

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ellen Walker,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 787 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: September 17, 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

Ellen Walker (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 Indiana UC Service Center upon the separation of her employment as a technical adviser 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.² A notice of determination of non-fault overpayment of benefit was issued to Claimant pursuant to Section 804(b) of the Law.³

Claimant appealed both determinations and a hearing was conducted before a Referee on January 11, 2010. Claimant appeared at the Referee's hearing *pro se* and testified on her own behalf. No one appeared on Employer's behalf at the hearing.

By decision and order mailed on January 15, 2010, the Referee affirmed the Service Center's determination finding Claimant ineligible for benefits pursuant to 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 to the Board.

Based on the evidence presented at the Referee's hearing, the Board found as follows. Claimant was employed by Employer beginning in 1972.

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

² The Service Center initially issued a determination on December 4, 2009, finding Claimant eligible for unemployment compensation benefits; however, by notice of redetermination issued on December 7, 2009, the Service Center found that Claimant was ineligible for benefits pursuant to Section 402(b) of the Law.

³ 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 a voluntary early retirement package (VERP) to certain employees which, if accepted, would enhance health insurance, life insurance and pension benefits. In order to be eligible for the VERP, employees were required to be at least a certain age with a certain number of years of service.

Claimant qualified for the VERP. Employer provided employees with documentation regarding the VERP in August 2009, which, if the employees accepted such package, they were required to separate from employment by October 30, 2009.

Claimant was advised that Employer was undergoing restructuring and that lay offs would occur by the end of 2009. However, no one in authority specifically advised Claimant that her particular position with Employer would be eliminated. Claimant accepted the VERP and left her employment effective October 30, 2009.

Before she left her employment, Claimant transitioned her work to other members of her department. To the best of Claimant's knowledge, the department in which she worked for Employer continues to exist and the employees continue to call Claimant for advice. Work would have remained available to Claimant following October 30, 2009, if she had not accepted the VERP.

Based on the foregoing findings of fact, the Board concluded as follows:

In the present case, the record establishes that the claimant voluntarily retired on October 30, 2009. Although there were indications that there would be reductions in the employer's workforce by the end of the year 2009, the claimant was not identified as an individual that would definitely be laid off and no specific lay off date was given. Moreover, the claimant chose to retire several months before any reduction of the

workforce would have occurred and acknowledges that her department continues to exist. It was uncertain and mere speculation as to whether the claimant herself would have been laid off. Based on the above, the claimant has not established that she voluntarily retired for cause of a necessitous and compelling nature and benefits will be disallowed under Section 402(b) of the Law.

Board Opinion at 3. Accordingly, the Board affirmed the Referee's decision and denied Claimant unemployment compensation benefits pursuant to Section 402(b) of the Law. This appeal followed.⁴

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

⁴ 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 court. Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe), 571 Pa. 189, 812 A.3d 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.

A.2d 1266, 1270 (Pa. Cmwlt. 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. Cmwlt. 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. Cmwlt. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004);⁵ Staub v. Unemployment Compensation Board of Review, 673 A.2d 434 (Pa. Cmwlt. 1996); Peoples First National Bank v. Unemployment Compensation Board of Review, 632 A.2d 1014 (Pa. Cmwlt. 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.

⁵ See also Diehl, Jr. v. Unemployment Compensation Board of Review, __ A.3d __ (Pa. Cmwlt., No. 2421 C.D. 2009, filed September 20, 2010), wherein this Court, in an *en banc* decision, declined to overrule Renda and reverse the long standing holding of this Court that Section 402(b) of the Law does not apply where a claimant accepts an early retirement incentive package.

Herein, Claimant argues that the Board erred by concluding that she failed to establish a necessitous and compelling reason for accepting the VERP and terminating her employment.⁶ Claimant contends that the evidence proves that there was a likelihood that her fears about her job security would otherwise materialize and that her belief that her job was imminently threatened was well-founded. Claimant contends that Employer positively informed her that it intended to conduct a workforce reduction due to the need to scale back its workforce to reflect its revenue when it presented Claimant with the VERP offer. Claimant contends further that she was certain that she would be terminated in the imminent workforce reduction given her knowledge that Employer intended to conduct imminent layoffs to accomplish the reduction in workforce.

Claimant contends further that the Board erred by concluding that continuing work was available to her on an indefinite basis. Claimant argues that Employer did not present evidence or testify at the hearing before the Referee that continuing work was available. Claimant contends that the Board also erred by concluding that Claimant was not entitled to benefits because no one of authority specifically advised her that her particular position with Employer would be eliminated. Claimant contends that it is not a requirement, as a matter of law, that she be specifically advised by her employer that her position in the company would be eliminated.

We will address first Claimant's contention that because Employer did not appear and present evidence, the Board erred in finding that continuing work was available. In Johnson v. Unemployment Compensation Board of

⁶ Claimant has not raised any issue in this appeal with respect to the non-fault overpayment of benefits.

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 erred in concluding that she did not have a necessitous and compelling reason to voluntarily terminate her employment. 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; Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1994); Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993). As recently pointed out by this Court, "[in] those cases, unemployment benefits were awarded where the record revealed the employers informed the claimants that they were within a group that could be laid off if they did not accept early retirement packages, and there was no competent evidence that continuing work was available to the claimants if they did not accept the early retirement offers." Diehl, slip op. at 17-18, __ A.3d at __.⁷

⁷ For example, in Eby, benefits were granted to the claimant because his undisputed
(Continued...)

Herein, while Claimant testified that she feared for her job and that she would be without medical benefits, 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, the Board found that no one in authority specifically advised Claimant that her particular position with Employer would be eliminated. This finding is supported by Claimant's testimony wherein she testified that no one told her what would have become of her position had she not accepted the VERP. Reproduced Record (R.R.) at 79a. In addition, Claimant testified, and the Board found, that the department in which Claimant worked continues to exist and the employees continue to call Claimant for advice. *Id.* at 85a. The Board found further, based on Claimant's testimony, that before she left her employment, she transitioned her work to other members of her department. Therefore, the Board's finding that work would have remained available to Claimant following October 30, 2009, if she had not accepted the VERP, is supported by the record. As such, pursuant to this Court's decisions in Renda and Staub, and more recently in Diehl, the Board applied the correct legal standard.

Claimant testified that she decided to accept the VERP due to: (1) information she obtained from all the town hall type meetings conducted by Employer's Senior Director of Corporate Benefits; (2) comments from her supervisor that since the VERP was being offered she was doing the correct thing in accepting the package; (3) Employer's statements that it was downsizing due to the economy and the work force budget; (4) the fact that Employer could not guarantee her job would be there if she decided not to accept the VERP; and (5)

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.

the fact that she would be guaranteed medical benefits if she accepted the VERP. Id. at 76a-80a.

However, Claimant's reasons for accepting the VERP are insufficient to satisfy Claimant's burden. As stated previously herein, "speculation 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). Fears over job security based on possibilities do not constitute a necessitous and compelling reason to terminate one's employment particularly where the record supports the finding that continuing work was available and where the employee was not informed that she would be laid off.

This matter is distinguishable from this Court's decisions in Philadelphia Parking Authority and 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.⁸

⁸ 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

(Continued....)

Id. 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 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.⁹

JAMES R. KELLEY, Senior Judge

Commonwealth's Unemployment Compensation Law, not federal law.

⁹ 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).

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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