

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Dennis F. Fulk,	:
Petitioner	:
	:
v.	:
	:
Unemployment Compensation Board	:
of Review,	: No. 774 C.D. 2008
Respondent	: Submitted: August 8, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
          HONORABLE RENÉE COHN JUBELIRER, Judge  
          HONORABLE JOHNNY J. BUTLER, Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
JUDGE BUTLER**

**FILED: September 5, 2008**

Dennis F. Fulk (Claimant) petitions this court for review of the March 28, 2008 decision and order of the Unemployment Compensation Board of Review (UCBR) affirming the Referee’s decision to deny benefits under Section 402(b) of the Unemployment Compensation Law (Law).<sup>1</sup> The Claimant presents two issues for the Court’s review: 1) whether the UCBR committed an error of law in affirming the Referee’s decision that Claimant failed to prove necessitous and compelling reasons for leaving his employment, and 2) whether the UCBR’s

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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).

decision was based on substantial evidence elicited at the Referee's hearing. For reasons that follow, we affirm the UCBR's decision and order.

Claimant had been employed with Verizon North Inc. (Employer) for over 40 years. In November 2007, Employer notified Claimant along with other employees in the equipment installation department orally and then in writing that he would be offered an Income Security Plan (incentive package) if he would leave employment with Employer. This was the only information Claimant received concerning the incentive package. In the paperwork Claimant received, Employer indicated that if at least 15 employees in Pennsylvania and Delaware did not accept the incentive package, Employer might have to lay off employees. The incentive package terms offered the employees a pre-determined amount of money for each year that the employee had worked for Employer up to 30 years. Claimant had 14 days to decide whether to take the incentive package or remain employed and face possible lay offs. Claimant accepted the incentive package on the last possible day that he could, and received a lump sum payment of \$33,000.00 under the terms of the incentive package.

Claimant applied for unemployment compensation benefits in December 2007. The Pennsylvania Department of Labor and Industry, Bureau of Unemployment Compensation Benefits and Allowances (Bureau) determined that Claimant was ineligible for benefits under the Law. The Bureau's decision was based on its determination that there was no information provided that showed Claimant had knowledge his job would be affected if he did not accept the incentive package. Claimant appealed the Bureau's decision, and a hearing was held before a Referee on February 7, 2008. The Referee determined that the claimant had unusually high seniority and faced only the possibility of being laid

off. The Referee concluded that the law required more than a subjective belief that one might be laid off in order to meet the burden of demonstrating necessitous and compelling reasons. Claimant appealed the Referee's decision to the UCBR. The UCBR adopted and incorporated the Referee's findings and conclusions, and affirmed the Referee's decision. Claimant appealed the UCBR's decision to this Court.<sup>2</sup>

Claimant first argues that the UCBR should not have affirmed the Referee's decision because Claimant proved necessitous and compelling reasons for leaving his employment when he testified that he felt real and substantial pressure to accept the incentive package or be laid off if a certain number of employees did not accept the incentive package.

Necessitous and compelling reasons for voluntarily terminating employment result 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. An employee voluntarily terminating employment has the burden of proving his termination was necessitous and compelling." *Renda v. Unemployment Compensation Board of Review*, 837 A.2d 685, 691 (Pa. Cmwlth. 2003) (citations omitted).

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 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

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<sup>2</sup> The Court's review is limited to determining whether Claimant's constitutional rights were violated, whether an error of law was committed, or whether the necessary factual findings are supported by competent evidence. *Sheets v. Unemployment Compensation Board Of Review*, 708 A.2d 884 (Pa. Cmwlth. 1998); 2 Pa.C.S. § 704.

threatened is well-founded. Speculation pertaining to an employer's financial condition and future layoffs, however disconcerting, does not establish the requisite necessitous and compelling cause.

*Id.* at 692 (footnote and citations omitted).

Claimant stated in his testimony that he was notified by his immediate supervisor and then in writing of a separation offer being made to the equipment installation department in which he worked because the company needed to cut 15 positions. Notes of Testimony, February 7, 2008, (N.T.) at 3. Claimant also stated that “the question and answer information they had put with the paperwork” indicated that he “could lose [his] job later on if [he] did not take this [incentive package].” N.T. at 3. However, he also states that if he did not take the incentive package he “would have been laid off had the[y] done that later on in the future, and [he] would have gone out then and probably applied for [his] pension, retirement at that time.” N.T. at 3. Further, Claimant testified that after he had “confirmed that [he] was going to take the [incentive package], [he] also began the process for retirement, so [he] was going to get [his] retirement, ... in a rolled over lump sum, which has occurred...” N.T. at 5. Finally, Claimant testified that the incentive package option was written into the union contract and that “[i]f they don't get anyone to ... take the incentive program, the income security plan, then they will, if they deem necessary, will go through and layoff the most junior people in the department.” N.T. at 4.

Claimant's testimony indicates that 1) he was not sure that Employer would lay off people if the incentive package had not been accepted by the requisite number of people; 2) if layoffs did occur, his seniority in the company could protect him from losing his job; and 3) even if layoffs were initiated in the future that he could apply for retirement and get his pension, and that he in fact did

apply for and receive his pension. For these reasons, Claimant did not prove that he voluntarily terminated his employment as a result of necessitous and compelling reasons. Accordingly, the UCBR did not err in affirming the Referee's decision.

Claimant next argues that there was a lack of substantial evidence to support the Referee's finding that continuing work was available to Claimant if he did not accept the incentive package because Employer did not contest Claimant's application for benefits and Claimant had a reasonable belief that his position would be selected if layoffs occurred.

"Substantial evidence is that relevant evidence which reasonable minds might accept as adequate to support a conclusion." *Eck v. Unemployment Compensation Board of Review*, 651 A.2d 689 (Pa. Cmwlth. 1994).

As stated previously, Claimant did not know definitively that he would be laid off if the requisite number of employees did not accept the incentive package. He testified that he was the most senior employee at his location and that the union contract established that the most junior people in the department would be laid off. N.T. at 4. He also testified that he made his decision to accept the incentive package "because [he] wasn't sure if [he] took it or [he] didn't take it that six months from now, or even right after [the] package was removed, they wouldn't lay people off, if they didn't get enough people to take the incentive." N.T. at 5.

Even though Employer did not testify or present evidence at the Referee's hearing, the Claimant's testimony indicates that he was never specifically told that he would not have a job or that layoffs were certain had the requisite number of employees not accepted the incentive package. Based on these

findings, the Referee could reasonably determine that Claimant could have expected to continue working if he had not accepted the incentive package.

For these reasons, the decision and order of the UCBR are affirmed.

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**JOHNNY J. BUTLER, Judge**

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**O R D E R**

AND NOW, this 5th day of September, 2008, the order and decision of the Unemployment Compensation Board of Review in the above-captioned matter are hereby affirmed.

**JOHNNY J. BUTLER, Judge**