

UNEMPLOYMENT COMPENSATION

DIEHL V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW: BROADENING UNEMPLOYMENT COMPENSATION LAWS IN PENNSYLVANIA

I. INTRODUCTION

In a controversial decision, *Diehl v. Unemployment Compensation Board of Review*,¹ the Supreme Court of Pennsylvania, by changing well-established law, gave companies an incentive to encourage early retirement, thus increasing the number of individuals nearing retirement age in the unemployment system. An individual who accepts an early retirement package, as a result of employer initiated workforce reduction, is now eligible for unemployment benefits. The Supreme Court of Pennsylvania in *Diehl* held that the voluntary layoff option found in section 402(b) of the Unemployment Compensation Law does not preclude employees who accept early retirement packages offered as a result of an employer-initiated workforce reduction from receiving unemployment benefits.²

This survey begins in Part II by providing background on the line of cases leading up to the decision in *Diehl* and discusses the statutes implicated by the decision, giving the reader a context in which to understand the *Diehl* decision. Part III explores the court's decision in *Diehl*, beginning with a concise statement of facts and procedural history. Next, this survey delves into an analysis of the Commonwealth Court of Pennsylvania's decision in *Diehl*, showcasing its reliance on the *Renda* line of cases. Part IV provides the reader with an evaluation of the decision by the author, and is followed by Part V, which provides concluding thoughts on the decision.

¹ *Diehl v. Unemployment Comp. Bd. of Review*, 57 A.3d 1209 (Pa. 2012).

² *Id.* at 1210.

II. BACKGROUND

A common issue presented in cases before the Unemployment Compensation Board of Review (Board) deals with section 402(b)³ of the Unemployment Compensation Act.⁴ First, section 402 begins by stating that any employee will be ineligible for benefits for any week in which his unemployment is due to "voluntarily leaving work without cause of a necessitous and compelling nature."⁵ Section 402(b), also referred to as the voluntary layoff proviso (VLO Proviso), states in relevant part, "[t]hat no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position pursuant to a labor-management contract agreement, or pursuant to an established employer plan, program or policy."⁶ This section also implicates section 401(d)⁷ of the Unemployment Compensation Act, which discusses whether a claimant is otherwise eligible to receive benefits.⁸

The Supreme Court of Pennsylvania has also provided guidance for interpreting various provisions of the Unemployment Compensation Act.⁹ For example, in *Penflex, Inc. v. Bryson*,¹⁰ the court stated that the Unemployment Compensation Act was enacted in order to "alleviate the rigors of unemployment and most specifically to assuage the distress of the individual unemployed

³ Codified as 43 PA. STAT. ANN. § 802(b) (West 2009), but referred to in case law as section 402(b) of the Unemployment Compensation Act.

⁴ See, e.g., *W.R. Grace & Co. v. Unemployment Comp. Bd. of Review*, 455 A.2d 729, 729 (Pa. Commw. Ct. 1983) (examining the terms of section 402(b)); see also *Flannery v. Unemployment Comp. Bd. of Review*, 557 A.2d 52, 53 (Pa. Commw. Ct. 1989) (discussing application of a two-prong test to determine eligibility for unemployment benefits under the voluntary layoff option proviso of section 402(b)); *Sievers v. Unemployment Comp. Bd. of Review*, 555 A.2d 260, 261 (Pa. Commw. Ct. 1987) (discussing an employee's appeal under section 402(b)).

⁵ tit. 43, § 802(b).

⁶ *Id.*

⁷ Codified as 43 PA. STAT. ANN. § 801(d)(1) (West 2009).

⁸ *Id.* § 801(d)(1)-(2) (providing that any person is eligible for unemployment if they are able and available for suitable work).

⁹ See *Penflex, Inc. v. Bryson*, 485 A.2d 359, 365 (Pa. 1984).

¹⁰ *Penflex, Inc. v. Bryson*, 485 A.2d 359 (Pa. 1984).

worker."¹¹ Therefore, the court determined that eligibility sections of the act must be construed liberally to provide the maximum number of benefits to the aggrieved unemployed individual, while the disqualification provisions of the act must be construed narrowly as to not deny a claimant who is deserving of benefits.¹²

The Commonwealth Court of Pennsylvania was consistent in its application of sections 402(b) and 401(d) to claimants who had accepted early retirement packages, thereby establishing what is known as the *Renda* line of cases.¹³ One of the early cases decided after an amendment to section 402(b) was *Sievers v. Unemployment Compensation Board of Review*,¹⁴ which dealt with an employee who had applied for unemployment benefits and was denied based upon his voluntarily terminating his employment as part of an "operation leveraging and streamlining plan."¹⁵ The plan was meant to allow the company to reduce its workforce without implementing involuntary terminations, and those who were selected to participate were not told beforehand if their employment would be affected should they choose to stay.¹⁶ The court affirmed the denial of benefits, finding that the claimant had voluntarily terminated his employment.¹⁷ The court determined that the claimant had voluntarily terminated his employment because the claimant had gone to the employer to ask about the package, the employer had not approached him.¹⁸ Additionally, the court determined that, in the claimant's department, there had already been a significant number of employees who had accepted

¹¹ *Id.* at 365 (quoting *Gladieux Food Servs., Inc. v. Unemployment Comp. Bd. of Review*, 388 A.2d 678, 681 (Pa. 1978)).

¹² *Id.*

¹³ *See, e.g., Renda v. Unemployment Comp. Bd. of Review*, 837 A.2d 685, 691-92 (Pa. Commw. Ct. 2003); *George v. Unemployment Comp. Bd. of Review*, 767 A.2d 1124, 1128 (Pa. Commw. Ct. 2001); *Flannery v. Unemployment Comp. Bd. of Review*, 557 A.2d 52, 53-54 (Pa. Commw. Ct. 1989); *Sievers v. Unemployment Comp. Bd. of Review*, 555 A.2d 260, 262 (Pa. Commw. Ct. 1987).

¹⁴ *Sievers v. Unemployment Comp. Bd. of Review*, 555 A.2d 260 (Pa. Commw. Ct. 1987).

¹⁵ *Id.* at 261.

¹⁶ *Id.* at 261-62.

¹⁷ *Id.* at 262.

¹⁸ *Id.*

the package, and, therefore, staff reductions were not needed in his department.¹⁹ As a result, the court showed a strict interpretation of section 402(b), demonstrating that any claimant who voluntarily leaves his position will not be eligible for benefits.

Section 402(b) was consistently interpreted by the court in *Flannery v. Unemployment Compensation Board of Review*,²⁰ where a company offered employees, who were age fifty-seven and older, the opportunity to voluntarily terminate their employment and receive an early retirement package in lieu of the company terminating younger employees.²¹ However, the claimant could continue working had he not chose to accept the package, and, therefore, the court determined that the claimant did not fall into the voluntary layoff provision of section 402(b).²² The court reasoned that since the claimant would not have lost his job if he had not accepted the package, then this situation could not fall under the voluntary layoff provision, and, therefore, he was ineligible for benefits.²³

In another well-known case, *W.R. Grace & Co. v. Unemployment Compensation Board of Review*,²⁴ the claimant was granted benefits after accepting a voluntary layoff with recall rights.²⁵ The court in *W.R. Grace & Co.* established a two-prong test for applying section 402(b): "leaving work without necessitous and compelling cause, is irrelevant so long as: (1) the employee is 'otherwise eligible' for unemployment compensation benefits; and (2) his unemployment is due to exercising a voluntary layoff option either negotiated by contract or established unilaterally by the employer."²⁶ The court proceeded to determine that, although the claimant had been given the option of two other shifts, she was

¹⁹ *Id.*

²⁰ *Flannery v. Unemployment Comp. Bd. of Review*, 557 A.2d 52 (Pa. Commw. Ct. 1989).

²¹ *Id.* at 53.

²² *Id.*

²³ *Id.* at 53-54.

²⁴ *W.R. Grace & Co. v. Unemployment Comp. Bd. of Review*, 455 A.2d 729 (Pa. Commw. Ct. 1983).

²⁵ *Id.* at 730.

²⁶ *Id.*

still available for full-time employment.²⁷ The court reasoned that she fell under the first prong of the test because her voluntary layoff was pursuant to an employer plan, and, therefore, her eligibility rested on whether she was otherwise eligible, which the court determined she was because she could accept any full-time employment.²⁸ Conversely, in *Flannery*, the claimant did not accept the voluntary layoff option pursuant to an employer plan because he voluntarily terminated his employment.²⁹

More recently, section 402(b) was at issue was in *George v. Unemployment Compensation Board of Review*,³⁰ where the claimant accepted an early retirement incentive as part of a workforce reduction effort by the employer.³¹ This case interprets part of section 402 that deals with whether there was a necessary and compelling reason for the claimant to terminate employment, or, put another way, whether the employee's belief that his or her job was in jeopardy was a legitimate belief.³² The court stated that this question is answered using an objective standard where the actions of a reasonable person in the same situation are considered.³³ Citing precedent, the court stated that " 'uncertainty and speculation about the future existence of a job does not create a necessitous and compelling cause.' " ³⁴ Therefore, mere speculation of a future layoff is not a necessitous and compelling cause, and, in *George*, the claimant's claim for benefits was denied because the possibility that he could be laid off was speculative.³⁵ The court based its decision on the fact that the claimant, who claimed he was worried about being terminated because he did not have high seniority, was specifically told that seniority was not a

²⁷ *Id.* at 731.

²⁸ *Id.* at 730.

²⁹ *Flannery v. Unemployment Comp. Bd. of Review*, 557 A.2d 52, 53 (Pa. Commw. Ct. 1989).

³⁰ *George v. Unemployment Comp. Bd. of Review*, 767 A.2d 1124 (Pa. Commw. Ct. 2001).

³¹ *Id.* at 1125.

³² *Id.* at 1128.

³³ *Id.*

³⁴ *Id.* at 1129 (citations omitted).

³⁵ *Id.*

factor in the decision.³⁶ Therefore, the court determined that the claimant did not have a necessitous and compelling reason to accept the voluntary layoff.³⁷

In the 2003 decision of *Renda v. Unemployment Compensation Board of Review*,³⁸ the court followed its prior interpretations of section 402(b) of the Unemployment Compensation Act and denied benefits to sixty-three similarly situated claimants who had filed claims pursuant to their acceptance of an enhanced income security plan offered by their employer, which was meant to aid the company in reducing its workforce.³⁹ The employees claimed that they thought their job security was uncertain; however, the company never specifically told any of the employees that they would be laid off.⁴⁰ Therefore, the Board and the court both determined that the employees had voluntarily quit without a necessitous and compelling cause.⁴¹ The court stated that in order to determine whether there is a necessitous and compelling reason it must inquire as to whether: (1) the plan would likely place a fear in the employees that their jobs could be terminated; (2) an impending threat to the jobs would be realized by employees; and (3) the employees' beliefs that their jobs were threatened is well-founded.⁴² The court, after discussing several similar situations, determined that, in order for there to be a necessitous and compelling reason, the employer must actively voice to the employees that layoffs may occur.⁴³

Overall, the law surrounding section 402(b) of the Unemployment Compensation Act was well-established leading up to *Diehl*. The Commonwealth Court of Pennsylvania made it clear that it would interpret the section unambiguously by directly applying the relevant facts to the section. First, the court looks to whether the claimant falls under the main portion of section

³⁶ *George*, 767 A.2d at 1129.

³⁷ *Id.*

³⁸ *Renda v. Unemployment Comp. Bd. of Review*, 837 A.2d 685 (Pa. Commw. Ct. 2003).

³⁹ *Id.* at 689.

⁴⁰ *Id.* at 691.

⁴¹ *Id.*

⁴² *Id.* at 692.

⁴³ *Id.*

402(b), which states that in order to receive benefits an individual must have a necessitous and compelling reason for voluntarily terminating employment.⁴⁴ If the claimants state that they were terminated at the request of their employer, then it is necessary to do an analysis under the VLO Proviso, which provides, in summation, that claimants will be eligible if they voluntarily terminate their position pursuant to an employer plan.⁴⁵

III. ANALYSIS: *DIEHL V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW*

A. Facts

Harold Diehl (Diehl) was an employee with high seniority at ESAB Welding and Cutting Products when he was asked to accept an early retirement package.⁴⁶ The employer was looking to reduce its workforce due to financial constraints it was facing and was hoping that several senior level employees, who were nearing retirement, would accept the package so it would not have to layoff its less senior staff.⁴⁷ The employer circulated a memorandum that listed twenty employees who would be laid off, along with ten employees who would be kept on if those with high seniority, who were being offered an early retirement incentive, took it.⁴⁸ The early retirement incentive included full payment of health insurance for three years, partial payment for two years, and payment for any unused vacation days, but no severance benefits.⁴⁹ Diehl accepted the early retirement option offered to him so that the other younger, less senior employees would not be terminated.⁵⁰ He subsequently filed for unemployment compensation benefits, which were denied.⁵¹

⁴⁴ 43 PA. STAT. ANN. § 802(b) (West 2009).

⁴⁵ *Id.*

⁴⁶ Diehl v. Unemployment Comp. Bd. of Review, 57 A.3d 1209, 1210 (Pa. 2012).

⁴⁷ *Id.* at 1211.

⁴⁸ *Id.* at 1210.

⁴⁹ *Id.* at 1211.

⁵⁰ *Id.*

⁵¹ *Id.* at 1212.

B. Procedural History

Diehl filed for unemployment benefits after accepting an early retirement package pursuant to a workforce reduction by his employer.⁵² The Board denied him benefits, explaining that, pursuant to section 402(b), the claimant needed knowledge that his job would be terminated if he did not accept the employer's plan and leave the company.⁵³ Diehl appealed and was granted a hearing before a referee, who also denied him benefits, stating that his unemployment was not due to a necessitous or compelling reason, as required under section 402(b).⁵⁴ The referee never discussed the other portion of section 402(b), containing the VLO Proviso.⁵⁵ Diehl then appealed to the Board, which initially affirmed the referee's decision, and then vacated for reconsideration under the VLO Proviso clause, based upon Diehl's motion.⁵⁶ The Board, after reconsideration, affirmed the decision, and cited *Renda* for the proposition that the VLO Proviso does not apply where the employee accepts early retirement packages.⁵⁷

Diehl then appealed to the Commonwealth Court of Pennsylvania, arguing that the plain language of the VLO Proviso applied to him as written.⁵⁸ The court evaluated precedent, citing several cases⁵⁹ where it had interpreted and applied the VLO Proviso.⁶⁰ Relying on the reasoning established in the *Renda* line of cases, the court reaffirmed its decision that the VLO Proviso does not apply to employees accepting early retirement programs.⁶¹ Therefore, the Commonwealth Court of Pennsylvania

⁵² *Diehl*, 57 A.3d at 1211.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 1212.

⁵⁷ *Id.*

⁵⁸ *Diehl*, 57 A.3d at 1212. Diehl also sought reconsideration of *Renda*, arguing that the decision wrongly interprets the VLO Proviso because the decision bars anyone who accepts financial incentives from receiving benefits. *Id.* The court rejected this claim, stating that the *Renda* cases comply with the plain language of the statute. *Id.* at 1213.

⁵⁹ See *supra* notes 3-43 and accompanying text.

⁶⁰ *Diehl*, 57 A.3d at 1212.

⁶¹ *Id.*

affirmed the Board's decision and denied the claim, which led Diehl to petition for review by the Supreme Court of Pennsylvania.⁶²

The issue presented on appeal was how the court should apply the VLO Proviso to situations where the employee voluntarily terminated employment as a result of accepting an early retirement plan that was offered pursuant to an employer's efforts at workforce reduction.⁶³

C. Arguments of the Parties

i. Diehl's Arguments

Diehl presents three arguments on appeal, the first of which pertains to reading and applying the statute in its plain language.⁶⁴ Specifically, Diehl takes issue with the Commonwealth Court of Pennsylvania's interpretation of the following language: " 'accepting a layoff . . . pursuant to an established employer plan, program, or policy.' "⁶⁵ The Commonwealth Court of Pennsylvania had previously ruled that there was little "distinction between an early retirement and a voluntary layoff," while Diehl argues that " 'layoff' refers to both temporary and permanent terminations," meaning that the VLO Proviso is also applicable to retirements.⁶⁶ He argues that a person may be retired from one job, but still eligible to work, therefore, placing them within the qualifications required for eligibility under section 401.⁶⁷

Diehl's second argument rests on the proposition that the Commonwealth Court of Pennsylvania's interpretation of the VLO Proviso conflicts with the public policy and purpose of the unemployment compensation law.⁶⁸ He cites to the court's decision in *Penflex, Inc.*, where the court determined that the eligibility sections should be interpreted broadly and disqualification sections

⁶² *Id.* at 1213.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Diehl*, 57 A.3d at 1213.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1214.

should be interpreted narrowly to further public policy.⁶⁹ He argues that the *Renda* cases do just the opposite by narrowly interpreting the eligibility requirements, while broadly interpreting the disqualification sections.⁷⁰ Diehl also relies on the dissent from *Sievers*, which states that denying benefits under the VLO Proviso to those who accept early retirement incentives would give employers incentives to develop " 'sophisticated schemes' " to " 'force early retirements.' "⁷¹

Finally, Diehl relies on the interpretations and practices of several other states regarding this area of unemployment law.⁷² He provides several examples of states that allow those who accept early retirement incentives to collect unemployment benefits because it allows companies to keep lower-seniority employees employed.⁷³ He contends that this furthers the overarching policy behind unemployment law, which is to provide benefits to those who are unwillingly unemployed.⁷⁴

ii. Board's Arguments

In contrast, the Board argues that the court should strictly adhere to the long-standing precedent established in the *Renda* line of cases.⁷⁵ The Board argues that, in order for a person to be deemed eligible to receive benefits when accepting unemployment compensation packages, the person needs to show that there was a necessitous and compelling reason for accepting the offer by showing that his or her layoff was likely to occur and that his or her job was imminently threatened.⁷⁶ The Board defends its position by stating that this burden is not entirely unattainable to meet, and cited several cases where it was, in fact, met.⁷⁷

The Board advances its second argument based on the legislative history of the VLO Proviso, arguing that the legislature

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* (citations omitted).

⁷² *Diehl*, 57 A.3d at 1214.

⁷³ *Id.* (citations omitted).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1214-15.

intended the proviso to only apply to temporary layoffs.⁷⁸ The Board relies on *W.R. Grace & Co.* for the language, stating that the VLO Proviso only applies to "voluntary layoff[s] with recall rights," which the Board interprets as meaning that the layoff must be temporary in nature.⁷⁹ The Board relies on precedent and states that nothing should disrupt the outcome from the *Renda* line of cases because the legislature only intended the VLO Proviso to apply to temporary layoffs, not permanent separations.⁸⁰

D. Opinion of the Court

The Supreme Court of Pennsylvania determined that the Commonwealth Court of Pennsylvania was not providing the correct statutory analysis and explanation of the VLO Proviso.⁸¹ The court acknowledges that it has previously adopted precedent to aid in the interpretation of unemployment laws like this.⁸² First, the court notes that the unemployment law's public policy is the "keystone upon which the individual sections of this Act must be interpreted and construed."⁸³ The court further states that the benefits sections are to be interpreted liberally and broadly to aid those who are subject to involuntary unemployment.⁸⁴ Therefore, in order to deny an employee benefits under any section of unemployment law, there must be explicit language that denies them, and further, this applies whether the layoff is temporary or permanent.⁸⁵

When it comes to the specific language of the statute, the court held that, under the plain language, "an employee who voluntarily accepts a layoff offer (either permanent or temporary) would not [be] eligible for compensation, absent a showing of a compelling

⁷⁸ *Diehl*, 57 A.3d at 1215.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1217.

⁸³ *Id.* (citing *Penn Hills Sch. Dist. v. Unemployment Comp. Bd. of Review*, 437 A.2d 1213, 1215 (Pa. 1981)).

⁸⁴ *Diehl*, 57 A.3d at 1217 (quoting *Penflex, Inc. v. Bryson*, 485 A.2d 359, 365 (Pa. 1984)).

⁸⁵ *Id.*

and necessitous reason."⁸⁶ The VLO Proviso, which is a limited exception to the rule, provides that if the claimant is otherwise eligible to receive benefits, he cannot be denied benefits for accepting a layoff pursuant to an established employer plan, program, or policy.⁸⁷ The court proceeded to define layoff, which it decided is not limited to only temporary separations.⁸⁸

In regards to the Commonwealth Court of Pennsylvania's determination that the VLO Proviso did not apply to those who voluntarily accepted early retirement packages or to those whose jobs were not in danger if they did not accept, the Supreme Court of Pennsylvania overruled this determination.⁸⁹ The court stated that the legislative intent of the General Assembly was to allow the VLO Proviso to apply to those individuals as well.⁹⁰ The court also stated that the language of the statute does not support the Commonwealth Court of Pennsylvania's interpretation because it is meant to cover all those who are involuntarily unemployed, not just those who voluntarily leave without a necessitous and compelling reason.⁹¹ The two may seem indistinguishable, but the court continues to explain that the option to accept an early retirement plan pursuant to an employer-initiated workforce reduction in this particular case is the same as " 'an option of accepting a layoff.' "⁹² A layoff is defined by the court as " '[a] termination of employment at the will of the employer. Such may be temporary . . . or permanent.' "⁹³ The court determined that because it must interpret eligibility provisions broadly, the early retirement package here was a termination of employment at the will of the employer and, therefore, is considered a layoff.⁹⁴

The court also acknowledged that other states likewise include early retirement packages in provisions that are similar in nature

⁸⁶ *Id.* at 1218.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Diehl*, 57 A.3d at 1221.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1222 (quoting BLACK'S LAW DICTIONARY 614 (6th ed. 1991)).

⁹⁴ *Id.*

and application to the VLO Proviso of Pennsylvania's law.⁹⁵ Ultimately, the court's conclusion came down to the policy behind the unemployment compensation law, and the fact that these early retirement programs are simply ways of accomplishing workforce reductions by layoffs.⁹⁶ Therefore, the court overruled the Commonwealth Court of Pennsylvania's interpretation of the VLO Proviso and remanded the case.⁹⁷

E. Concurring Opinion

Justice Saylor filed a concurring opinion in which he provided an additional requirement that would allow an employee who accepted early retirement incentives to collect unemployment benefits, so long as he remained within the labor pool and did not separate entirely from the workforce.⁹⁸ He based his argument on the idea that one should examine the facts at the time of termination, not only the classification of the layoff or retirement.⁹⁹

F. Dissenting Opinion

Justice Eakin dissented on the basis that the term layoff should not be construed so broadly as to include retirement.¹⁰⁰ He argued that the definition of retirement means to voluntarily terminate employment, and, therefore, the terms layoff and retirement cannot be synonymous.¹⁰¹ Justice Eakin also argued that there was no reason to believe that the employee would have been terminated had he not accepted the retirement package.¹⁰² Therefore, he could not justify applying the VLO Proviso to employees that are freely able to accept a retirement package.¹⁰³

⁹⁵ *Id.*

⁹⁶ *Diehl*, 57 A.3d at 1222.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1223 (Saylor, J., concurring).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1223 (Eakin, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Diehl*, 57 A.3d at 1223 (Eakin, J., dissenting).

¹⁰³ *Id.*

IV. EVALUATION

For forty years,¹⁰⁴ Pennsylvania courts denied unemployment compensation to individuals who accepted early retirement incentives as a result of an employer workforce reduction plan, and, with one opinion, the Supreme Court of Pennsylvania reversed that long-standing precedent, enacting a change that will affect a multitude of individuals. First, this decision will have a negative impact on the general social welfare. *Diehl* has opened the door for employers to use early retirement programs to force workforce reductions, which will result in individuals collecting unemployment while they are still able and eligible to work.¹⁰⁵

The *Diehl* decision gives employers an easy way to achieve workforce reductions and cut costs.¹⁰⁶ In any industry, it is likely that the older, more experienced workers will, in conjunction with being the best in their field, be paid at the highest rate.¹⁰⁷ Therefore, if employers are able to phase out these workers through early retirement programs, with the workers' knowledge that they will be able to collect unemployment, then there is no reason why they would not do so. It would be an easy way for employers to cut labor costs without developing a reputation for a high layoff rate.

However, it is also likely that the early retirees, who are being let go, are the best and brightest in their field.¹⁰⁸ Without these talented and more experienced workers, the training of new workers will be affected, as well as worker productivity.¹⁰⁹ If the older, more experienced workers are phased out at a high rate in order to reduce employer costs, then training of new workers will

¹⁰⁴ See *supra* notes 3-43 and accompanying text.

¹⁰⁵ Cindy Perman, *Too Young to Retire: Boomers Pushed Out of the Work Force*, CNBC (Mar. 8, 2011, 3:49 PM), <http://www.cnbc.com/id/41973383>.

¹⁰⁶ See, e.g., *Workforce Reductions: Strategies in Today's Market*, WATSON WYATT WORLDWIDE (Oct. 2001), <http://www.watsonwyatt.com/us/pubs/insider/showarticle.asp?ArticleID=8982>.

¹⁰⁷ Kate Rogers, *Older Workers: Productive and In Demand*, FOX BUS. (June 11, 2013), <http://www.foxbusiness.com/personal-finance/2013/06/11/older-workers-equally-productive/>.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

be affected because those who are best able to train new employees will be gone.¹¹⁰ Additionally, newer employees will not have as high of a productivity rate as older, more experienced workers. This result will not always be ideal for the social welfare because it encourages companies to layoff their better workers and hire other workers at a cheaper rate in order to cut costs and possibly put out substandard products or services as a result. Therefore, *Diehl* will have a negative impact on the way employers structure employee reduction plans.

Furthermore, this author is in agreement with Justice Saylor, who notes in his concurrence, that there needs to be some form of accountability for these early retirees who are accepting unemployment benefits.¹¹¹ It is commonplace that employees who are receiving unemployment benefits are supposed to be actively seeking work and be an active member of the labor pool.¹¹² It would appear that if an early retiree accepts any early retirement program from an employer in exchange for terminating employment, then he or she would likely collect unemployment benefits without seeking work. If the early retiree is not actively seeking work, defining that employee as laid off is inconsistent with long-standing unemployment law,¹¹³ as Justice Eakin notes in his dissent.¹¹⁴ Therefore, the VLO Proviso cannot be interpreted to include those accepting early retirement packages because it clearly indicates that it applies to laid off employees and not retirees.¹¹⁵ Essentially, this provides employees who fall into this category a windfall – an early retirement with unemployment benefits to collect.

The counter-argument here is that this allows employers to reduce their workforce, in these tough economic times, without laying off younger employees who need stability in their careers. It appears to be a win-win situation, except that the public suffers as unemployment funds go to early retirees, who may eventually be

¹¹⁰ *See id.*

¹¹¹ *Diehl v. Unemployment Comp. Bd. of Review*, 57 A.3d 1209, 1223 (Pa. 2012) (Saylor, J., concurring).

¹¹² 43 PA. STAT. ANN. § 802(b) (West 2009).

¹¹³ *Id.* § 802(a)-(b).

¹¹⁴ *Diehl*, 57 A.3d at 1223 (Eakin, J., dissenting).

¹¹⁵ tit. 43, § 802(b).

forced to return to the workforce as funds dwindle and the cost of living increases.¹¹⁶ There are other individuals who are in desperate need of these funds because they are unable to find work. These funds should not be spent on those individuals who could still be working and who are unable to support themselves on unemployment compensation alone.

V. CONCLUSION

Overall, *Diehl* has changed the way Pennsylvania courts will interpret the VLO Proviso in the future by allowing it to apply to those who accept early retirement packages.¹¹⁷ This decision further broadens how courts will interpret unemployment compensation laws in Pennsylvania. It gives a wide berth to courts and the Board in deciding whether or not to grant compensation. This decision also gives employers a reason to structure employee reduction plans in a negative manner by allowing them to easily layoff older, more senior, higher paid employees, while retaining others with less experience.

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¹¹⁶ See, e.g., Rich Motoko, *For the Unemployed Over 50, Fears of Never Working Again*, N.Y. TIMES (Sept. 19, 2010), http://www.nytimes.com/2010/09/20/business/economy/20older.html?pagewanted=all&_r=0.

¹¹⁷ *Diehl*, 57 A.3d at 1222.

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