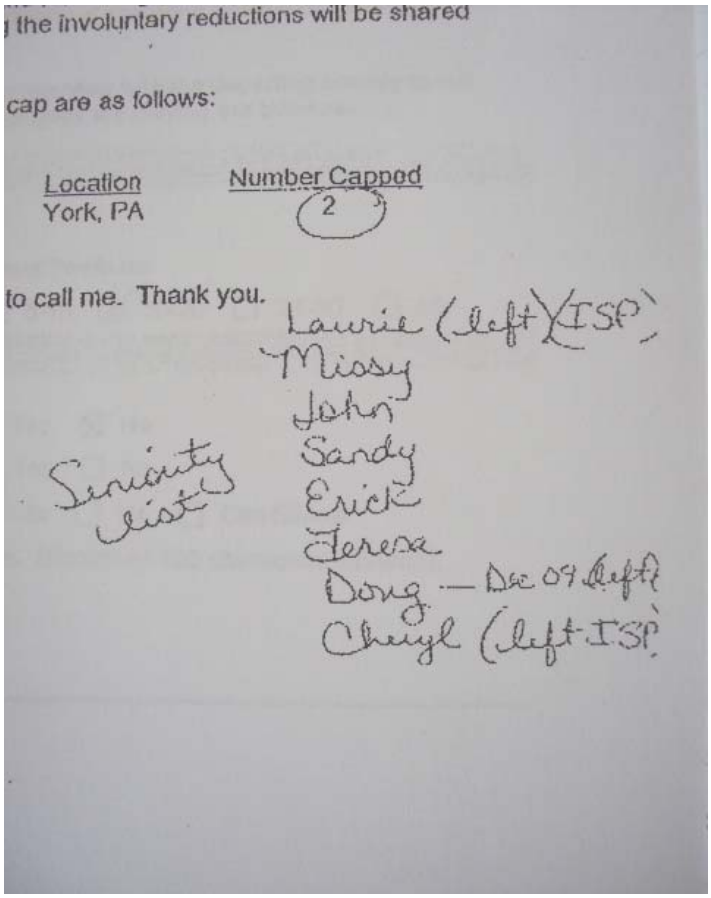
status as a high seniority employee. We concluded that any concern the claimant in Smithley may have had about being laid off was purely speculative and unsupported by the record.

In the instant case, Claimant argues that the Board's finding that two employees with greater seniority had accepted the ISP is unsupported by substantial evidence.[6] Claimant further maintains that the evidence of record establishes necessitous and compelling reasons for her voluntary termination. After review, we agree.

The Board found as fact that "[o]f the two designated surplus storekeeper positions targeted and capped by the Employer, Claimant's own seniority list indicates that two volunteers had already elected to take the Plan, both senior to the Claimant." (Finding of Fact No. 15.) However, the record reflects that Claimant, the sole witness in the case, testified that only she and one other employee, Laurie Plonck, took the ISP, (R.R. at 36a-37a, 40a-41a), and Claimant specifically stated that she did not know of any other employees who were taking the ISP. (R.R. at 41a.) In

[6] The Board responds that Claimant failed to challenge any specific finding of fact in her petition for review or in her statement of questions involved. Therefore, the Board argues that this issue is waived and that its findings of fact are conclusive on appeal, citing Salamak v. Unemployment Compensation Board of Review, 497 A.2d 951 (Pa. Cmwlth. 1985). However, although it is true that Claimant did not specifically identify the number of the challenged finding, the substance of Claimant's argument is clearly set forth in her brief and petition for review. Further, Claimant raised this identical argument in her appeal to the Board and identified the challenged finding as Finding of Fact No. 15. (R.R. at 70a.) Claimant left no doubt as to the specific finding of fact in dispute. Therefore, we will address the merits of Claimant's substantial evidence argument. See Fitzpatrick v. Unemployment Compensation Board of Review, 616 A.2d 110 (Pa. Cmwlth. 1992) (declining to follow Salamak where, among other things, the claimant's brief spoke to the substance of the challenged finding).

addition, Claimant's handwritten list of employees ranked in order of seniority reflects only that Claimant and one other employee took the ISP:



(R.R. at 18a.) Moreover, the document plainly indicates that "Doug," the third employee who left his employment, stopped working in December 2009, nine months after the March 12, 2009, closing date to accept the ISP. Also, Employer required any employee who accepted the ISP to depart his or her employment by March 27, 2009, long before the date Doug stopped working. Hence, a fair reading of the seniority list and the testimony does not support the Board's finding that two senior

employees accepted the ISP. Therefore, we conclude that Finding of Fact No. 15 is unsupported by substantial evidence.

On appeal, the Board concedes that Claimant subjectively feared that her position would be eliminated if she did not accept the ISP. (Board's brief at 11.) However, relying on its finding that two other persons accepted the ISP, the Board maintains that Claimant's fears were merely speculative and that her job was secure. (Board's brief at 11-12.) Having concluded that the Board's finding is not supported by substantial evidence, we disagree.

The question of whether an employee has cause of a necessitous and compelling nature to quit his or her employment is a legal question subject to appellate review. Brown v. Unemployment Compensation Board of Review, 780 A.2d 885 (Pa. Cmwlth. 2001). Here, contrary to the Board's unsupported finding, no evidence of record rebuts Claimant's testimony. Instead, as reflected by the Board's remaining findings, Claimant's testimony is amply corroborated by the evidence of record. See Brown (holding that the Board capriciously disregarded competent evidence to find that the claimant failed to carry her burden of proof under section 402(b) of the Law, where the claimant's testimony was the only competent evidence and demonstrated that the claimant acted with ordinary common sense to preserve her job in the face of racial discrimination and the employer's refusal to reimburse thousands of dollars in relocation and business expenses). Therefore, we conclude that the evidence is sufficient to meet Claimant's burden to establish circumstances indicating a likelihood that her fears about her employment would materialize, that serious impending threats to her job would be realized, and that her job was imminently threatened.

Accordingly, Claimant is not ineligible for benefits under section 402(b) of the Law, Wright-Swygert, and we reverse the Board's order.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 21st day of June, 2011, the August 24, 2010, order of the Unemployment Compensation Board of Review is hereby REVERSED.

PATRICIA A. McCULLOUGH, Judge