IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bell Socialization Services, Inc.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1038 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: October 8, 2010
	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: December 10, 2010**

Bell Socialization Services, Inc., (Employer) petitions for review of an order of the Unemployment Compensation Board of Review (Board) granting unemployment compensation benefits to former employee, Detrell Brown (Claimant). Employer fired Claimant in September 2008 after Claimant allegedly verbally abused two of Employer's clients. (Referee's Decision/Order, Findings of Fact (FOF) ¶ 7.) Claimant had worked with Employer's clients who have mental-health issues or challenges. (Referee's Decision/Order at 2.)

The Altoona Unemployment Compensation Service Center (Service Center) found that Claimant had violated Employer's work rule, which forbids mistreating clients or being insensitive to their needs. (Service Center Notice of Determination at 1.) On the basis of this and other findings, the Service Center deemed Claimant ineligible for benefits under Section 402(e) of the Unemployment Compensation Law (Law).[1] (Service Center Notice of Determination at 1.)

Claimant appealed the Service Center's ruling. On February 16, 2010, an Unemployment Compensation Referee (Referee) held a hearing at which two Employer witnesses testified. (Referee Hr'g Tr. at 1.) Claimant did not attend the hearing. (Referee Hr'g Tr. at 1.) Kevin Traister, Employer's Director of Human Resources, testified regarding the Employer's disciplinary guidelines and Claimant's termination. (Referee Hr'g Tr. at 2-6.) Theresa Franklin, Employer's Coordinator of Residential Services, testified that she investigated the two clients' allegations that Claimant had spoken abusively to them. (Referee Hr'g Tr. at 7.) Ms. Franklin said that she interviewed Claimant and both clients. (Referee Hr'g Tr. at 8.) She also told the Referee that state law required her to file a post-investigation report. (Referee Hr'g Tr. at 8.) Ms. Franklin testified that both clients repeated for her the vulgar language that Claimant had allegedly used towards them.[2] (Referee Hr'g Tr. at 8-9.) She also said she interviewed Claimant, who denied using such vulgarity towards the clients. (Referee Hr'g Tr. at 9.) Ms. Franklin believed the clients' recitation of Claimant's vulgar and abusive remarks

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. § 802(e).

[2] Ms. Franklin testified that Claimant called one client a "bi***" and the other a "f-ing c*** sucker." (Referee Hr'g. Tr. at 9.)

and did not believe Claimant's denial. (Referee Hr'g Tr. at 9.) She told the Referee that a county employee approved her report of each incident on October 15, 2008, and a state Department of Developmental Programs employee approved the reports on October 16, 2008. (Referee Hr'g Tr. at 10-11.) The Referee accepted copies of Ms. Franklin's reports into evidence. (Referee Hr'g Tr. at 11.)

Based on the testimony of Ms. Franklin and Mr. Traister, the Referee made the following findings of fact:

> 1. For the purposes of this appeal, the claimant filed an application for benefits dated October 19, 2008. His weekly benefit amount equals $209.00 and his partial benefit credit equals $84.00.
>
> 2. The claimant received unemployment compensation benefits for compensable weeks ending November 1, 2008, until April 25, 2009, in the amount of $5,642.
>
> 3. The claimant was employed from November 30, 2007, until August 29, 2008, at Bell Socialization Services as a full-time Residential Service Worker, earning $9.00 per hour.
>
> 4. The employer has a policy, of which the claimant was aware or should have been aware, in which negligence, mistreatment or insensitivity to the needs of the employer's customers can lead to disciplinary action.
>
> 5. The employer received allegations from two customers that the claimant was verbally abusive toward them.
>
> 6. The claimant denied the allegations of verbal abuse.
>
> 7. On September 26, 2008, the claimant was discharged for alleged verbal abuse toward the employer's customers.

(FOF ¶¶ 1-7.)

The Referee reversed the Service Center and granted Claimant benefits. (Referee's Decision/Order at 3.) The Referee held that the Findings of Fact "are based entirely on the employer's sworn testimony which provides the only competent evidence on the record." (Referee's Decision/Order at 2.) The Referee noted that Employer called no witnesses who had firsthand knowledge of the alleged verbal abuse. (Referee's Decision/Order at 2.) The Referee allowed benefits because Ms. Franklin's testimony "consists of uncorroborated hearsay, on which findings of fact cannot be based. The employer has failed to meet its burden in this case." (Referee's Decision/Order at 2-3.)

Employer appealed the Referee's Order to the Board. The Board incorporated the Referee's findings of fact and conclusions of law, and affirmed the allowance of benefits. (Board Order at 1.) The Board held that Ms. Franklin's testimony was hearsay because Ms. Franklin did not have firsthand knowledge of the language Claimant used towards Employer's clients and her account of what Employer's clients told her was offered to prove the truth of the matter that the clients asserted, namely, that Claimant had verbally abused them. (Board Order at 1.) The Board also noted that the record contained no competent evidence that corroborated Ms. Franklin's testimony. (Board Order at 1.)

Employer now appeals to this Court.[3] Employer argues that: (1) Claimant's statements to Employer's residents are not hearsay; (2) Ms. Franklin's statements

[3] This Court's "scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law or whether necessary findings of fact are supported by substantial evidence." Resource Staffing, Inc. v. Unemployment Compensation Board of Review, 995 A.2d 887, 890 n.5 (Pa. Cmwlth. 2010).

regarding what Employer's clients told her are competent because they are the best available evidence, which, if not allowed, would promote the abuse of similarly-situated clients; and (3) Claimant committed willful misconduct by lying to Ms. Franklin.

The first issue is whether Ms. Franklin's testimony constitutes hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa. R.E. 801(c). A statement is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Pa. R.E. 801(a).

Employer argues that Claimant's comments to Employer's clients are not hearsay because Claimant did not intend his comments to be assertions. (Petitioner's Br. at 12.) Rather, Claimant's comments were exclamations, which are not statements and thus cannot fall within the definition of hearsay. (Petitioner's Br. at 12.) Employer also argues that Claimant's comments are not hearsay because they were not offered to prove the matter that Claimant allegedly asserted. (Petitioner's Br. at 12.) Specifically, Claimant's comments were not offered to prove that the clients actually fit Claimant's pejorative descriptions of them. (Petitioner's Br. at 12.)

Employer's arguments focus on what Claimant allegedly said to the clients; however, at issue here is what the clients said to Ms. Franklin about what Claimant allegedly said to them and Ms. Franklin's testimony about what the clients told her.

What the clients said to Ms. Franklin are statements because they are verbal assertions. The statements assert that Claimant used vulgar language towards the clients. The statements were made out-of-court, as the declarants (the clients) did not testify at the Referee's hearing. Employer offered these out-of-court statements in order to prove the truth of the matter asserted, namely, that Claimant had actually used the vulgar language to the declarants. Even if Claimant's remarks to the clients are considered to be exclamations and, therefore, not hearsay, Ms. Franklin could not competently testify about the exclamations because she did not have firsthand or personal knowledge of them. Pa. R.E. 602. Ms. Franklin could refer to what Claimant allegedly said only by prefacing her reference with a qualifier such as "the client told me that . . .". Such a statement is hearsay. Therefore, the Board correctly characterized as hearsay Ms. Franklin's repetition of what the clients had told her.

Employer next contends that the information Ms. Franklin elicited from the clients is competent evidence because her investigation into the allegations was prompt and because both clients made similar allegations. (Petitioner's Br. at 13, 14.) Employer submits that Ms. Franklin's testimony is the best evidence available and that there are no evidentiary alternatives. (Petitioner's Br. at 13.) Moreover, exclusion of Ms. Franklin's testimony, Employer warns, will result in the "repeated and unchecked abuse of the less fortunate, underprivileged and mentally challenged." (Petitioner's Br. at 13.) Mentally challenged individuals cannot be expected to testify reliably at a hearing months after an alleged incident, Employer argues. (Petitioner's Br. at 9.) "Job discipline and/or termination for such offenses is the only check-valve for such abuses." (Petitioner's Br. at 13.)

Although Ms. Franklin's testimony may have been the only evidence available in this case, it was still inadmissible hearsay. In Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976), this Court held that if hearsay is admitted into evidence without objection, it will be given its natural probative value only if it is corroborated by competent evidence in the record. Here, Ms. Franklin's hearsay testimony was not objected to by Claimant. Under Walker, her testimony, if corroborated by other competent evidence in the record, could have supported a finding that Claimant had verbally abused Employer's clients. Employer points to no such corroborating evidence. That one client's allegation corroborates the other's allegation is not competent evidence because both allegations are hearsay. One piece of inadmissible hearsay cannot, under Walker, corroborate another. As discussed above, Ms. Franklin's testimony about Claimant's interaction with clients was not competent because she lacked personal or firsthand knowledge of the interaction and was only able to give hearsay testimony as to what Employer's clients told her. Pa. R.E. 602, 801. Employer points to no other evidence that corroborates Ms. Franklin's testimony. Therefore, her testimony about the allegations of Employer's clients could not support a finding that Claimant was, in fact, verbally abusive towards the clients.

We understand that employers face unique difficulties when responding to allegations by mentally challenged clients that employees have been verbally abusive. However, Employer points to no authority that creates an exception to the Walker rule in such situations. An employer may terminate an employee for such verbal abuse but, in an unemployment compensation proceeding, proof that such improper verbal conduct has occurred must be substantiated other than by introducing hearsay evidence.

Lastly, Employer argues that Claimant committed willful misconduct by lying to Ms. Franklin when he denied having spoken profanely to Employer's clients. (Petitioner's Br. at 14-15.) In Ms. Franklin's opinion, Claimant's denial was not truthful. (Petitioner's Br. at 14-15.) Employer argues that Ms. Franklin is an expert investigator and, thus, was qualified to determine the veracity of Claimant's representations to her. (Petitioner's Br. at 14-15.)

An employee's deliberate untruthfulness or attempt to mislead his or her employer constitutes willful misconduct. Glasser v. Unemployment Compensation Board of Review, 404 A.2d 768, 770 (Pa. Cmwlth. 1979). However, a denial of unemployment compensation benefits due to willful misconduct may be based only on the proffered cause for termination. In Century Apartments, Incorporated v. Unemployment Compensation Board of Review, 373 A.2d 1191, 1192 (Pa. Cmwlth. 1977), the claimant was fired for failing to adjust her timesheet to reflect that she had left work early one afternoon. The Board ruled that the claimant was not ineligible for unemployment compensation. Id. The employer argued on appeal that the claimant should have been denied benefits because leaving work early, in itself, constituted willful misconduct and was, therefore, a sufficient basis on which to deny the claimant benefits. Id. We rejected this argument and held that "while leaving work early may be willful misconduct, it may not be assigned as a reason for denying unemployment compensation if it was not a cause of the claimant's unemployment." Id. See also Mine Safety Appliances Company v. Unemployment Compensation Board of Review, 423 A.2d 798, 800 (Pa. Cmwlth. 1980).

Century Apartments is applicable to the present case. Although an employee's deliberate untruthfulness or attempt to mislead his or her employer constitutes willful misconduct, in this case Claimant was not discharged for being dishonest with or misleading Employer. Here, Claimant was discharged for verbally abusing Employer's clients. (FOF ¶ 7.) Therefore, in this case, Claimant's untruthfulness with or misleading of the Employer does not render him ineligible for unemployment compensation benefits because such conduct was not the proffered reason for his termination.

Because Ms. Franklin's testimony was hearsay that was uncorroborated by other competent evidence in the record, we affirm the Board's order.

RENÉE COHN JUBELIRER, Judge

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	:	
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O R D E R

NOW, December 10, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge