IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary E. Tracy,	:	
Petitioner	:	
	:	
v.	:	No. 408 C.D. 2011
	:	SUBMITTED: September 30, 2011
Unemployment Compensation	:	
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: November 10, 2011**

Mary E. Tracy (Claimant) petitions for review of the order of the Unemployment Compensation Board of Review (Board) that affirmed the referee's decision denying her unemployment compensation benefits under Section 402(b) of the Unemployment Compensation Law (Law), Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, *as amended*, 43 P.S. § 802(b).[1] Claimant contends that she is eligible for unemployment benefits because her separation from employment was due to a necessitous and compelling medical reason. Because the record supports the denial of benefits, we affirm.

Claimant was employed by Verizon Pennsylvania, Inc. (Employer)

[1] Section 402(b) of the Law provides in pertinent part that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature …."

from May 5, 1991 until she accepted a voluntary separation incentive package offered by Employer, effective July 3, 2010. The UC Service Center denied Claimant's application for unemployment benefits for the waiting week ending July 31, 2010 under Section 402(b) of the Law. On appeal, the referee held a hearing, at which Claimant and Employer presented evidence regarding the circumstances leading to Claimant's separation from employment.

During her last seven years of employment with Employer, Claimant worked as a full-time sales consultant earning $1100 a week. In 2010, Employer adopted a plan to reduce its national workforce by 12,000 employees. Following negotiations, Employer and the Communications Workers of America (union) reached an agreement on Employer's "One-time Enhanced Voluntary Separation Incentive Offer." Employer's Exhibit No. 2; Supplemental Reproduced Record (S.R.) at 30b. In addition to existing separation benefits, the separation incentive package offered by Employer included a one-time $50,000 cash bonus, $2200 for every year of service, acceleration of a pension band increase, a guaranteed interest rate for pension lump-sum conversion, a waiver of age-based pension reductions, a reimbursement of tuition or relocation or training expenses, and payment for medical insurance for six months following separation. *Id.*; Referee's Finding of Fact No. 7. Employer mailed the separation incentive offer to its employees on May 18, 2010. The deadline to respond to the offer was June 16, 2010, and the effective date of separation was July 3, 2010.

When Employer offered the separation incentive package, Claimant had been on a medical leave of absence since April 20, 2010. In an attending physician's statement, dated May 27, 2010 and attached to Claimant's disability claim form filed with an insurance company, her treating physician, Matthew

Berger, M.D., a psychiatrist, stated that Claimant suffered from a major depressive disorder and a generalized anxiety disorder and was unable to return to any kind of work. Reproduced Record at 16-18. Claimant's claim for disability benefits was approved through July 26, 2010. Claimant accepted Employer's separation incentive offer and was permanently separated from employment effective July 3, 2010.

Claimant testified that she could not work in a highly stressful work environment and never met the sales objectives set by Employer while working as a sales consultant. Although she was never disciplined for failing to meet the sales objectives, she was monitored and coached to improve her performance. Claimant insisted that her manager advised her that her job would be affected if she did not accept the separation incentive offer because the sales objectives would be set higher after the reduction of Employer's work force. Claimant admitted that she could not have been laid off had she not accepted the separation offer, under the collective bargaining agreement between Employer and the union, which prohibited Employer from laying off employees who were hired prior to August 3, 2003. Employer's Exhibit No. 1; S.R. at 29b. Claimant also admitted that she did not tell Employer that she was leaving employment due to health reasons. Claimant stated that she could have retired in May 2011 after 20 years of service with full pension payment of $238,000 and other retirement benefits.

The referee rejected Claimant's testimony that Employer advised her that her job would be affected if she did not accept the separation package. The referee found that Claimant chose to accept the separation package in exchange for cash and other incentives offered by Employer. Concluding that Claimant failed to establish a necessitous and compelling reason for terminating her employment, the

referee denied Claimant benefits under Section 402(b) of the Law. The Board adopted and affirmed the referee's decision. Claimant appealed the Board's order, and Employer intervened in the appeal.

Claimant argues that she is eligible for benefits because she left employment for a necessitous and compelling medical reason. She relies on her own testimony that her manager told her that she would experience more stress on the job if she did not accept the separation offer. She claims that the Board's findings are against the weight of the evidence.

To be eligible for benefits under Section 402(b) of the Law, a claimant must prove that the separation from employment was for a necessitous and compelling reason. *Diehl v. Unemployment Comp. Bd. of Review*, 4 A.3d 816 (Pa. Cmwlth. 2010), *appeal granted*, ___ Pa. ___, 20 A.3d 1192 (2011). To meet that burden, the claimant must demonstrate circumstances which placed a real and substantial pressure upon him or her to terminate employment that would compel a reasonable person to act in the same manner. *Smithley v. Unemployment Comp. Bd. of Review*, 8 A.3d 1027 (Pa. Cmwlth. 2010). Whether the claimant's termination of employment was for a necessitous and compelling reason is a question of law subject to this Court's plenary review. *W. & S. Life Ins. Co. v. Unemployment Comp. Bd. of Review*, 913 A.2d 331 (Pa. Cmwlth. 2006).

Health problems, including an emotional or psychological disorder, can constitute a necessitous and compelling reason to terminate employment. *Genetin v. Unemployment Comp. Bd. of Review*, 499 Pa. 125, 451 A.2d 1353 (1982); *Beattie v. Unemployment Comp. Bd. of Review*, 500 A.2d 496 (Pa. Cmwlth. 1985). To establish a necessitous and compelling health reason for leaving employment, the claimant must: (1) present competent evidence of an

adequate health reason justifying termination of employment; (2) have informed the employer of the health problems; and (3) be able and available to perform work which is not inimical to his or her health, if a reasonable accommodation is made by the employer. *Ridley Sch. Dist. v. Unemployment Comp. Bd. of Review*, 637 A.2d 749 (Pa. Cmwlth. 1994). The claimant, who has failed to meet any of these requirements, is ineligible for benefits. *Ruckstuhl v. Unemployment Comp. Bd. of Review*, 426 A.2d 719 (Pa. Cmwlth. 1981).

A necessitous and compelling health reason can be established by any competent medical or non-medical evidence. *Cent. Data Ctr. v. Unemployment Comp. Bd. of Review*, 458 A.2d 335 (Pa. Cmwlth. 1983). Claimant presented the evidence that she suffered from depression and anxiety. Claimant admitted, however, that she did not "tell …Employer that [she was] leaving because of health reasons." Notes of Testimony at 25; S.R. at 26b. She was also required to demonstrate that she was able to work and available for suitable work, because the Law is not intended to provide health and disability benefits for ill employees. Section 401(d)(1) of the Law, 43 P.S. § 801(d)(1); *Genetin*.[2] She was on a medical leave and was receiving disability benefits when she left her employment. Her treating physician did not release her to return to work because her condition prevented her from working in any kind of position with or without restrictions. Hence, Claimant failed to establish that she was able to work and available for suitable work.[3]

---

[2] Employer's policy provided that "[w]hen an employee is able to work, but due to medical restrictions cannot perform all of the essential functions of his/her job with or without reasonable accommodation, the Company will seek to place the medically restricted employee in an available position the employee is qualified to perform." Employer's Exhibit No. 4; S.R. at 36b.

[3] We note that Claimant has not raised the applicability of Section 401(d)(2) and the proviso in Section 402(b) of the Law, which provide that "[n]o otherwise eligible claimant shall be **(Footnote continued on next page…)**

Because the record supports the referee's conclusion, adopted by the Board, that Claimant's separation from employment was caused by her decision to accept the separation incentives offered by Employer, not by a necessitous and compelling medical reason, the Board's order is affirmed.

BONNIE BRIGANCE LEADBETTER,
President Judge

(continued…)

denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position, pursuant to a labor-management contract" or "pursuant to an established employer plan, program or policy." The critical inquiry in determining the applicability of Section 401(d)(2) and the proviso in Section 402(b) in the context of corporate downsizing is, *inter alia*, a likelihood that fears and serious impending threats of a job loss would be materialized. *Renda v. Unemployment Comp. Bd. of Review*, 837 A.2d 685 (Pa. Cmwlth. 2003). The evidence in this case showed that Claimant's job was secure despite Employer's plan to reduce its work force. Claimant was never disciplined for failing to achieve the sales objectives and could not be laid off under the collective bargaining agreement. Employer's attendant administrator, Carol Mowery, testified that Claimant's seniority was 20 or 25 out of 140 consultants when Employer planned to eliminate only 13 sales consultant positions. Therefore, Claimant is ineligible for benefits under Section 401(d)(2) and the proviso in Section 402(b) of the Law, even if Claimant had raised her eligibility for benefits under those provisions. *See also Diehl* (holding that Section 401(d)(2) and the proviso in Section 402(b) did not apply to the employee who voluntarily terminated his employment by accepting an early retirement package offered by the employer).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Mary E. Tracy,	:	
Petitioner	:	
	:	
v.	:	No. 408 C.D. 2011
	:	
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

O R D E R

AND NOW, this 10th day of November, 2011, the order of the Unemployment Compensation Board of Review in the above-captioned matter is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge