

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marjorie Berger, :
Petitioner :
v. : No. 727 C.D. 2010
: Submitted: September 3, 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: September 28, 2010

Marjorie Berger (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review 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's decision.

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 –

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Claimant was employed by Independence Healthcare Management (Employer) as a part-time Senior Communications Specialist from May 24, 1996, through her last day on October 29, 2009. Claimant voluntarily terminated her employment when Employer offered and Claimant accepted a voluntary early retirement package (VERP). Claimant filed for unemployment compensation benefits with the Office of UC Benefits² which denied her claim finding that she accepted a voluntary separation from her Employer. The Office of UC Benefits also found that the separation was permanent, and that there was insufficient information provided by Claimant to show that she had knowledge that her job would be affected if she did not accept Employer's plan to voluntarily terminate employment. Claimant filed an appeal requesting a hearing before a Referee.

At the hearing, Employer did not appear. Claimant testified that she had worked part-time for Employer, approximately 18.75 hours per week at a rate of \$39.60 per hour since 1996. She explained that she accepted a VERP from Employer which was being offered as a result of a workforce reduction/cost reduction. Employer also offered a financial incentive to her pension to accept the retirement package, i.e., additional money. Claimant stated that there were going to be layoffs in her department in June and "it was indicated to everyone that was

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(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 Claimant sought benefits only for the week ending November 7, 2009.

accepting this package that there would be more layoffs after the retirement—after the people chose—this round chose to retire. And in fact – and I have in this paper clipping – in fact 200 more were laid off after this group of 500 and some accepted the package.” (Notes of testimony at 4.) She admitted, however, that Employer did not tell her that she was going to be laid off if she did not accept the package, and that she only felt vulnerable due to her age and her part-time status. She also stated that because she had worked for Employer for 16 years and she made more per hour than the newer, younger employees, she felt that she would be laid off. When asked by the Referee if she knew how Employer decided who would be laid off, Claimant responded that she did not know. She also stated that she did not feel she was forced, pressured or coerced by anyone into accepting the retirement package.

The Referee found that in order to accomplish workforce reduction, Employer offered to Claimant and other similarly-situated co-workers a VERP; that Claimant was not told that she would be laid off if she did not accept the VERP; that Claimant believed that if she did not accept the VERP, she would probably be laid off during the next round of lay-offs; and had Claimant not accepted the VERP, continuing work was available for Claimant on an indefinite basis. He then denied Claimant benefits because she accepted the VERP and voluntarily chose to permanently leave her employment because she felt vulnerable due to her age and high rate of pay. No evidence was presented at the hearing which indicated that she was forced, pressured or coerced into accepting the VERP against her will. Further, the evidence indicated that had Claimant not accepted the VERP, continuing work was available for her on an indefinite basis. Claimant’s

speculation that she was going to be laid off at some point in the future did not constitute cause of a necessitous and compelling nature to quit and become eligible for unemployment compensation benefits. Claimant appealed the Referee's decision to the Board which affirmed, and this appeal by Claimant followed.³

Claimant contends that the Board erred by concluding that she failed to establish a necessitous and compelling reason for terminating her employment because her belief that her job was imminently threatened was well-founded due to her age and pay status, and that there was a substantial likelihood that those fears would materialize.⁴ Her fears about the security of her job were not speculative. She also argues that the Board's finding that there was continuous work available for her was not supported by substantial evidence.

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).

⁴ Claimant argues in her brief that she was certain that she would be terminated in the imminent workforce reduction based upon the following facts: (1) she was the oldest employee in her department by approximately 30 years; (2) she was the only part-time employee which effected workflow; (3) she received one of the highest hourly rates of \$39.60 per hour which was a higher per-hour rate than other similarly-situated employees in her department; and 4) she did not have the same level of experience with the computer technology and software as other similarly-situated employees in her department. However, none of those arguments were raised before the Referee at the hearing and were only presented to the Board in an appeal letter after the hearing. While the Board is the fact-finder in unemployment cases, our determination is based on the Referee's findings because the Board adopted them as its own and did not make new findings of facts. *Zimmerman v. Unemployment Compensation Board of Review*, 829 A.2d 735, 736 n.2 (Pa. Cmwlth. 2003). Therefore, these "newly alleged facts" will not be considered now on appeal before this Court.

In determining whether a necessitous and compelling cause exists in the context of corporate downsizing, this Court held in *Renda v. Unemployment Compensation Board of Review*, 837 A.2d 685 (Pa. Cmwlth. 2003), that the relevant inquiry is “whether the fact-finder determined 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 437.⁵

⁵ 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).

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[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. Because personal fears or speculation regarding layoffs does not constitute the necessitous and compelling reason for a voluntary quit, Claimant's argument that her job was imminently threatened is meritless.

As to Claimant's argument that there was no evidence that Employer made continuous work available for her as required in *Renda*, it is true that no evidence was offered by Employer because it was not present at the hearing. 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.

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

Here, even though Employer did not provide any evidence of continuing work, Claimant failed to prove a necessitous and compelling reason to voluntarily terminate her employment. Consequently, there is no error in the Referee's finding based on a lack of direct evidence that there was continuing employment for Claimant.

Accordingly, the order of the Board is affirmed.

DAN PELLEGRINI, JUDGE

