

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

F. Deloise Council-Johnson,	:	
Petitioner	:	
	:	
v.	:	No. 944 C.D. 2010
	:	
Unemployment Compensation	:	Submitted: October 1, 2010
Board of Review,	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: November 9, 2010

F. Deloise Council-Johnson (Claimant), *pro se*, 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 Philadelphia UC Service Center upon the separation of her employment as a network coordinator 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.

Claimant appealed the Service Center's determination and a hearing was conducted before a Referee on January 5, 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 6, 2010, the Referee affirmed the Service Center's determination finding Claimant ineligible for benefits pursuant to Section 402(b) of the Law. Claimant appealed to the Board. Upon review of the record and the testimony submitted at the hearing before the Referee, the Board adopted the Referee's findings of fact and conclusions of law, which are as follows.

Claimant worked as a full-time network coordinator for Employer from January 3, 1978, through October 30, 2009. Claimant's age is 60 and Employer's normal retirement age is 62. Employer announced that work was slow and that there would possibly be a reduction in staff. Claimant's supervisor told Claimant that "[a]ll positions are being evaluated." Claimant feared that she would be laid off from her job.

Employer offered Claimant a Voluntary Early Retirement Package (VERP) in an effort to reduce costs. Claimant accepted the VERP and received a

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

lump sum pension. Claimant was never told by Employer that her job was being eliminated or that she was being laid off for lack of work. Continuing work was available to Claimant on October 30, 2009, when Claimant opted to accept the VERP.

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

In this case, the claimant accepted a [VERP] and received a lump sum pension The claimant was not told by the employer that her job was going to be eliminated or that she was being laid off for lack of work on a specific date. The Courts have held that when a claimant voluntarily quits a job in anticipation of a potential lay off, the separation is not considered cause of a necessitous and compelling nature for leaving. Thus, the claimant has failed to meet her burden of proving cause of a necessitous and compelling nature for leaving, and must be denied benefits under Section 402(b) of the Law.

Accordingly, the Board affirmed the Referee's decision denying Claimant's unemployment compensation benefits pursuant to Section 402(b) of the Law. Claimant then filed the instant appeal from the Board's order.²

² 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.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

(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);³ 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).

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.

³ See also Diehl, Jr. v. Unemployment Compensation Board of Review, 4 A.3d 816 (Pa. Cmwlth. 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.

“[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.

Herein, Claimant argues that the Board erred as a matter of law in deeming her ineligible for unemployment compensation benefits due to her voluntarily leaving work without cause of a necessitous and compelling nature. Claimant, relying upon Philadelphia Parking Authority v. Unemployment Compensation Board of Review, 654 A.2d 280 (Pa. Cmwlth. 1994), and Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993), argues that her separation from employment was involuntary because: (1) she believed that she would be terminated if she did not accept the VERP; (2) Employer did not offer a reasonable assurance that her position would not be eliminated and she feared that if she did not accept the financial incentives and her position was indeed eliminated, she would lose the financial benefits of having accepted the VERP; (3) her welfare was most important and ordinary common sense dictates that because she could not reasonably ascertain whether her job would be eliminated, she was afraid she would be laid off if she did not accept the VERP; and (4) employees who accepted the VERP were required to complete the American Recovery and Reinvestment Act subsidy application, which indicates within its federal mandate, that to be considered for reduced health benefit contributions, each employee’s loss of employment must be “involuntary.”

Claimant further points out that Employer did not contest her application for unemployment compensation benefits. Finally, Claimant contends that she is justified in questioning why other claimants who also accepted the VERP have received unemployment compensation benefits. Claimant contends that it is discriminatory and a non-uniform outcome to be deemed ineligible when her circumstances are identical to those claimants who were deemed eligible.

We will address first Claimant's contention that she is entitled to unemployment compensation because Employer did not appear and contest her claim for 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 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; Eby. As recently pointed out by this Court, "[i]n 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, 4 A.3d at 825-826.⁴

Herein, Claimant did not testify or present any credible evidence that she was informed by Employer that her job was going to be eliminated or that she was being laid off due to lack of work on a specific date. Clearly based on Claimant’s testimony that, “[i]t was not said that my job was being eliminated,” her reasons for accepting the VERP were based on a fear that her job would possibly be eliminated. See Certified Record, Notes of Testimony of January 5, 2010 Referee’s Hearing at 4. As such, 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.

⁴ 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

(Continued....)

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.

Moreover, the fact that Claimant's acceptance of the VERP may have been deemed involuntary for purposes of participating in federal health insurance coverage or that some former employees were deemed eligible for unemployment compensation, is of no moment. First, 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. Second, the Board makes such a determination on a case by case basis as each application for benefits normally involves numerous fact-specific issues regarding each claimant's situation. As such, it was entirely appropriate for the Board, based on the evidence presented, to issue a separate decision with respect to any employee who accepted Employer's VERP and then later applied for unemployment compensation benefits. See McGoldrick v. Unemployment Compensation Board of Review, 526 A.2d 461 (Pa. Cmwlth. 1987)(Unless cases are consolidated, the Board is required, pursuant to its own regulations, to set forth separate findings of fact, conclusions of law, and appropriate reasons for its decisions.)

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. Peoples. The Court empathizes with the difficult position that Claimant found

as part of a group that would be laid off due to lack of continuing work. Eby, 629 A.2d at 178.

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.⁵

JAMES R. KELLEY, Senior Judge

⁵ 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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ORDER

AND NOW, this 9th day of November, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is affirmed.

JAMES R. KELLEY, Senior Judge