

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Deborah Grant-Cook, :  
Petitioner :  
v. : No. 738 C.D. 2010  
Unemployment Compensation : Submitted: September 3, 2010  
Board of Review, :  
Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: October 19, 2010

Deborah Grant-Cook (Claimant) petitions, pro se, for review of an order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that denied Claimant's application for unemployment compensation benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> We affirm.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. § 802(b). Section 402(b) of the Law provides, in pertinent part:

An employe shall be ineligible for compensation for any week—

\* \* \*

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature,

(Continued....)

Claimant filed a claim for benefits with the Philadelphia UC Service Center upon the separation of her employment as a claims payment adjuster with Independence Blue Cross Corp. (Employer). The Service Center representative issued a determination denying her claim for benefits pursuant to Section 402(b) of the Law.

Claimant appealed this determination and a hearing was conducted before a Referee on December 21, 2009. See N.T. 12/21/09<sup>2</sup> at 1-7. Claimant testified at the hearing<sup>3</sup>, and indicated that she had separated from her employment with Employer to accept a voluntary early retirement package that had been offered by Employer. See id. at 3. Claimant testified that she accepted the offer because business was slow and Employer was struggling. See id. at 4. But Claimant acknowledged that she was not directly informed by Employer that she would be laid off if she did not accept the retirement package, and that continuing work would have been available to her if she had remained in her employment with Employer. See id. at 3-4, 5, 7.<sup>4</sup>

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irrespective of whether or not such work is “employment” as defined in this act.

<sup>2</sup> “N.T. 12/21/09” refers to the transcript of the hearing conducted before the Referee on December 21, 2009.

<sup>3</sup> No one appeared on Employer’s behalf at the hearing.

<sup>4</sup> More specifically, Claimant testified, in pertinent part, as follows:

R So why did you take it?

C Well, the reason I took it was because work was slow. They had different letters and things that they sent over the e-mail saying that the company was kind of struggling, and they needed to make the company more competitive with other insurance companies.

R So you left as a favor to the Employer?

*(Continued....)*

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C Well, the handwriting was on the wall was that work was slow, and it was cut down, and they were going to have layoffs, and I felt that ....

R Did anybody tell you that you were going to be laid off? Did your employer come to you and tell you, "Ms. Grant-Cook..."

C No.

R "... you're going to be laid off"?

C No, not in those words exactly.

\* \* \*

R Were you told by your manager or anybody that if you did not accept this incentive package that your job would be affected in any way?

C The only thing we were told was that if you didn't take this package at this present time, it wouldn't be offered to you later if....

R Yes. Okay. But was this a voluntary package? Did the package say...

C Yes, it was voluntary.

R ... that you have to retire or did it say it's voluntary?

C It's voluntary is what...

R Okay.

C ... the package said.

R All right. Had you not retired, was work available to you?

C I'm assuming that it would have been. I don't know for what length of time, but if I had gone to work that following Monday, I'm sure that ...

R But you don't know that?

C No, I don't know that.

R So you were just anticipating getting laid off?

C Exactly.

\* \* \*

R [S]o, based on the incentives offered you left, right?

*(Continued....)*

On December 28, 2009, the Referee issued a Decision in which she made the following relevant findings of fact: (1) Employer offered a voluntary early retirement program package to its eligible employees; (2) the early retirement program package was voluntary; (3) Claimant felt that work was slow, Employer was struggling financially, and that “the handwriting was on the wall”; (4) although Claimant anticipated that she would be laid off, she was not specifically told that she would be laid off; (5) Claimant was told that the early retirement program package would not be offered at a later time; (6) Claimant accepted a lump-sum financial incentive, adding years to her age and service in computing her pension, and accepted Employer’s early retirement program package; and (7) Claimant voluntarily left her employment. Referee’s Decision at 1-2.

Based upon the foregoing, the Referee concluded:

The Pennsylvania Courts have held that unemployment resulting from the acceptance of an employer incentive agreement offered to facilitate a reduction in force does not establish the requisite necessitous cause to voluntarily terminate one’s employment. Where continuing work would have been available had a claimant not accepted an incentive agreement, the claimant is ineligible for benefits. Only a lack of suitable continuing work, either currently or at a discernable point in time, plus a likelihood of imminent layoff has been held to suffice to establish cause of a necessitous and compelling nature for voluntarily terminating employment.

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C Yes, ma’am.

R You were not told, right? Again, I’m asking you about you being laid off specifically?

C No.

R Okay. And...

C It was implied, but not told to me directly.

At the Referee's Hearing, the claimant testified that the work was slow and that she had received emails stating that the company was struggling and that the company was going to become more competitive with the other insurance companies. The claimant believed that "the handwriting was on the wall" and that she would be laid-off. The claimant, therefore, accepted the program offered by the employer.

Based on the testimony offered by the claimant, the Referee finds that the claimant quit her employment based on speculation pertaining to the employer's financial condition and the possibility of future lay-offs. The Referee also finds that the claimant was not specifically told that she would be laid-off and was informed the program was voluntary. The claimant was not told that her job would be eliminated in the near future. The Referee finds that had the claimant not quit, work was available to the claimant.

\* \* \*

In the present case, the Referee finds that the claimant quit her employment for personal reasons. As such, the Referee concludes that the claimant did not meet her burden of proving that the claimant had a necessitous and compelling reason to quit her employment.

Referee's Decision at 2-3. Accordingly, the Referee issued an order affirming the Service Center representative's determination, and finding her ineligible to receive benefits pursuant to Section 402(b) of the Law. Id. at 3.

On January 7, 2010, Claimant appealed the Referee's decision to the Board. On March 18, 2010, the Board adopted the Referee's decision, and issued an order affirming that decision. Claimant then filed the instant appeal from the Board's order.<sup>5</sup>

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<sup>5</sup> This Court's scope of review in an unemployment compensation appeal is limited to  
(Continued....)

In this appeal, Claimant contends: (1) the Board erred in determining that there was not sufficient evidence demonstrating that she had “necessitous and compelling cause” to terminate her employment; and (2) the Board erred in determining that she was not eligible for benefits pursuant to Section 402(b) of the Law.

Claimant first contends that the Board erred in determining that there was not sufficient evidence demonstrating that she had “necessitous and compelling cause” to terminate her employment. More specifically, Claimant asserts that the decision to accept the early retirement program package was based upon information that she had received from her supervisor that the work that Claimant had been performing was going to be outsourced. However, in her brief, Claimant acknowledges that “[t]his information was not given at the Referee’s Hearing, because [Claimant] felt that by bringing forth this confidential information, the supervisor would be in jeopardy of being terminated....” Brief of Petitioner at 8-9.

As the Superior Court has previously noted, “[i]t is beyond cavil that an appellate court is limited to considering only those facts which have been duly

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determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994). In addition, issues of credibility are for the Board which may either accept or reject a witness’ testimony whether or not it is corroborated by other evidence of record. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977).

certified in the record on appeal. For purposes of appellate review, what is not of record does not exist.” Spink v. Spink, 619 A.2d 277, 280 n. 1 (Pa. Super. 1992) (citations omitted). In addition, as this Court has noted, “[i]t is of course fundamental that matters attached to or contained in briefs are not evidence and cannot be considered part of the record either before an administrative agency or on appeal.” Zinman v. Department of Insurance, 400 A.2d 689, 691 (Pa. Cmwlth. 1979).

Thus, Claimant’s first claim of error is based upon information that was not presented to the Board and is, therefore, not part of the certified record in the instant appeal. As a result, this information cannot be considered by this Court in disposing of this appeal. Accordingly, Claimant’s allegation of error in this regard is patently without merit.

Finally, Claimant asserts that the Board erred in determining that she was not eligible for benefits pursuant to Section 402(b) of the Law. We do not agree.

A claimant is ineligible for unemployment compensation benefits if she voluntarily becomes unemployed without cause of a necessitous and compelling nature. 43 P.S. § 802(b). A necessitous and compelling cause for unemployment “results from circumstances which produce pressure to terminate employment that is both real and substantial, and which would compel a reasonable person under the circumstances to act in the same manner.” McCarthy v. Unemployment Compensation Board of Review, 829 A.2d 1266, 1270 (Pa. Cmwlth. 2003). The burden of proving that her voluntary termination was necessitous and compelling rests with the claimant. Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126 (Pa. Cmwlth. 2001). If an employer elects not to testify or provide evidence regarding a claimant’s

termination or the possibility of continued work, benefits are not automatically granted “because the burden remains on the claimant to demonstrate necessitous and compelling cause.” Johnson v. Unemployment Compensation Board of Review, 869 A.2d 1095, 1105 (Pa. Cmwlth. 2005).

It is now well settled that in the context of corporate downsizing, the critical inquiry is whether the fact finder determined the circumstances surrounding a claimant’s voluntary quit indicated a likelihood that her fears would materialize, that serious impending threats to her job would be realized, and that her belief that her job is imminently threatened is well-founded. Renda v. Unemployment Compensation Board of Review, 837 A.2d 685 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004); Staub v. Unemployment Compensation Board of Review, 673 A.2d 434 (Pa. Cmwlth. 1996); Peoples First National Bank v. Unemployment Compensation Board of Review, 632 A.2d 1014 (Pa. Cmwlth. 1993). “[S]peculation pertaining to an employer’s financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause.” Renda, 837 A.2d at 692 (quoting Staub, 673 A.2d at 437). Where 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 compensation benefits fails despite the offer to leave. Id.

As noted above, the following findings of fact made by the Referee were adopted by the Board: Claimant quit her employment based on speculation regarding Employer’s financial condition and the possibility of future layoffs; Claimant was not specifically told that she would be laid off and was informed that the retirement package program was voluntary; Claimant was not told that her job would be eliminated in the near future; and work was available to Claimant had



she not terminated her employment. As also noted above, these findings are amply supported by Claimant's testimony at the hearing conducted before the Referee. See N.T. 12/21/09 at 3-4, 5, 7. As a result, these findings are conclusive in our review of the instant appeal. Taylor.

Moreover, these findings support the Board's determination that Claimant is not eligible for benefits pursuant to Section 402(b) of the Law.<sup>6</sup> As a result, Claimant's allegation of error in this regard is likewise patently without merit. Renda; Staub; Peoples First National Bank.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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<sup>6</sup> See, e.g., Peoples First National Bank, 632 A.2d at 1018 ("Claimant voluntarily terminated his employment as a matter of choice because he wished to avoid the possibility of being laid off in the future. At no time, did Employer state that Claimant's job was to be eliminated. Moreover, our review of the record reveals that the testimony of Employer's witness, which Claimant did not refute, indicates that continuing work was available.... We, therefore, conclude that Claimant's speculative belief that he would be terminated if he did not accept Employer's voluntary enhanced early retirement package is not cause of a necessitous and compelling nature. As such, Claimant is ineligible for benefits under Section 402(b) of the Law.").

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Board of Review,	:	
	:	
Respondent	:	

**ORDER**

AND NOW, this 19th day of October, 2010, the order of the Unemployment Compensation Board of Review, dated March 18, 2010 at No. B-497025, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge