

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Cecilia L. Nazaruk,	:	
	:	
Petitioner	:	
v.	:	No. 1280 C.D. 2010
	:	Submitted: November 19, 2010
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	
	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: December 30, 2010

Cecilia Nazaruk (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the decision of a referee denying Claimant’s benefits pursuant to Section 402(b) of the Unemployment Compensation Law (Law), due to her voluntarily leaving work without cause of a necessitous and compelling nature.¹ We reverse.

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 that an employee 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...

Claimant was employed by Verizon Services (Employer) for just under five years when she took advantage of an incentive package and left her employment. Claimant's last day of employment was December 3, 2009. Thereafter, Claimant applied for unemployment compensation benefits, which were denied by the service center. Claimant appealed and a hearing was then conducted before a referee. Claimant and her counsel were the only two present at the referee's hearing, after which the referee concluded that Claimant was ineligible for benefits, having voluntarily left her employment without cause of a necessitous and compelling nature. On appeal, the Board made the following findings of fact:

1. The claimant was employed for approximately five years with Verizon as a full-time operator earning \$15 per hour. The claimant's last day of work was December 3, 2009.
2. Prior to December 3, 2009, the claimant was informed that the employer intended to downsize their workforce by 150 employees.
3. As a part of the downsizing, the employer offered an incentive package to employees who voluntarily left employment.
4. The claimant was informed that, if the employer did not get 150 volunteers, the employer would proceed with layoffs, starting with employees hired after August 3, 2003.
5. A seniority list was posted. The seniority list identifies employees with the most seniority at the top and those employees with the least seniority at the bottom.
6. The claimant was the 46th employee from the bottom of the list.

7. The claimant was hired after August 3, 2003.
8. Effective December 5, 2009, the claimant voluntarily left employment with Verizon in order to accept the incentive package.
9. Continuing work was available to the claimant at the time that she quit her employment.

(R.R. at 44a-45a.)

Based on the above, the Board determined that Claimant brought about her unemployment, that continuing work was available to Claimant, and that Claimant failed to show cause of a necessitous and compelling nature for quitting. Therefore, the Board determined that Claimant was not eligible for benefits pursuant to Section 402(b) of the Law. This appeal followed.²

Essentially, Claimant contends that the Board erred in determining that she did not have a necessitous and compelling reason to quit. Once it is determined that Claimant voluntarily terminated her employment, the Claimant “bears the burden of proving a necessitous and compelling reason for voluntarily terminating the employment relationship.” Mutual Pharmaceutical Company v. Unemployment Compensation Board of Review, 654 A.2d 37, 39 (Pa. Cmwlth. 1994). “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

² The court’s review when the burdened party is the only party to present evidence and did not prevail, is limited to determining whether the Board committed an error of law or capriciously disregarded the evidence. Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993).

that fears 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. Renda v. Unemployment Compensation Board of Review, 837 A.2d 685, 692 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004).³

Claimant maintains that she had a necessitous and compelling reason for terminating her employment because, as found by the Board, Employer notified the employees that 150 employees would be laid off in order of seniority, with the employees with the least seniority being laid off first. Employer further warned that employees hired after August 2003 would be the first to be laid off. Additionally, a letter was posted for employees to see the order of their seniority. Claimant was the 46th least senior person hired after August of 2003. Further, at the time the list was posted, Employer offered a severance package to the employees. Claimant accepted the severance package, ending her employment with Employer. Claimant also testified that people that did not take the package and who were hired after August 3, 2003, were let go. (R.R. at 32a.)

In Eby, as in this case, the claimant was the only party to present testimony and evidence. The claimant introduced a retirement offer sent to him by the employer which stated "*you are in a group that has identified work to be eliminated,*" urged the claimant to "be realistic" and expressed "sad[ness]...that we must take these actions." Id. 629 A.2d at 177. (Emphasis in original.) The claimant testified that he reasonably believed that he would be terminated if he did not accept the retirement

³ In Renda, however, the claimants were not under any imminent threat of termination and thus, did not have a necessitous and compelling reason to quit.

package. This court determined that the claimant met his burden of proving that his voluntary termination was for a necessitous and compelling nature through presentation of the employer's letter which showed a likelihood of imminent layoff and the claimant's own testimony.

Although uncertainty and speculation about the future existence of a job does not create a necessitous and compelling cause for a voluntary termination, Department of the Navy v. Unemployment Compensation Board of Review, 650 A.2d 1138 (Pa. Cmwlth. 1994), Claimant here, just as in Eby, showed a likelihood of imminent layoff. Claimant was informed that Employer was laying off 150 employees. Like Eby, Claimant was informed that she was part of the group to be eliminated. Namely, Employer would proceed with layoffs starting with employees hired after August of 2003 in reverse seniority order. Claimant was hired after August of 2003 and Employer posted a seniority list which identified Claimant as 46th from the bottom. Claimant was also offered an incentive/severance package to leave. Here, Claimant presented testimony that she would likely lose her job had she not accepted the severance package. In fact, as testified to by Claimant, people that did not take the package and were hired after August 3, 2003 were let go. Just as in Eby, Claimant was the only witness and presented evidence and testimony that supports the legal conclusion that there was no competent evidence to support the UCBR's finding that continuing work was available. The UCBR erred as a matter of law under the capricious law standard. As in Eby, Claimant met her burden of proving that she voluntarily left work for cause of a necessitous and compelling nature.

Accordingly, we must reverse the decision of the Board.

JIM FLAHERTY, Senior Judge

President Judge Leadbetter concurs in result only.

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ORDER

Now, December 30, 2010, the order of the Unemployment Compensation Board of Review, in the above-captioned matter, is reversed.

JIM FLAHERTY, Senior Judge