IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michele R. Shrader,	:	
Petitioner	:	
	:	
v.	:	No. 2330 C.D. 2009
	:	Submitted: February 18, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI FILED: March 17, 2011

Michele R. Shrader (Claimant) petitions for review of 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).[1] For the reasons that follow, we affirm the Board.

[1] 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…)

Shrader was employed by Trib Total Media (Employer) as a full-time national account executive from January 2, 1996, through her last day on March 20, 2009. She left her employment when she accepted Employer's Voluntary Separation Program (Package). Claimant filed for unemployment compensation benefits with the Department of Labor and Industry, Office of UC Benefits, which denied her claim finding that she did not have knowledge that her job would have been affected if she did not accept Employer's package to voluntarily terminate her employment. Claimant appealed.

Before the Referee, Claimant testified that she was the national account executive and that she oversaw the national advertising for Employer and its affiliates handling approximately 80 to 100 accounts and that her income was both salary and commission-based. She received a letter from Employer indicating that the 2009 year for Employer was going to be dismal and other events led her to believe that her job was in jeopardy.[2] She stated that she only had three clients

(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.

[2] That letter states in pertinent part:

> As you are aware, 2008 was a very difficult year economically and 2009 is starting off just as dismally. Our industry and our company face unprecedented challenges, both in generating revenue and in controlling expenses.
>
> Over the years, this company has taken prudent steps to control costs in ways that would impact employees the least. For instance,

(Footnote continued on next page…)

based locally, while the other 77 were based nationally, thereby requiring her to travel, but that she was no longer allowed to do so. She also stated that she asked to attend several conferences, which were denied; one was the NAA Conference in Pittsburgh where her second largest client would be attending. Because they were travelling from New York, she thought that it was necessary to meet with them in order to maintain their business. Her other client withdrew from the conference. Those two clients made up 40% of her overall revenue.

She also stated that she sat in on some confidential meetings along with her supervisor, Dean DeLuca (DeLuca), in which there were discussions of forming a merger with the Pittsburgh Post-Gazette. She was concerned that the national advertising staff of 10 would be consolidated to a staff of five. When

(continued…)

> we have changed the size and weight of our newsprint, combined staff and management in many departments, and reduced the number of facilities we must maintain and manage. We have and will continue to review and select health care options which attempt to favorably address employee contributions. All of these moves are aimed at controlling expenses in ways that disrupt employees least.
>
> This year, we are required to take more steps to control expenses in this shrinking economy. To that end, a wage freeze has been instituted for 2009. Employees will still receive an annual performance appraisal, but there will be no wage increases.
>
> We recognize this is unpleasant news and we did not make this decision without careful consideration of the impact it has on you and your families.

(Original Record, Claimant's Exhibit #1.)

during one of those meetings she asked if she would retain her position, DeLuca told her that "nobody would know if they would have a job after this merger." (August 19, 2009 Hearing, Notes of Testimony at 8.) DeLuca also expressed concern for his own position in one of those meetings, and, in fact, three weeks prior to her leaving, DeLuca was no longer the national account supervisor and was working exclusively on the merger. Claimant also explained that Employer previously acquired the Pittsburgh Penny Saver, and that offices and accounts that were being handled by her were also being sold by the Pittsburgh Penny Saver representatives, so several clients were being shared and she was competing for clients that used to be solely her own. Claimant also stated that she was entitled to a bonus for the 2008 year which she earned but never received.

Regarding the Package, Claimant stated that she contacted her attorney who, in turn, contacted Doug Bailey (Bailey), Employer's Chief Human Resources Officer, to find out if her position would remain if she did not take the Package. Bailey told her attorney that he could not guarantee that it would remain available. Claimant further stated that her attorney asked Bailey that if enough people did not take the Package if there would be a layoff, and Bailey told him he was not sure if there would be a layoff if enough people did not accept the Package. In any event, Claimant stated that she would not have stayed unless it was guaranteed that a position was going to be made available to her. She said that her primary concern prior to agreeing to the Package was that the Pittsburgh Post-Gazette account representative and she were competing for the same position. However, on cross-examination, Claimant admitted that had she not agreed to take the Package, her job was still available to her and she would have reported to work

on the following Monday. She also stated that nothing in the letter regarding the Package indicated that if she did not take the Package that her position would be eliminated. In fact, she admitted that she trained someone to fill her position one week prior to leaving her position. She also admitted that in her 14 years with Employer, she never had a guarantee of continued employment.

Bailey testified for Employer briefly explaining that Employer had sent out a letter offering all full-time employees the opportunity to accept a buyout with various levels of benefits based on their tenure with the company. There were over 700 employees that were eligible. Nowhere in any of those documents were layoffs mentioned. It was clearly a voluntary separation agreement and a voluntary resignation. Bailey stated that Claimant had sent him several e-mails with specific questions about the buyout regarding the duration, whether she would have 45 days to make a decision, i.e., logistical questions; however, she never asked him any questions about future employment. He also stated that her attorney did call him, and they spoke once. The crux of that conversation was his attempt to negotiate better terms for Claimant which Bailey said he could not do because if he changed her terms, then he would have to change them for everyone. Bailey stated that Claimant accepted the Package voluntarily, that nobody compelled her to do it, and that he was consistent with what he told every employee that asked about future employment. "And I told every employee that asked me that none of us can foresee the future. That this decision should be based on your sole circumstances, does this work for me at my time of life, my career and my family and that's what you should base your decision on and nothing else. And continuing work was available." (August 19, 2009 Hearing, Notes of Testimony at 27.) Bailey stated

that he talked to about 200 employees regarding the Package, but he did not talk directly to Claimant.

Claimant's supervisor DeLuca testified that he was the major national account manager for Employer and Claimant's direct supervisor, and that he did have a conversation with Claimant after she was offered the Package because she asked his opinion. He told her, "I don't think it's going to work for me, I said I can't afford not to work, I said but, you know, it's up to you what you do. So she said she was considering it and at that time I said, well if you do consider taking it, please let me know in advance, so I can make arrangements to have your position covered." (August 19, 2009 Hearing, Notes of Testimony at 28.) DeLuca said he planned to replace her if she left, and when she definitely decided to accept the Package, he did ask her to train a replacement to fill the position. DeLuca also stated that Claimant never asked him at any time if her job was going to be eliminated, he never told her at any time that her job was going to be eliminated, and continuing work was available. During cross-examination, DeLuca admitted that he was in a meeting with Claimant when a merger was discussed but he denied being asked by Claimant if her job was going to be eliminated or that he discussed the future of his own job. Regarding any travelling being denied so that Claimant could not see her clients, DeLuca stated that Employer determined not to go to the NAA Conference because they were no longer a member of the Newspaper Association of America. However, he told Claimant specifically that if she wanted to see her client attending the conference, she could call them and tell them she would visit them and she did so. He also testified that her travel budget was never cut.

The Referee found that Employer had offered the Package to all of its full-time Employees; Claimant had her attorney review the Package who contacted Employer and made inquiries into a "guarantee" of future employment for Claimant; Employer informed Claimant's attorney that no one could foresee the future; and that the employees should look at their family's circumstances and then decide to accept or reject the Package. The Referee further found that although Claimant was the only employee working in her department as a national account executive, her job was not affected by the voluntary separation; she was never threatened with the termination of her job; she was never told that her job would be eliminated; she was not threatened with future loss of wages if she decided to continue her employment; and she was not threatened with the loss of her job if she did not accept the Package. Because Claimant's job was not in jeopardy of loss and she was never told that she would be laid off in the future due to the downswing in the economy, Claimant's beliefs were mere speculation which did not amount to a necessitous and compelling reason to voluntarily terminate her employment. Claimant filed an appeal with the Board, which affirmed the Referee's decision, and this appeal followed.[3]

Claimant contends that the Board erred in denying her benefits because her acceptance of the Package was not based on mere speculation that she would lose her employment given the financial condition of Employer and the

[3] 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).

circumstances existing at her position that would compel a reasonable person to act in the same manner. She points out that Employer prevented her from meeting with her clients both outside of Pittsburgh and at a conference in Pittsburgh; she was denied her bonus in March 2008 that she had earned; Employer's staff began sharing space with the Pittsburgh Penny Saver, which had been purchased by Employer and that the accounts that had been handled solely by Claimant were now being handled by advertising representatives of Penny Saver as well; and Claimant met with her supervisor who confirmed that a merger was going to take place. As a final straw, Claimant received a letter from Employer that indicated that it was suffering economically and was offering the Package. All of these circumstances led her to believe that she was going to lose her job and she feared for her future employment.

In determining whether a necessitous and compelling cause exists in the context of corporate downsizing, this Court, in *Renda v. Unemployment Compensation Board of Review,* 837 A.2d 685 (Pa. Cmwlth. 2003), held that the relevant inquiry is whether "the circumstances surrounding a 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.[4]
>
> [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 found … that remove an employee's beliefs from the realm of speculation, a claim for unemployment benefits fails despite the offer to leave.

Id.

Although Claimant alleges that she was denied the right to travel, that there was going to be a merger, and that she now had to share space and clients

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[4] 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.

with representatives from the Penny Saver, none of those reasons indicated that it was certain that she was going to lose her job. Additionally, the letter Claimant received from Employer that she alleged led her to believe that she was going to be laid off did not provide any such threats to have induced Claimant to accept the Package. While much of the letter explained the steps Employer had taken to date to cut costs and what it was doing to continue to do so, (*see* n. 2), Claimant ignores the last paragraph in the letter which provides the following important information:

> Trib Total Media continues to provide a comprehensive wage and benefit package that provides our employees with affordable health care, paid time off, company paid life insurance, a 401k retirement plan and other important benefits for you and your family. *With a team effort, hard work, diligence and the full cooperation of everyone, we feel we can weather this economic storm and continue to provide services for our readers, advertisers and customers.* (Emphasis added.)

(Original Record, Claimant's Exhibit 1.) Nowhere in the letter is there any language regarding layoffs and, in fact, the letter explains that Employer will continue to provide compensation and benefits to its employees and ends on a note of hope. In addition, it was garnered from the testimony that Claimant was never told by anyone that her job would be ending due to financial conditions of the company. She was also never told that she would be laid off in the future because of over-employment or a downswing in the economy. While Claimant testified that she accepted the Package because Employer could not guarantee her future employment, DeLuca testified that continuing work was available to Claimant, and Claimant also testified that had she not accepted the Package, she would have been

able to come to work the following Monday. Consequently, under these facts, Claimant is not entitled to unemployment compensation benefits.

Accordingly, the order of the Board is affirmed.

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DAN PELLEGRINI, JUDGE

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O R D E R

AND NOW, this 17th day of March, 2011, the order of the Unemployment Compensation Board of Review, dated November 2, 2009, at B-490776, is affirmed.

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DAN PELLEGRINI, JUDGE