

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melisa Pastewka, :
Petitioner :
v. : No. 197 C.D. 2011
Unemployment Compensation : SUBMITTED: July 22, 2011
Board of Review, :
Respondent :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER FILED: October 18, 2011**

Claimant Melisa Pastewka petitions *pro se* for review of the December 9, 2010 order of the Unemployment Compensation Board of Review. The Board affirmed the decision of the referee to deny her unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law),¹ which provides that an employee is ineligible for benefits during any week “[i]n which his [or her] unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature.” We affirm.²

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).

² A determination of whether necessitous and compelling cause exists is a question of law, fully reviewable by this Court. *Johnson v. Unemployment Comp. Bd. of Review*, 869 A.2d 1095 (Pa. Cmwlth. 2005).

After a hearing, the referee made the following findings of fact:

1. The Claimant was last employed full-time as [a] Directory Assistance Operator [for Employer Verizon] from May 31, 1994, through August 21, 2010, earning \$17.30 per hour.
2. The Claimant was being disciplined due to her tone [of voice] and voice quality.
3. In July 2010, the Employer offered a financial incentive package to voluntarily reduce their workforce.
4. Employees were offered a one[-]time \$50,000.00 bonus, \$1,100.00 for every year of service incentive, a \$3,750.00 termination allowance, and paid health insurance for 6 months.
5. The Claimant chose to take the voluntary retirement separation package.
6. Continuing work was available for the Claimant if [she] chose not to take the Employer's incentive package.

Referee's Findings of Fact Nos. 1-6.

The referee affirmed the service center's denial of benefits, rejecting Claimant's contention that she involuntarily took the package and finding that there was no evidence of record that her job was in actual jeopardy merely because Employer had instituted disciplinary measures. In an order mailed to Claimant on December 9, 2010, the Board affirmed, adopting and incorporating the referee's findings and conclusions.³ Claimant's petition for review followed.⁴

³ The facts as found by the Board are conclusive on appeal as long as the record, in its entirety, contains substantial evidence to support those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

⁴ On January 11, 2011, Claimant filed a letter with this Court stating that she was appealing the Board's decision. In response, the Chief Clerk pursuant to this Court's Internal Operating **(Footnote continued on next page...)**

A claimant bears the burden of proving necessitous and compelling cause for leaving his or her job. *Brunswick Hotel & Conf. Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlth. 2006). In order to show such cause, the claimant must establish 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.” *Id.* at 660. When a voluntary early retirement incentive is involved, there is no necessitous and compelling cause where continuing work was available and no evidence that the employee was in danger of losing her job if she declined to participate. *Davila v. Unemployment Comp. Bd. of Review*, 926 A.2d 1287 (Pa. Cmwlth. 2007).

(continued...)

Procedure 211, 210 Pa. Code § 67.13, sent Claimant a notice on January 27, 2011, advising her that 1) it was preserving January 11, 2011 as the filing date for her appeal; 2) if January 11, 2011 was more than thirty days from the mailing date of the Board’s order, her appeal could be dismissed as untimely; and 3) unless her perfected petition for review was filed and the filing fee, if any, paid within thirty days of the date of the notice, the Court would take no further action in this matter. In response, Claimant filed a petition for review on February 8, 2011.

Pursuant to Pennsylvania Rule of Appellate Procedure 1512(a)(1), Claimant had thirty days after entry of the Board’s order in which to file her petition for review. As the thirty-day appeal period expired on Saturday, January 8, 2011, the last day in which Claimant could file a timely appeal was Monday, January 10, 2011. Because, however, the Chief Clerk received Claimant’s petition for review on Tuesday, January 11th, it was deemed timely because she had to have mailed it at the very latest by Monday, January 10th, the date it was due. *See Miller v. Unemployment Comp. Bd. of Review*, 505 Pa. 8, 476 A.2d 364 (1984) (holding that claimant substantially complied with thirty-day requirement where it was manifest that her petition for review was deposited in the mail before the thirtieth day because it was in the Court’s post office box at the second Harrisburg post office, closed Saturdays and Sundays, and could not have arrived “late” on Monday unless it had been timely mailed before Friday, when it was due).

In the present case, Claimant argues that the Board erred in determining that her quit was voluntary where management allegedly urged employees “on disciplinary steps” to accept the proffered retirement package and she felt forced to do so. She maintains that she would not have accepted the package if she were not “on disciplinary steps.”

In this matter, we are bound to view the evidence, and every reasonable inference deducible therefrom, in the light most favorable to Employer as the prevailing party. *Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review*, 496 Pa. 620, 437 A.2d 1213 (1981). Employer’s witness testified that, if Claimant had declined to take the package, continuing work as a full-time directory assistance operator would have been available to her. October 20, 2010 Hearing, Notes of Testimony (“N.T.”) at 5. In addition, the evidence reflects that Employer advised its employees that, if there were not enough volunteers for the package, there would be no forced reduction. N.T. at 4, 6. This Court has upheld the denial of benefits where the claimant could have retained his job had he not accepted a retirement plan and was not facing imminent layoff. *Davila*.

Moreover, as the evidence reflects, any conjecture on Claimant’s part as to the effect of Employer’s discipline on her continuing employment was mere speculation. In that regard, Claimant testified as follows:

Well, I took the package, because after 16 years I was on disciplinary [steps] and I got my written warning and my day off. They got me in May. They got me in June. And I *believe* in July they probably would have got me. I would have got my three days off and I *believe* I would have been fired.

N.T. at 3 (emphasis added). Where an employee in order to avoid the mere possibility of dismissal accepts a voluntary termination package, separation is

voluntary. *Johnson*, 869 A.2d 1095 (no necessitous and compelling cause where an employee two disciplinary steps away from termination accepted enhanced income security plan).

Accordingly, we affirm the Board's denial of benefits.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 18th day of October, 2011, the order of the Unemployment Compensation Board of Review is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge