

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barbara B. Cochran,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Unemployment Compensation	:	
Board of Review,	:	No. 1555 C.D. 2010
	:	
Respondent	:	Submitted: December 17, 2010

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

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 21, 2011

Barbara B. Cochran (Claimant) petitions for review of the July 2, 2010 order of the Unemployment Compensation Board of Review (UCBR) affirming the Referee’s decision denying her unemployment compensation (UC) benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).¹ The issues in this case are: (1) whether the UCBR erred by admitting into evidence Claimant’s breath test, and (2) whether the UCBR erred by finding that Claimant was properly terminated for being functionally impaired by alcohol at work. For the reasons that follow, we reverse the decision of the UCBR.

Claimant was employed as a carriage house assembler for Overhead Door Corporation (Employer) from January 5, 2004 through August 13, 2009, when

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

she was terminated. On August 13, 2009, Claimant's foreman, Mary Ann Campbell, and production supervisor, Linette Zarzyczny, observed Claimant acting erratically and appearing strange when she reported for work at 6:00 a.m. Ms. Zarzyczny reported her concerns to Employer's human resource manager, Beverly Miller, who directed Claimant to undergo drug and alcohol testing. On the way to the testing facility, Claimant admitted to Ms. Zarzyczny that she had been drinking alcohol the night before. A breath test conducted by Mid-State Occupational Health Services taken at 7:45 a.m. revealed a blood alcohol content of .121. A second test conducted at 8:02 a.m. revealed a level of .110. Claimant certified that the results were accurate. During a meeting with Ms. Miller following the test, Claimant told Ms. Miller that she was out drinking the night before. Claimant's employment was terminated.

Claimant filed for unemployment compensation (UC) benefits, which were denied by the Scranton UC Service Center. Claimant filed a timely appeal and a hearing was held, at which the Referee excluded evidence of Claimant's breath tests. The Referee affirmed the UC Service Center's denial of benefits. Claimant appealed to the UCBR, which remanded the matter for the Referee to conduct a hearing because the UCBR held that the Referee's exclusion of the alcohol test results in the first hearing was improper. Following the remand hearing at which the Referee admitted the alcohol test results, the UCBR affirmed the Referee's original decision. On August 4, 2010, the UCBR denied Claimant's request for reconsideration. Claimant appealed to this Court.²

² This Court's review is limited to determining whether the findings of fact were supported by substantial evidence, whether constitutional rights were violated, or whether errors of law were committed. *Brunswick Hotel & Conference Ctr., LLC v. Unemployment Comp. Bd. of Review*, 906 A.2d 657 (Pa. Cmwlt. 2006).

Under Section 402(e) of the Law, an employee is not eligible for benefits if “his unemployment is due to his discharge . . . for willful misconduct connected with his work”

Willful misconduct has been defined as (1) the wanton and willful disregard of the employer’s interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer’s interests or the employee’s duties and obligations.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009).

[A]n employer has the burden of proving that an employee has engaged in willful misconduct. In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation. Furthermore, whether or not an employee’s actions rise to the level of ‘willful misconduct’ is a question of law that is fully reviewable by this Court.

Lindsay v. Unemployment Comp. Bd. of Review, 789 A.2d 385, 389-90 (Pa. Cmwlth. 2001) (citation omitted). There is no question in this case that Employer’s Hourly Associate’s Handbook (Handbook) clearly prohibits employees from “[r]eporting for work functionally impaired due to the influence of intoxicants,” and states that a violation of the drug and alcohol policy is one for which its employees could be terminated. Original Record (O.R.) Item 8, Exs. 1-A, 1-B. Claimant acknowledged that she read and understood the policy. O.R. Item 8, Ex. 1-C. Neither party has challenged the reasonableness of Employer’s rule. Therefore, the only question we must address is whether Claimant violated Employer’s work rule on August 13, 2009.

On behalf of Employer, Ms. Campbell testified that Claimant was acting “a little bit different” when the staff was preparing for work. Notes of Testimony,

October 13, 2009 (10/13/09 N.T.) at 7. She testified that Claimant was loud, and had puffy eyes that Claimant hid when the supervisor passed her. Ms. Campbell did not smell alcohol from Claimant, but she felt something about Claimant's behavior was strange enough to report it Ms. Zarzyczny. Ms. Zarzyczny testified for Employer that, before her shift on August 13, 2009, Claimant asked Ms. Zarzyczny for a timecard and a pair of safety glasses. Ms. Zarzyczny observed that Claimant appeared disheveled, and she was "animated" - laughing and her arms were moving around - which was not normal for Claimant. 10/13/09 N.T. at 15, 17. It was not until after Ms. Campbell raised her concerns about Claimant's behavior, however, that Ms. Zarzyczny contacted Ms. Miller about what she should do. Ms. Miller instructed Ms. Zarzyczny to take Claimant for drug and alcohol testing. Ms. Zarzyczny testified that, during their time in the car, she detected the odor of alcohol around Claimant, and Claimant told her she "drank her share" the night before. 10/13/09 N.T. at 12. Ms. Miller testified that, after the test, she told Claimant "that she violated our rules and regulations regarding alcohol testing" and, after she told Claimant she had no recourse but to terminate her employment, Claimant responded, "I made a mistake. You know, I had been up drinking." 10/13/09 N.T. at 21, 23. Employer's human resources administrator, Susan Shoemaker, testified that Claimant's employment was terminated because "[s]he came to work on August [13th] under the influence." Notes of Testimony, April 6, 2010 at 2, 16.

Claimant testified that she was not under the influence of alcohol and, although she forgot her glasses that day and had difficulty reading orders, she had no trouble performing her job the morning of August 13, 2009. According to her testimony, she had been drinking with friends the night before and at approximately 10:00 p.m. was driven home, where she realized she did not have her keys and she

was locked out. She contacted co-worker, Joseph Ennis, who picked her up and took her to his house for the night. They reported for work together the next morning. Claimant stated that she was not intoxicated, but did not feel quite awake. Mr. Ennis testified that Claimant did not appear impaired that morning and, during the 30 minutes he worked with Claimant before she was called to Ms. Zarzyczny's office, her behavior was characteristic of her.

Ultimately, the Referee based its denial of benefits on Claimant's admission in her Petition for Appeal, and her admission to the human resource manager that she "had been up drinking." O.R. Item 5; 10/13/09 N.T. at 23. The UCBR denied Claimant benefits based on: Claimant's admission to Employer that she had been drinking the night before, the positive alcohol test results, the signed statement admitting the results were accurately recorded, and the test results indicating she was above the legal limit for driving. Claimant argues that those facts do not establish that Claimant was functionally impaired at work on August 13, 2009. We agree.

Reporting to work in an intoxicated condition can constitute willful misconduct. *See Lindsay; Kirkpatrick v. Unemployment Comp. Bd. of Review*, 450 A.2d 289 (Pa. Cmwlth. 1982); *Durst Buster Brown v. Unemployment Comp. Bd. of Review*, 424 A.2d 580 (Pa. Cmwlth. 1981); *Klink v. Unemployment Comp. Bd. of Review*, 289 A.2d 494 (Pa. Cmwlth. 1972). However, unless otherwise specifically stated in an employer's work rules, more than mere consumption of alcohol is required. *See Keay v. Unemployment Comp. Bd. of Review*, 551 A.2d 391 (Pa. Cmwlth. 1988); *Hammond v Unemployment Comp. Bd. of Review*, 465 A.2d 79 (Pa. Cmwlth. 1983).

Here, the policy under which Employer terminated Claimant's employment neither prohibits the consumption of alcohol, nor being under its influence. Instead, it authorizes Employer to terminate the employment of an employee who reports for work *functionally impaired* due to alcohol. Employer's policy does not, however, define functional impairment. Moreover, we have found no unemployment compensation case law specifically defining functional impairment. Thus, we must look to the plain meaning of the terms Employer specifically chose to govern its policy. Impairment is defined as "[t]he fact or state of being damaged, weakened, or diminished." *Black's Law Dictionary* 819 (9th ed. 2009). Functional is defined as "performing or able to perform a regular function." *Merriam-Webster's Collegiate Dictionary* 507 (11th ed. 2003). It is clear, therefore, that being functionally impaired requires more than mere consumption of alcohol. It would require that one's ability to perform a regular function is damaged, weakened or diminished by the consumption of alcohol. Although blood alcohol content may be a factor in making such a determination, Employer's policy does not specify a blood alcohol level that constitutes a violation of its work rule prohibiting reporting to work functionally impaired.³

Although Claimant admitted to drinking the previous evening, she did not admit being functionally impaired on the date in question. She reported to work and was doing her job when she was asked to report to the director of human resources because her foreman reported that she was acting strangely. Claimant was

³ We note that Section 5 of Employer's Drug and Alcohol Policy provides a list of "Initial and Confirmatory Test Levels," setting the test level for alcohol at 50 mg/dl milligrams per deciliter (i.e., .05 blood alcohol content). O.R. Item 8, Ex. 1 at 8. Section 5 does not state that it represents the level at which Employer deems an employee functionally impaired, and the remainder of the Policy makes no reference, whatsoever, to that section. Section 5 of the Policy, therefore, has no bearing on this Court's analysis.

then sent for a breathalyzer test, which registered positive for alcohol. The only witness to Claimant's actual work that morning testified that he did not smell alcohol on Claimant, nor did he notice any other signs of intoxication. We hold that the results of Claimant's breathalyzer tests and Claimant's statements that she was drinking the night before are not sufficient to prove that she was functionally impaired at work on August 13, 2009 and, therefore are not sufficient to prove that she violated Employer's work rule.⁴ Accordingly, the UCBR erred by finding that Claimant was properly terminated for violating Employer's work rule.

For the reasons stated above, the UCBR's order is reversed.

JOHNNY J. BUTLER, Judge

⁴ In light of our holding, we need not address whether the UCBR erred by admitting Claimant's breath test into evidence.

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ORDER

AND NOW, this 21st day of January, 2011, the July 2, 2010 order of the Unemployment Compensation Board of Review is reversed.

JOHNNY J. BUTLER, Judge