IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sharlene Younger,	:	
Petitioner	:	
	:	
v.	:	No. 1317 C.D. 2010
	:	SUBMITTED: December 10, 2010
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: March 18, 2011**

Sharlene Younger (Claimant), petitions this court for review of the order of the Unemployment Compensation Board of Review (Board) which affirmed a decision of the referee denying Claimant unemployment compensation benefits for willful misconduct pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] After review, we affirm.

Claimant was employed as a Home Care Specialist by Circle C Youth and Family Services (Employer) from June 21, 2007, until November 19, 2009.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended,* 43 P.S. § 802(e). Section 402(e) of the Law provides that an employee shall be ineligible for compensation for any week "[i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work . . . ."

Employer operates group homes for at-risk youth. Claimant initially worked at Patak Program under the supervision of Tom Schaffnit. Employer had a progressive disciplinary policy, of which Claimant was or should have been aware: reprimand, a one-day suspension, a three-day suspension, and then termination. On April 20, 2009, Claimant received a one-day suspension for using profanity and for insubordination. On June 5, 2009, Claimant received a second suspension, this time for three days, for sending an inappropriate text message to her supervisor and for insubordination.

As a result of these two incidents, Claimant was transferred to the Carrick Group Home in July 2009. Claimant's new supervisor was Sharon Holly, who was in charge of both Carrick House, whose residents were boys, and Oasis House, whose residents were girls. Although Claimant's primary assignment was to make breakfast for the residents at Carrick House and keep the residence clean, she would occasionally be assigned to Oasis House. Claimant's assignment at Oasis House usually involved driving the residents to and from school. On October 6, 2009, Claimant failed to bring a resident to an emergency medical appointment as directed by her supervisor, Ms. Holly. Then again on October 9, 2009, Claimant failed to deliver medication for a resident of Oasis House at school, as instructed. Although Ms. Holly intended to deliver another three-day suspension to Claimant as a result of these two incidents, she did not do so because she was out of work with swine flu from the middle of October until November 16, 2009.

On the evening of November 17, 2009, Employer received a call out from an employee and had to reassign Claimant to Oasis House for the next day. Ms. Holly left messages for Claimant directing her to go to Oasis House for

November 18, 2009, in order to drive the residents to school. When Claimant showed up at her regular assignment at Carrick House, another employee was there to take her place and Claimant called Ms. Holly for an explanation. Ms. Holly told Claimant that she was needed at Oasis House to drive the residents to school, to which Claimant responded by yelling that she "doesn't do b*tches" and that she was refusing to drive the residents to school. Board's Finding of Fact No. 7. Eventually, Claimant reported to Oasis House, and later that afternoon, she picked the residents up at school and drove them home. Employer discharged Claimant the next day for insubordination and inappropriate communication with her supervisor.

The Duquesne Unemployment Compensation Service Center denied Claimant's application for unemployment compensation benefits pursuant to Section 402(e) of the Law. Claimant appealed and a hearing was held on February 9, 2010 before a referee, at which Claimant appeared and testified as did Ms. Holly, Claimant's Supervisor, and Mr. Richard Knouff, Employer's Executive Director. The referee found that Ms. Holly credibly testified that Claimant refused her directives on October 6 and 9, 2009, and further that Claimant was argumentative with her on November 18, 2009, and used an expletive when referring to the residents of Oasis House. Finding that Claimant's actions on November 18, 2009 were intentional, the referee concluded the Employer met its burden of proving willful misconduct.

Claimant appealed the referee's decision to the Board and also filed a request for a remand to allow additional testimony and evidence. The Board denied Claimant's request for a remand and affirmed the decision of the referee.

After her request for reconsideration was denied, Claimant filed her petition for review with this court.

On appeal, Claimant challenges the Board's findings and argues that the Board erred as a matter of law in determining that Employer satisfied its burden of proof of establishing that her actions on November 18, 2009 constituted insubordination and/or willful misconduct under the Law.[2]

Whether a claimant's conduct rises to the level of willful misconduct is a question of law subject to plenary review by this court. *Walsh v. Unemployment Comp. Bd. of Review*, 943 A.2d 363 (Pa. Cmwlth. 2008). The term willful misconduct has been defined as a wanton and willful disregard of an employer's interest, a deliberate violation of its rules, a disregard of standards of behavior which an employer has a right to expect of its employees, or negligence indicating an intentional disregard of the employer's interest or an employee's

[2] In both the Statement of the Scope and Standard of Review and Argument sections of her brief, Claimant argues that this court may overturn the Board's decision if we determine that the Board capriciously disregarded competent evidence, citing *Treon v. Unemployment Compensation Board of Review*, 499 Pa. 455, 453 A.2d 960 (1982). In *Treon*, the Board rejected a referee's finding that was based on the uncontradicted testimony of claimant, the only party to testify. However, the fact-finder does not capriciously disregard competent evidence where, as here, he or she chooses to accept one witness' testimony over another witness' testimony. *Snyder v. R.R. Borough*, 430 A.2d 339 (Pa. Cmwlth. 1981). Thus, although Claimant frames the issue as whether or not the Board capriciously disregarded evidence in making its findings of fact, which we have explained amounts to a willful or deliberate ignorance of evidence which a reasonable person would consider important, *Leon E. Wintermyer, Inc. v. Workers' Compensation Appeal Board (Marlowe)*, 571 Pa. 189, 203 n. 12, 812 A.2d 478, 487 n. 12 (2002) (citation omitted), we nevertheless conclude that she is actually attacking the board's credibility determinations and its resolution of the issues of fact against her. We note that the court in *Wintermyer* also cautioned that "where there is substantial evidence to support an agency's factual findings, and those findings in turn support the conclusions, it should remain a rare instance in which an appellate court would disturb an adjudication based upon capricious disregard." *Id.* at 204 n. 14, 812 A.2d at 488 n. 14.

duties and obligations. *Grieb v. Unemployment Comp. Bd. of Review*, 573 Pa. 594, 827 A.2d 422 (2003). The employer bears the burden of proving willful misconduct. *Id.* Once the employer establishes that, the burden shifts to claimant to prove good cause for her actions. *Peak v. Unemployment Comp. Bd. of Review*, 509 Pa. 267, 501 A.2d 1383 (1985).

The particular findings made by the Board being challenged by Claimant are:

> 5. On October 6, and October 9, 2009, the claimant refused to follow directives from the employer.
>
> 6. The employer was going to issue a second three-day suspension for those issues; however, the supervisor was out with the swine flu from approximately the middle of October and returned on November 16, 2009.
>
> 7. On November 18, 2009, the employer directed the claimant to the Oasis house to work and the claimant yelled that she "doesn't do b*tches" and refused to drive the students to school.

Board's Decision, Findings of Fact Nos. 5-7.

First, Claimant argues that the parties disagreed about the factual circumstances surrounding the events of October 6 and 9, 2009. Claimant asserts that she testified, contrary to Ms. Holly's testimony, that she was "never asked to take any medication to school" on October 9, 2009, and that Ms. Holly was "making that up." Hearing of February 9, 2010, Notes of Testimony (N.T.) at 36. Claimant argues that she also testified that the reason she did not take the resident to his emergency medical appointment on October 6, 2009 was because she did not know her way around and could not find directions to the medical facility, so she called and rescheduled the appointment. Claimant asserts that Employer did not follow its own progressive discipline policy for these alleged incidents, which

suggests that Employer "created these false reports" in order to discredit her and then use them to support its decision to terminate her. Claimant's Brief at 12. As further proof that Employer "created" the false reports of alleged disobedience by Claimant on October 6 and 9, 2009, she testified that she had not seen the reports until the day of the hearing. Finally, with respect to the Board's finding that she refused to drive the residents on November 18, 2009 and used profanity, Claimant disputes the findings and asserts that she was told by Ms. Holly that she did not have to do so because they would take the bus. Claimant argues that as the Board found, she did drive them home in the afternoon, and thus it does not make sense that she would have uttered such a profane statement in the first place. Claimant asserts that this "seems like a thinly veiled attempt" by Employer to further discredit her.

Claimant's arguments are nothing more than an attempt to have this court reweigh the evidence and resolve the conflicting testimony in her favor. This we decline to do. The Board, as the ultimate fact-finder, is empowered to resolve conflicts in the evidence, determine the credibility of the witnesses, and determine the weight to be accorded the evidence. *Peak.* As such, the Board's findings of fact are conclusive upon review provided that the record, taken as a whole, provides substantial evidence to support those findings. *Taylor v. Unemployment Comp. Bd. of Review,* 474 Pa. 351, 378 A.2d 829 (1977).

The Board accepted as credible Ms. Holly's testimony that Claimant was directed to transport a resident to an emergency medical appointment on October 6, 2009, which she admittedly failed to do. The Board further credited Ms. Holly's testimony that Claimant was directed to take a resident's medicine to them at school on October 9, 2009, which Claimant also failed to do. Ms. Holly

testified that she intended to issue another three-day suspension to Claimant, but she went out of work sick with swine flu from approximately October 15th or 16th until November 16, 2009. Ms. Holly also testified that on November 18, 2009, Claimant refused a directive to report to Oasis house to transport residents to school, and that when Claimant called her "she immediately started screaming and yelling about she wasn't going over there. She is not a jitney. She is not going to drive - - I told you that I don't do b*tches. She just kept screaming in the phone." Hearing, N.T. at 23. Ms. Holly testified that while Claimant eventually calmed down and reported to Oasis house, Claimant's failure to report there and drive them to school, as directed, required another employee to send them on the bus. It is clear from its findings and its discussion, that the Board accepted Employer's version of events and that it considered but ultimately rejected Claimant's explanations for failing to follow Ms. Holly's directives as "not credible." Board's Decision and Order at 3. It was within the Board's province to determine the credibility of the witnesses. The testimony accepted by the Board supports its findings. *Peak; Taylor.*

Finally, Claimant argues that the Board erred as a matter of law in determining that Employer met its burden of proving willful misconduct based on Claimant's insubordination of November 18, 2009, when the record shows that she obeyed all directives "as she learned of them . . ." Claimant's Brief at 15. Claimant asserts that the Board incorrectly analyzed her conduct to determine if she was insubordinate, rather than determining whether or not her use of profanity was provoked and therefore, excusable. Claimant argues that she "may have used a profane statement but in response to an unexpected situation caused by the employer." *Id.* Claimant avers that where a claimant has used vulgar or profane

language in response to provocation by employer, or where the claimant's language was merely "curt," the court has concluded that such behavior was not willful misconduct, citing *Cundiff v. Unemployment Compensation Board of Review,* 489 A.2d 948 (Pa. Cmwlth. 1985) and *Arnold v. Unemployment Compensation Board of Review,* 703 A.2d 582 (Pa. Cmwlth. 1997).

The Board found, however, that Claimant used profanity toward her supervisor. The record does not reveal that she was provoked or that the supervisor used profanity towards Claimant. An employee's use of profanity or vulgar language towards his or her supervisor without provocation constitutes willful misconduct. *Williams v. Unemployment Comp. Bd. of Review,* 531 A.2d 88 (Pa. Cmwlth. 1987) (even a single instance of vulgarity can constitute willful misconduct when the vulgarity is unjustified, unprovoked, unnecessary, or uncalled for under the circumstances). Moreover, the Board also concluded that Claimant's actions on November 18, 2009 were intentional and that she did not have good reason for failing to follow Employer's directives.

Accordingly, as the Board's findings are amply supported by the evidence of record and there being no error of law, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 18th day of March, 2011, the order of the Unemployment Compensation Board of Review in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge