

the UC Law.¹ The second order affirmed the referee’s decision which determined that benefits beginning with compensable week ending July 19, 2008 are disapproved under Section 402(e) of the UC Law and Section 4001 of Public Law 110-252 (EUC Act of 2008).² The referee further found that

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937), 2897, as amended, 43 P.S. §802(e), §874(a) and §871(b). Section 402(e) of the Law provides that an employee 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). Section 804(b) provides that “[a]ny person who other than by reason of his fault has received...any sum as compensation under this act to which he was not entitled shall not be liable to repay such sum but shall be liable to have such sum deducted from any future compensation payable to him....” 43 P.S. §874(b). Section 801(b) of the Law provides for disqualification and penalties for knowingly making a false statement or for failure to disclose a material fact in order to obtain or increase any compensation or payment under this act. 43 P.S. §871(b).

² Section 4001 of Title IV – Emergency Unemployment Compensation Act, United States Public Law 110 P.L. 252, 122 Stat. 2323, 2008 Enacted H.R. 2642, provides that a:

State agency will make payments of emergency unemployment compensation to individuals who—

- (1) have exhausted all rights to regular compensation under the State law or under Federal law with respect to a benefit year...;
- (2) have no rights to regular compensation or extended compensation with respect to a week under such law or any other State unemployment compensation law or to compensation under any other Federal law...; and
- (3) are not receiving compensation with respect to such week under the unemployment compensation law of Canada.

Claimant was overpaid for compensable weeks ending July 19, 2008, to February 14, 2009 and that the “Service Center shall recalculate the

(2) the terms and conditions of the State law which apply to claims for regular compensation and to the payment thereof shall apply to claims for emergency unemployment compensation and the payment thereof....

Section 4005 of the EUC Act provides in pertinent part as follows:

If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of emergency unemployment compensation under this title to which such individual was not entitled, such individual—

(1) Shall be ineligible for further emergency unemployment compensation under this title in accordance with the provisions of the applicable State unemployment compensation law relating to fraud in connection with a claim for unemployment compensation; and

(2) shall be subject to prosecution under *section 1001 of title 18, United States Code*.

(b) Repayment.—In the case of individuals who have received amounts of emergency unemployment compensation under this title to which they were not entitled, the State shall require such individuals to repay the amounts of such emergency unemployment compensation to the State agency, except that the State agency may waive such repayment if it determines that—

(1) the payment of such emergency unemployment compensation was without fault on the part of any such individual....

overpayment, if necessary, and the overpayment shall be recouped under the NON-FRAUD provisions of Sections 4005(b) and (c) of the EUC Act. No penalty weeks shall be assessed on the EUC claim.” We affirm both decisions.

This matter involves two appeals. The first appeal, B-09-09-F-2053, involves Claimant’s claim for regular unemployment compensation benefits for the period beginning with the waiting week ending January 12, 2008. The second appeal, B-EUC-09-09-F-2005, involves Claimant’s claim for emergency unemployment compensation benefits beginning with the compensable week ending July 19, 2008.

On January 6, 2008, Claimant filed for and was granted by the Service Center, unemployment compensation benefits under the UC Law after she was laid off from her seasonal employment with National Christmas Center (Employer).³ Her weekly benefit amount equals \$231.00 and her partial benefit credit equals \$93.00. Claimant received regular unemployment compensation benefits for compensable weeks ending January 19, 2008, to July 12, 2008, in the amount of \$6,006. Claimant’s regular benefits ended and she began receiving EUC benefits under the EUC Act for compensable weeks ending July 19, 2008 through February 14, 2009, in the amount of \$5,544. Employer appealed the grant of benefits. A hearing was conducted by a referee, which made the following findings of fact:

3. For the purposes of this appeal, the claimant was employed from September 2006, until January

³ We note that a claimant does not file a separate claim for EUC benefits, that after a claimant’s regular benefits stop, the Department of Labor and Industry (Department) provides the information needed to collect EUC benefits.

6, 2008, at National Christmas Center as a full-time, seasonal, Café Manager, earning \$11.50 per hour.

4. During the last period of her employment, the claimant was seasonally employed from June 2007, until January 6, 2008, when she was laid off due to seasonal lack of work.

5. The claimant was typically called back to work from her seasonal lay off at the end of May or beginning of June.

6. The employer has a policy, of which the claimant was aware or should have been aware, in which theft of company property, or unauthorized use of company equipment or credit cards for personal reasons will result in immediate dismissal.

7. On March 6, 2008, the claimant's husband informed the employer that the claimant had used the business credit card for personal use.

8. The employer informed the claimant's husband that such use of the credit card was unacceptable.⁴

9. On March 6, 2008, the claimant's husband paid the employer two checks of \$600 and \$400 respectively, and he informed the employer that the credit card use would not happen again.

10. On March 19, 2008, the employer received a credit card statement which showed that the claimant had removed approximately \$1,446 in cash from the credit card.

⁴ Finding of Fact No. 8 on the referee's EUC opinion reads slightly different:

8. The employer informed the claimant's husband that this type of credit card use was unacceptable.

11. On March 24, 2008, the employer checked the company credit card and found ongoing activity from the claimant.

12. On March 24, 2008, the employer confronted the claimant about the credit card use.

13. On March 24, 2008, the claimant admitted to using the card to purchase a living room suite and to pay bills.

14. On March 24, 2008, the claimant gave the employer a check for \$1000.

15. On March 24, 2008, the employer discharged the claimant for using the company credit card for personal reasons.

16. When the claimant filed her application for unemployment compensation benefits on January 8, 2008, the claimant was unemployed due to a seasonal lack of work.

17. The claimant did not deliberately mislead the Service Center into receiving benefits to which she was not entitled.

Referee's decisions, May 21, 2009, Findings of Fact nos. 1-17, at 1-2.

Regarding the EUC benefits, the referee concluded that Claimant was not credible in her testimony that Employer had given Claimant permission to use its credit card for personal use. The referee determined that using a business credit card to purchase a living room suite, to pay bills and to withdraw cash is clearly a violation of the standard of behavior which Employer has the right to expect of its employees. The referee determined that Claimant committed willful misconduct and denied benefits pursuant to Section 402(e) of the Law.

However, the referee also found that there was no evidence to show that Claimant had deliberately misled the Service Center into receiving benefits to which she was not entitled. When Claimant filed for benefits she was unemployed due to a seasonal lack of work. Thus, the referee determined that while Claimant was still overpaid, the amount shall be recouped under the non-fault provisions of Section 804(b) of the Law and penalty weeks were not appropriate.

The referee further determined that benefits beginning with compensable week ending July 19, 2008, are disapproved under Section 402(e) of the Law and Section 4001 of Public Law 110-252 (EUC Act of 2008). The referee determined that Claimant was overpaid for compensable weeks ending July 19, 2008 through February 14, 2009 and that such overpayment shall be recouped under the non-fraud provisions of Sections 4005(b) and (c) of the EUC Act and no penalty weeks shall be assessed on the EUC claim.

With regard to the regular UC claim, the referee again determined that Claimant was discharged for personal use of the company credit card. The referee found that Employer had a policy which called for immediate dismissal for the unauthorized use of such card. The referee determined that Claimant was not credible in her testimony that Employer had given her permission to use the credit card for personal use. The referee further determined that using a business credit card to purchase a living room suite, to pay bills and to withdraw cash is clearly a violation of the standard of behavior which Employer has the right to expect of its

employees. The referee determined that Claimant committed willful misconduct and denied benefits pursuant to Section 402(e) of the Law.

The referee then determined that as Claimant was laid off for a specific period for lack of work and that she would not be recalled to work until sometime in the beginning of June 2008, that the disqualification of Claimant was not effective until June 1, 2008. The referee further determined that Claimant did not deliberately mislead the Service Center in her receipt of benefits that she was not entitled to receive. Thus, the amount Claimant overpaid should be recalculated based upon a disqualification effective with compensable week ending June 7, 2008 and it shall be recouped under the non-fault provisions of Section 804(b) of the UC Law, and penalty weeks are not appropriate. On appeal, the Board adopted the findings of the referee and affirmed both determinations. Claimant now petitions our court for review.⁵

Claimant contends that the Board erred in determining that her conduct rose to the level of willful misconduct and that even if her conduct did rise to such a level, that she is entitled to partial unemployment compensation benefits and/or full unemployment compensation benefits during parts of her claim.⁶

⁵ Our review in this matter is limited to a determination of whether constitutional rights were violated, errors of law committed, and whether essential findings of fact are supported by substantial evidence. Brady v. Unemployment Compensation Board of Review, 544 A.2d 1085, 1086 (Pa. Cmwlth. 1988).

⁶ The Board is the ultimate fact-finder and “the findings of the Board as to facts, if supported by the evidence, are conclusive.” Unemployment Compensation Board of Review v. Ruffel, 336 A.2d 670 (Pa. Cmwlth. 1975). This court must “examine the testimony in the light most favorable to the party in whose favor the Board has found, giving that party the benefit of all inferences that can logically and reasonably be drawn

Claimant states that she did not commit willful misconduct by using Employer's credit card because she had been granted permission to use the credit card by Employer, had used the credit card previously without sanction or warning from Employer, had not been fired for such use and had never received notice that her continued use of the credit card was no longer acceptable.

Where, as here, a claimant has been discharged for a work rule violation, the employer has the burden of proving the existence of the rule and that the claimant violated it. Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997). Once the employer establishes those elements, the burden then shifts to the claimant to show that she had good cause to violate the rule. ATM Corporation of America v. Unemployment Compensation Board of Review, 892 A.2d 859, 865 (Pa. Cmwlth. 2006).

Here, Employer submitted into evidence a copy of the Employer's handbook which Claimant signed, acknowledging that she had read and understood it. Employer Handbook, Receipt and Acknowledgment of Handbook at 7. The handbook stated in pertinent part as follows:

Occurrences of any of the following violations, because of their seriousness may result in immediate dismissal without warning:

Theft of company property or the property of fellow employees...including...unauthorized use

from the testimony...." Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977).

of company equipment, credit cards or property for personal reasons or profit.

Employer's Handbook at 20-21. Thus, there is substantial evidence to support the Board's finding that Employer had a policy, of which Claimant was aware or should have been aware, that personal use of Employer's credit cards was prohibited and that such use could result in immediate dismissal.

Further, Claimant admitted to the personal use of Employer's credit card. A single proven incident of theft from the employer will support a disqualification. Temple University v. Unemployment Compensation Board of Review, 565 Pa. 178, 772 A.2d 416 (2001). Therefore, willful misconduct was proven and the burden then shifted to Claimant to show that she had good cause for violating Employer's rule.

Claimant stated that Employer gave her permission to use the credit card for personal reasons. The referee, however, did not find Claimant's testimony credible and, thus, Claimant failed to establish a good explanation for her conduct. The Board determines the credibility of a witness and the weight to be accorded to the testimony. Bowman v. Unemployment Compensation Board of Review, 410 A.2d 422 (Pa. Cmwlth. 1980). The Board did not err in determining that Claimant had committed willful misconduct.

Next, Claimant contends that if she is found to have committed willful misconduct, that she is still entitled to partial unemployment benefits from June of 2008 to November of 2008 and full benefits after the first week of January 2009. We disagree.

Claimant, a seasonal employee, was discharged while on her seasonal lay-off and was not expected to return until the beginning of June,

2008. In Coleman v. Unemployment Compensation Board of Review, 406 A.2d 259 (Pa. Cmwlth. 1979), this court determined that when an employee's unemployment is due to being laid off and not due to her willful misconduct which occurred after the lay-off, she may receive unemployment benefits until the date she would have been recalled if she had not committed the act of willful misconduct. Id. at 260.

The referee properly applied this court's reasoning to the present controversy. The record reflects that Claimant would not have been recalled to work until sometime in the beginning of June, 2008. The referee properly determined that Claimant was not disqualified until June 1, 2008. Claimant argues that she would have been called back at a part-time position in June, not full-time, and full-time would only begin in November. However, Coleman does not distinguish between "full-time", "part-time" or an "as needed" employee. The date at which Claimant was to be recalled is the date her benefits end. A claimant is considered discharged for willful misconduct at the time she was to be recalled and is not eligible for any unemployment benefits after such discharge. The Board did not err in affirming the referee.

Accordingly, we must affirm the decisions of the Board.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Barbara Y. Wiley,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1746 C.D. 2009
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 19th day of May, 2010 the orders of the Unemployment Compensation Board of Review in the above-captioned matter are affirmed.

JIM FLAHERTY, Senior Judge