IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Abby N. Smith,	:	
Petitioner	:	
	:	
v.	:	No. 1520 C.D. 2010
	:	SUBMITTED: February 25, 2011
Unemployment Compensation	:	
Board of Review,	:	
Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: June 14, 2011**

Abby N. Smith (Claimant) petitions this court for review of the order of the Unemployment Compensation Board of Review 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.

[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 [or her] unemployment is due to his [or her] discharge or temporary suspension from work for willful misconduct connected with his [or her] work . . . ."

Claimant was employed as a lead teacher with Small Freys Childrens Center, Inc. (Employer), a daycare center owned and operated by Barbara Frey, from September 29, 2007 until October 16, 2009. Employer receives tuition subsidies from the Commonwealth of Pennsylvania for a number of its students. During the 2009 State budget crisis, Employer did not receive funding for many of its students, forcing it to delay the employees' paychecks. On October 7, 2009, Employer informed the employees that they would be getting not a regular paycheck but what it characterized as "an advance" due to the ongoing budget crisis. Employer did not withhold taxes from these checks. Some of the employees then posted inappropriate comments on Facebook and met at Heather Harnish's home (a fellow employee) on October 12, 2009, to discuss the pay situation and whether to file a formal complaint with the Department of Labor and Industry and the Internal Revenue Service. At the meeting, the employees agreed to call out sick the next day. They were fully aware that Employer was required by the State to maintain a specific student-to-teacher ratio at all times. Five or six employees called out sick on October 13, not including Claimant who had been scheduled to be off that day. When Employer met with the employees to discuss the situation, Claimant denied attending the meeting and denied any knowledge of the employees' agreement to call off on October 13, 2009. Claimant was discharged for devising a plan to disrupt Employer's business and for lying to Employer when questioned about the incident.

The Lancaster Unemployment Compensation Service Center determined that Claimant was eligible for benefits under Section 402(e) of the Law. It concluded that Employer failed to prove that Claimant was involved in the incident causing separation from her employment to establish that Claimant's

actions constituted willful misconduct. Employer appealed and a hearing was held on December 29, 2009, before a referee at which Employer's owner, Barbara Frey, appeared and testified, as well as Employer's witness, Melissa Henry. Claimant also appeared and testified as well.[2]

Claimant testified that when Employer called her and Ms. Ditzler into the office on October 14, 2009, and asked them about the meeting, they denied attending the meeting. Claimant stated that she was afraid she would be fired if she said she was at the meeting. Claimant explained that the meeting was held to discuss employment conditions and that as a result of the meeting they filed complaints with the Department of Labor and with the IRS. Claimant admitted that she not only was at the meeting but lied about it to Employer. With respect to the comments on Facebook regarding the incident, Claimant stated that she only remembers posting a comment that she met with the other employees. She further explained that the comment about being a volunteer was in reference to the fact that they were not being paid in a timely manner.

Ms. Frey testified that she was financially strapped by the state budget impasse and did the best she could to keep her business open and pay her employees. Ms. Frey stated that she kept the employees apprised of the situation via newsletters and staff meetings and that she went into personal bankruptcy as a result of not taking a salary herself during the budget crisis. Ms. Frey testified that she read postings on Facebook made by some of her employees and felt that their reference to their jobs as volunteer work and discussion of forming a union was inappropriate. Ms. Frey testified that five or six employees called off from work

[2] The referee consolidated Claimant's appeal with appeals of Heather A. Harnish and Brittany Ditzler, fellow employees of Employer, only for the purpose of taking evidence.

on October 13 and only one employee gave a reason, with the rest just stating "we'll see you tomorrow." Hearing of December 29, 2009, Notes of Testimony (N.T.) at 13. Ms. Frey later found out that several employees, including Claimant, had met the night before at Ms. Harnish's house. Ms. Frey testified that when Claimant came in for work on October 14, she asked her if she had attended the meeting at Ms. Harnish's house, and Claimant said no. Ms. Frey testified that she did not discharge Claimant for filing complaints with the Department of Labor or the IRS, and that she found out about the complaints after Claimant's termination. She insisted that Claimant and the other employees were terminated for lying to her and for trying to close down her business by calling off work.

The Referee found that "employer decided to discharge all the claimants because of their agreement to stay off work and also because they were not truthful with the employer about the entire matter." Finding of Fact No. 22. The referee noted that Claimant did not have a good reason for calling out sick and that she lied about the meeting. Concluding that Claimant's failure to give Employer honest answers rose to the level of willful misconduct, the referee determined that Claimant was ineligible for benefits under Section 402(e).

Claimant appealed on the ground that because she was already scheduled off from work on October 13, 2009, her absence could not be considered willful misconduct. The Board affirmed the referee, concluding that Claimant's action in calling off sick without valid excuse was willful misconduct. However, after reconsideration upon Claimant's request, the Board vacated the initial decision and later affirmed the referee's decision. In this decision, dated July 15, 2010, the Board found that Claimant had been scheduled to be off from work on October 13, 2009, and that she did not call off on that day. The Board further

found that when Claimant was asked by Employer if she had gone to the meeting on October 12, 2009, Claimant denied meeting with her co-workers and denied any knowledge that they were all supposed to call off on October 13, 2009. The Board found that "claimant was discharged for devising a plan to disrupt the employer's business, as well as not being truthful with the employer when she was questioned about the incident." Board's Finding of Fact No. 19.

On appeal, Claimant raises the sole issue of whether the Board erred in concluding that she was ineligible for compensation benefits due to her willful misconduct. She argues that the conduct which Employer cited as grounds for termination and which the Board found rendered Claimant ineligible due to willful misconduct is protected by the National Labor Relations Act,[3] which gives employees the right to engage in concerted activities, such as collectively refusing to work in protest over wages, hours or other working conditions. Claimant maintains that because she was engaged in such protected activity to discuss their untimely wages and other working conditions, it was error for the Board to conclude that this conduct constituted willful misconduct rendering her ineligible for compensation benefits under Section 402(e) of the Law. *Penflex, Inc. v. Bryson*, 506 Pa. 274, 485 A.2d 359 (1984).[4]

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[3] 29 U.S.C. §§ 151-169.

[4] In *Penflex*, the claimant was part of a union whose collective bargaining agreement expired, after which he and other members engaged in a work stoppage, resulting in their discharge from employment. The claimants filed for unemployment compensation benefits, which were initially granted. This court then reversed, concluding that the claimants' conduct in participating in a work stoppage in violation of federal law constituted willful misconduct. On further appeal, our Supreme Court reversed, holding that in light of the specific circumstances of the case, i.e. that the collective bargaining agreement had expired prior to the strike, that the claimants had no available statutory means to achieve their demands, and that employer had not warned them that continued work stoppage would result in termination, the claimants' strike was not willful misconduct. The Court stated: "Involvement in a strike, absent a prohibition
(Footnote continued on next page…)

Employer counters that Claimant was not discharged for engaging in concerted protected activity. Citing *Flores v. Unemployment Compensation Board of Review,* 686 A.2d 66 (Pa. Cmwlth. 1996), Employer further contends that even if it were determined that Claimant was engaged in such activity, "mere involvement in labor-related activity will not shield an employee from the consequences of a discharge for willful misconduct . . . ." Employer's Brief at 7. Employer asserts that the Board's finding that Claimant lied to Employer about her attendance at a meeting alone amounted to willful misconduct, rendering her ineligible for benefits under Section 402(e) of the Law.

The fundamental purpose of the Law is to give compensation to workers unemployed through no fault of their own. *Gillins v. Unemployment Comp. Bd. of Review,* 534 Pa. 590, 633 A.2d 1150 (1993). We have held that the disqualification provisions of the Law "should be narrowly construed and a claimant must not be denied compensation unless he [or she] is unequivocally excluded by the plain language of these provisions." *Penflex,* 506 Pa. at 286, 485 A.2d at 365. Moreover, "[e]mployee conduct which renders a claimant ineligible for benefits under Section 402(e) must be *willful* and 'not merely conduct which *appears* to be contrary to the employer's interests.'" *Id.* at 290, 485 A.2d at 367 [citing *Unemployment Compensation Board of Review v. National Aluminum Co.,*

(continued…)

contained in a valid bargaining agreement, may not properly be viewed as a disregard of standards of behavior which an employer has a right to expect. Workers have the right to engage in a lawful strike and, consequently, they retain a reasonable expectation of continued employment during the work stoppage." 506 Pa. at 295-96, 485 A.2d at 370 (footnote omitted). However, as we will address later, participation in labor activities does not immunize an employee from the consequences of her willful misconduct. *Id.* at 288, 485 A.2d at 366; *see also Flores v. Unemployment Comp. Bd. of Review,* 686 A.2d 66 (Pa. Cmwlth. 1996).

349 A.2d 527, 529 (Pa. Cmwlth. 1975)](Emphasis in original). Where, as here, the claimant has been discharged for multiple reasons, she is still disqualified from receiving benefits if only one of those reasons amounts to willful misconduct. *Glenn v. Unemployment Comp. Bd. of Review*, 928 A.2d 1169 (Pa. Cmwlth. 2007).

In this case, the Board specifically found that Claimant was "discharged for devising a plan to disrupt employer's business, *as well as not being truthful with the employer when she was questioned about the incident."* Board's Finding of Fact No. 19 (emphasis added). While Claimant would have us focus solely on the fact that she and her fellow employees were allegedly engaged in concerted protected activity when they met to discuss Employer's failure to timely pay wages, the Board's finding that she lied to Employer, supported by the evidence alone supports the Board's conclusion that she committed willful misconduct. In *Downey v. Unemployment Compensation Board of Review*, 913 A.2d 351, 353 (Pa. Cmwlth. 2006), we held that "an employee's dishonesty or misrepresentation can exhibit a disregard of the employer's interests and disregard of standards of behavior that the employer can rightfully expect from its employees." In addition, the Board concluded that Claimant and the other employees had other legal means at their disposal, such as filing complaints with the Department and the IRS before intentionally calling off work to disrupt Employer's business. *See Houck v. Unemployment Comp. Bd. of Review*, 405 A.2d 1062 (Pa. Cmwlth. 1979) (at the time employees struck, there was a petition to certify the union pending before the Pennsylvania Labor Relations Board, thereby making the strike unnecessary as the employees could have achieved their goals by complying with the certification procedures).

The Board found that Claimant was terminated because she lied to Employer when she was asked if she attended the meeting. Claimant admitted that she lied to Employer and her testimony alone constitutes substantial competent evidence to support a determination of willful misconduct. Accordingly, we affirm the order of the Board.

BONNIE BRIGANCE LEADBETTER,
President Judge

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O R D E R

AND NOW, this 14th day of June, 2011, the order of the Unemployment Compensation Board of Review in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge