IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zarlenga & Seltzer, Inc., Petitioner	:	
v.	:	No. 159 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: June 18, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: August 19, 2010

Zarlenga & Seltzer, Inc. (Employer) petitions for review of the order of the Unemployment Compensation Board of Review (Board) affirming the decision of a Referee that granted Debra K. Falls (Claimant) unemployment compensation benefits pursuant to the provisions of the Unemployment Compensation Law (Law).[1] We affirm.

Claimant filed a claim for benefits with the Lancaster UC Service Center upon the termination of her employment as a part-time telemarketer with

[1] Act of December 5, 1936, Second Ex. Sess. P.L. (1937) 2897, as amended, 43 P.S. §§ 751 – 914.

Employer. On July 23, 2009, the Service Center issued a Notice of Determination in which it concluded that Claimant had been discharged for reasons that constitute willful misconduct under Section 402(e) of the Law.[2] As a result, the Service Center denied Claimant unemployment compensation benefits.

Claimant appealed this determination and a hearing was conducted before a Referee at which she testified, and Employer's general manager and vice president testified. See N.T. 10/8/09[3] at 1-36. On October 21, 2009, the Referee issued a decision disposing of the appeal in which she determined that Claimant had been discharged for reasons that do not constitute willful misconduct under Section 402(e) of the Law. As a result, the Referee issued an order reversing the Service Center's determination, and granted Claimant benefits.

On October 30, 2009, Employer filed an appeal of the Referee's decision with the Board. On January 11, 2010, the Board issued a decision in which it made the following relevant findings of fact: (1) Claimant was last employed as a part-time telemarketer by Employer on June 15, 2009; (2) Employer has a policy which requires employees to accept and expect variations in the schedule as needed by the business; (3) Employer has a policy which permits

---

[2] Section 402(e) of the Law provides, in pertinent part:

> An employe shall be ineligible for compensation for any week—
>
> * * *
>
> (e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act.

43 P.S. § 802(e).

[3] "N.T. 10/8/09" refers to the transcript of the hearing conducted before the Referee on October 8, 2009.

employees to work a second job as long as it does not interfere with their job performance and they are expected to work their assigned schedule; (4) Claimant was aware of Employer's policies; (5) Claimant worked a second part-time job with Rite-Aid during her four years of employment with Employer; (6) Claimant's work schedule with Rite-Aid was Mondays from 6:00 p.m. to 9:00 p.m., Thursdays from 6:00 p.m. to 10:00 p.m., and every other weekend and her schedule with Rite-Aid never changed; (7) Employer was aware of Claimant's employment with Rite-Aid; (8) Employer switched Claimant to part-time hours in January of 2009 due to its dissatisfaction with her work performance; (9) Claimant was generally scheduled to work from 9:00 a.m. to 5:00 p.m. Mondays through Thursdays since April of 2009; (10) On May 14, 2009, Employer informed its employees that its office hours were changing to close at 7:00 p.m. due to a new client on the west coast; (11) Claimant's hours stayed the same, but she was assigned to back up "Amber" who worked until 7:00 p.m. and she was required to work if "Amber" could not work; (12) On June 15, 2009, "Amber" came into work but left sick at noon; (13) Claimant wrote a letter to her supervisor explaining that she could not stay until 7:00 p.m. to fill in for "Amber" as she had a second job that she had to report to at 6:00 p.m.; (14) Employer responded to Claimant in a memo stating that she was expected to work until 7:00 p.m. and she would be terminated if she did not do so; (15) Claimant again informed Employer that she could not stay until 7:00 p.m.; (16) Claimant clocked out at 5:48 p.m. and went to her second job; and (17) The next day, Employer terminated Claimant's employment due to job abandonment. Board Decision at 1-2.

Based on the foregoing, the Board concluded:

> The Board resolves the conflicts in testimony in favor of the claimant and finds the testimony of the claimant to be credible.

> Here, there is no dispute that the claimant left work prior to 7:00 p.m. on June 15, 2009. Given the employer's business needs, and the fact that "Amber" left work early on June 15, 2009, the Board finds the employer's directive for the claimant to work late was reasonable. However, the Board finds that the claimant had good cause justification for her refusal to work until 7:00 p.m. The claimant had a second job, of which the employer was aware and whose hours never changed over four years. The direction to work until 7:00 p.m. did not come until after noon that day, and the claimant immediately explained to the employer her inability to stay and why. The claimant did stay as long as she could after her regular work hours, but the employer was unwilling to compromise. Therefore, the Board finds that the claimant's actions do not rise to the level of willful misconduct.

Board Decision at 3. Accordingly, the Board issued an order affirming the Referee's decision and granting Claimant unemployment compensation benefits. Id. at 4. Employer then filed the instant petition for review.[4]

[4] This Court's scope of review in an unemployment compensation appeal is limited to determining whether an error of law was committed, whether constitutional rights were violated, or whether necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; Hercules, Inc. v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). In addition, it is well settled that the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). Thus, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Peak; Chamoun. Findings of fact are conclusive upon review provided that the record, taken as a whole, contains substantial evidence to support the findings. Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 378 A.2d 829 (1977). This Court must examine the evidence in the light most favorable to the party who prevailed before the Board, and to give that party the benefit of all inferences that can be logically and reasonably drawn from the testimony. Id.

In this appeal, Employer contends the Board erred in determining that Employer had not sustained its burden of proving that Claimant was ineligible for compensation benefits under Section 402(e) of the Law. More specifically, Employer asserts that Claimant's actions rose to the level of willful misconduct because Claimant willfully disregarded Employer's business interests, deliberately violated Employer's work rules, and disregarded the standards of behavior which Employer had a right to expect of Claimant.

As noted above, pursuant to Section 402(e) of the Law, an employee is ineligible for unemployment compensation benefits when she had been discharged from work for willful misconduct connected with her work. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999). The burden of proving willful misconduct rests with the employer. Id. Whether an employee's conduct constitutes willful misconduct is a question of law subject to this Court's review. Id.

Although willful misconduct is not defined by statute, it has been described as: (1) the wanton and willful disregard of the employer's interests; (2) the deliberate violation of rules; (3) the disregard of standards of behavior that 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. Id. (citing Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 309 A.2d 165, 168-169 (Pa. Cmwlth. 1973)).

Once an employer establishes a prima facie case of willful misconduct, the burden shifts to the claimant to prove that her actions did not constitute willful misconduct under the facts or that she had good cause for her behavior. Jordan v. Unemployment Compensation Board of Review, 684 A.2d

1096 (Pa. Cmwlth. 1996). Good cause is established where the claimant's actions are justified or reasonable under the circumstances. Id. Indeed, as the Pennsylvania Supreme Court has noted:

> [I]n order to fall within the definition of "willful misconduct" the actions must represent "a disregard of standards of behavior which the employer has a right to expect of an employe(e)." Thus, not only must we look to the employee's reason for noncompliance we must also evaluate the reasonableness of the request in light of all of the circumstances. To accommodate this end the Superior Court developed a concept of good cause. The rationale upon which this concept of good cause was developed was that where the action of the employee is justifiable or reasonable under the circumstances it cannot be considered willful misconduct since it cannot properly be charged as a willful disregard of the employer's intents or rules or the standard of conduct the employer has a right to expect.

Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 86-87, 351 A.2d 631, 634 (1976) (citations omitted).[5] The question of whether or not a claimant has proved the requisite good cause is also a question of law subject to this Court's review. Gwin v. Unemployment Compensation Board of Review, 427 A.2d 295 (Pa. Cmwlth. 1981).

Employer contends that Claimant's refusal to stay on the job until 7:00 p.m., as requested by Employer, constitutes willful misconduct. However, when viewed in a light most favorable to Claimant, our review of the certified

[5] See also McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 619, 383 A.2d 533, 535 (1978) ("[W]e must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reason for noncompliance. The employee's behavior cannot fall within 'willful misconduct' if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in willful disregard of conduct the employer 'has a right to expect.' In other words, if there was 'good cause' for the

(Continued....)

record in this case demonstrates that there is substantial evidence supporting the Board's determination that Claimant had good cause for her failure to comply with Employer's request to remain on the job until 7:00 p.m., thereby negating any purported willful misconduct. See N.T. 10/8/09 at 19-20, 21-22, 27-29; Exhibit C-1; Exhibit E-1 at F, H. More specifically, the record supports the Board's findings that: Employer was aware of Claimant's second job with Rite-Aid; Employer's request to stay late did not come until after noon during Claimant's regular shift; Claimant immediately explained to Employer her inability to stay and why; Claimant stayed as long as she could after her regular shift before leaving to report for her second job at Rite-Aid; and Employer was unwilling to compromise in its request requiring her to remain after her regular shift. See id.

As noted above, the Board is the ultimate finder of fact in unemployment compensation proceedings. Peak; Chamoun. In addition, issues of credibility are for the Board which may either accept or reject a witness' testimony whether or not it is corroborated by other evidence of record. Id. Thus, the Board was free to credit the foregoing evidence regarding the good cause for Claimant's actions and to discredit evidence to the contrary. Id. In addition, those findings are conclusive on appeal as they are supported by the foregoing substantial evidence. Taylor.

In short, the evidence found credible by the Board in this case demonstrates that it did not err in determining that Claimant had good cause for refusing to comply with Employer's last-minute request to remain at work until 7:00 p.m., in light of her prior known commitment to report for work at Rite-Aid

---

employee's action, it cannot be charged as willful misconduct.") (citations omitted).

that same day at 6:00 p.m., thereby negating a finding of willful misconduct under Section 402(e) of the Law. McLean; Frumento.[6]

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

[6] See also Key v. Unemployment Compensation Board of Review, 687 A.2d 409, 412, 413 (Pa. Cmwlth. 1996) ("The UCBR's findings reveal that Claimant had been hired with the known limitations and that because he had custody of his children during the school year, he would be unable to travel away from home for indefinite periods of time. This arrangement lasted for almost three years. Employer, despite its knowledge of Claimant's limitations, informed Claimant with only one day's notice that he would be assigned to a stable in South Carolina. Claimant informed Employer of his inability to accept this assignment, in effect refusing to follow Employer's directive. Employer then informed Claimant not to return to his place of employment…. The UCBR found that Claimant had been discharged for refusing Employer's directive to report to work in South Carolina…. The UCBR did not consider Employer's request reasonable in light of Claimant's reasonable restrictions for travel. Thus, the UCBR did not consider Claimant's separation from work as being a voluntary termination but rather a discharge pursuant to Section 402(e) of the Law. We have reviewed the record and hold that the UCBR correctly determined Claimant's separation from work was a termination and rightfully granted benefits.") (citation omitted); Mulqueen v. Unemployment Compensation Board of Review, 543 A.2d 1286, 1287-1288 (Pa. Cmwlth. 1988) ("We have previously held that a claimant's absence was justified where an employer issued the claimant an ultimatum to report for work on a Sunday or be fired, despite the claimant having previously notified his employer that he was needed at home to care for his sick wife and son. *Thomas v. Unemployment Compensation Board of Review*, [322 A.2d 423 (Pa. Cmwlth. 1974)]. Similarly, in *Baillie v. Unemployment Compensation Board of Review*, [413 A.2d 1199 (Pa. Cmwlth. 1980)], the claimant was given an ultimatum after alerting her employer that she could not report for work because she had to care for her seriously ill mother. There, we held that those circumstances justified her absence. Here, the claimant's uncontroverted testimony established that he too was issued an ultimatum. Having informed his employer that he could not hire a sitter under such limited time constraints, his supervisor told him to report to work or be fired. As a single parent with two young daughters, having to leave work at 5:30 p.m. on a Friday and secure adequate child care in time to report for work promptly at 7:00 a.m. the next day is an exceptional demand. We conclude that under such short notice, and faced with employer's ultimatum, Mulqueen's choice to remain at home to care for his daughters, like *Thomas* and *Baillie*, justified his absence.").

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Zarlenga & Seltzer, Inc., Petitioner	:	
v.	:	No. 159 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 19th day of August, 2010, the order of the Unemployment Compensation Board of Review, dated January 11, 2010, at No. B-493466, is AFFIRMED.

_____

JAMES R. KELLEY, Senior Judge