

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Peterson,	:	
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Petitioner	:	
	:	
v.	:	No. 1120 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: September 10, 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

Carol Peterson (Claimant) petitions 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).¹ We affirm.

¹ 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 Allentown UC Service Center upon the separation of her employment as a claims payment adjuster with Independence Blue Cross (Employer). The Service Center representative issued a determination denying her claim for benefits pursuant to Section 402(b) of the Law. A notice of determination of non-fault overpayment of benefit was issued to Claimant pursuant to Section 804(b) of the Law.²

Claimant appealed both determinations and a hearing was conducted before a Referee on February 12, 2010. Claimant appeared at the Referee's hearing *pro se* and testified on her own behalf. Claimant also presented the testimony of two former co-workers: (1) Kathy Yamas and (2) Blanche Aboyan. No one appeared on Employer's behalf at the hearing.

Based on the evidence presented, the Referee found as follows. Claimant worked full time as a claims payment adjuster from February 10, 1998, until her last day of work on October 30, 2009. In September 2009 Employer had a meeting and informed the employees, including Claimant, that the company was issuing a voluntary early retirement package (VERP). If the employee qualified for the VERP, the individual's last day of work would be October 30, 2009.

Under the terms and conditions of the VERP, an individual would receive an additional three years to their years of service and three years to their age. The individual would also receive medical, dental and life insurance benefits.

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

² 43 P.S. §874(b). Section 804(b) of the Law provides in pertinent part that "any person who other than by reason of his fault has received with respect to a benefit year any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him with respect to such benefit year, or the three-year period immediately following such benefit year"

Employer offered the VERP to any employee greater than 55 years of age with 10 or more years of service. Employer offered the VERP to over 800 employees and over 500 employees accepted the package.

Claimant was eligible for and accepted the VERP. Claimant did not receive definite and specific information from Employer that her specific job would be eliminated if she chose not to accept the VERP. Claimant voluntarily terminated her employment when she accepted the VERP and retired.

Accordingly, the Referee concluded that, absent specific information that her job would be eliminated if she chose not to accept the VERP, Claimant's termination of her employment to accept the VERP did not constitute a necessitous and compelling reason to voluntarily leave her job. Thus, the Referee affirmed the Service Center's determination finding Claimant ineligible to receive benefits under Section 402(b) of the Law. The Referee also affirmed the Service Center's determination that Claimant received a non-fault overpayment of benefits.

Claimant appealed the Referee's decision to the Board. Upon review of the record and the testimony submitted at the hearing before the Referee, the Board affirmed the Referee's decision without making any independent findings of fact or conclusions of law. Claimant then filed the instant appeal from the Board's order.³

³ This Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). An adjudication cannot be in accordance with the law if it is not decided on the basis of law and facts properly adduced; therefore, appellate review for the capricious disregard of material, competent evidence is an appropriate component of appellate consideration if such disregard is properly before the reviewing

(Continued....)

A claimant is ineligible for unemployment compensation benefits if she voluntarily becomes unemployed without cause of a necessitous and compelling nature. Section 402(b) of the Law, 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).

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,

court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.2d 478 (2002). When determining whether the Board capriciously disregarded the evidence, the Court must decide if the Board deliberately disregarded competent evidence that a person of ordinary intelligence could not conceivably have avoided in reaching a particular result, or stated another way, if the Board willfully or deliberately ignored evidence that any reasonable person would have considered to be important. Id. at 203 n.12, 812 A.2d at 487 n. 12; Porco.

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.

Herein, Claimant raises the sole issue of whether the Board used an incorrect legal standard for benefits where the Board required Claimant to show that her specific position would be eliminated before finding necessitous and compelling cause for terminating her employment.⁴ In support of this issue, Claimant contends that the Board used an incorrect standard by requiring her to show to a certainty that her specific job would be eliminated. Claimant contends that under the correct standard, she made more than an ample showing that her fears about the lack of continuing work were well-founded under all the circumstances.

Claimant argues that she believed her separation from employment was imminent. Claimant contends that her belief was buttressed by statements by her supervisor that there was no guarantee that Claimant would still be employed two weeks into November if she did not take the VERP and that there would definitely be more layoffs. Claimant points out that Employer did not appear at the hearing and dispute her evidence. Claimant contends that she had a reasonable belief that continuing work was not going to be available because Employer specifically told her that her separation was involuntary, the company was in bad

⁴ Claimant has not raised any issue in this appeal with respect to the non-fault overpayment of benefits.

financial shape, there was a series of downsizing, and less work was available for those few who remained employed. Claimant argues that, based on the foregoing evidence, she should have prevailed as a matter of law.

We will address first Claimant's contention that because Employer did not appear and dispute her testimony, particularly her belief that continuing work was not going to be available, she should have prevailed in her claim for unemployment compensation benefits. 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.

We now turn to Claimant's contention that the Board applied the incorrect standard by requiring her to show to a certainty that her specific job would be eliminated. Claimant contends that her situation is similar to the claimant's position in Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993), where this Court determined that the Board's finding that continuing work was available was capricious and not based on any evidence.

We agree with Claimant that in situations where claimants have left employment to accept voluntary retirement incentive packages and continuing work was unavailable or evidence provided by either the employee or employer

showed a likelihood of imminent layoff, this Court has generally upheld the grant of compensation benefits. Staub; Eby. For example, in Eby, benefits were granted to the claimant because his undisputed testimony, supported by a letter from his employer, provided that he was specifically identified as part of a group that would be laid off due to lack of continuing work. Eby, 629 A.2d at 178.

Herein, Claimant did not testify that she was directly informed by Employer that continuing work would not be available if she accepted the VERP. To the contrary, Claimant testified that while her supervisor indicated to her that there would be more layoffs in the future, the supervisor also informed Claimant that she could not guarantee that Claimant would be one of the employees laid off because it depended on who accepted the VERP. Reproduced Record (R.R.) at 10a. Claimant testified further that she could have come back to work on October 31st, November 1st or November 2nd and still had a job “but the longevity of the company was not guaranteed.” Id. at 11a. Claimant testified that if she did not take the VERP, she “could not be guaranteed, [she] would have a job into the near future” and that she believed she would have been one of the 200 people that were laid off shortly after she left her employment on October 30, 2009. Id. Claimant testified that she could not take the chance of not having the medical coverage or the dental coverage and other benefits if she decided to stay employed and not accept early retirement. Id.

Claimant’s testimony clearly shows that her belief that she would be laid off if she did not accept the VERP was speculative. Pursuant this Court’s decisions in Renda and Staub, as set forth above, the Board applied the correct legal standard. Claimant’s testimony reveals that she was not informed by Employer, either verbally or through documentation, that her specific job would be

in jeopardy or that Employer guaranteed that her job would be eliminated.⁵ As such, this matter is distinguishable from Eby, where there was evidence that the claimant's position would definitely be eliminated, and more akin to our decision in Peoples.

In Peoples, the claimant was not definitively told that he would be laid off and testified that there was only a possibility that he would be laid off. Peoples, 632 A.2d at 1018. This Court determined that the claimant was disqualified from receiving benefits because his purely speculative belief that a layoff was imminent created a voluntary choice to leave his employment in order to avoid the possibility of being laid off in the future. Id.

Accordingly, because Claimant's departure in this case to accept the VERP was based on speculation and to avoid the mere possibility of being laid off in the future, she was properly denied benefits under section 402(b) of the Law. Id. Moreover, the fact that Claimant's acceptance of the VERP may have been deemed involuntary for purposes of participating in federal health insurance coverage, is of no moment. The Board is charged with determining whether a claimant has met his or her burden of proving a necessitous and compelling reason to terminate employment based on the provisions of this Commonwealth's Unemployment Compensation Law, not federal law.

The Court empathizes with the difficult position that Claimant found herself in when faced with the choice of whether to accept the VERP offered by

⁵ We note that while Claimant presented the testimony of a former co-worker who did not accept the VERP and was later laid off effective February 12, 2010, because her position was eliminated, that co-worker was employed in a different department and in a different position than Claimant. See R.R. at 15a-16a. In addition, Claimant's other witness, also a former co-worker, who did accept the VERP, testified that she was not told that she would not have a job if she did not accept early retirement. Id. at 14a.

Employer or to continue to remain employed. However, based on the Board's findings and the legal standard applicable to this matter, we are compelled to affirm the Board's order.⁶

JAMES R. KELLEY, Senior Judge

⁶ 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). 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).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Peterson,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1120 C.D. 2010
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 19th day of October, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge