IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Debbie L. McBride, Petitioner	:	
v.	:	No. 1807 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	Submitted: March 11, 2011

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY FILED: April 14, 2011

Debbie L. McBride (Claimant) petitions for review of the August 6, 2010, order of the Unemployment Compensation Board of Review (Board) denying Claimant unemployment compensation benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] We reverse.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e). Section 402(e) 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 the act.

This case has a somewhat long and tortured history. Claimant was employed by FCI-Schuylkill – Department of Justice (Employer) as a correctional counselor for approximately 18 years. Claimant's last day of work was July 8, 2009.

Claimant filed a claim for unemployment compensation benefits via the internet on July 9, 2009. Therein, Claimant stated that she had been discharged for a rule violation that occurred on October 30, 2008. In response, Employer provided a notice addressed to Claimant, dated March 31, 2009, which stated that the unit manager was proposing that she be removed from her position as corrections counselor based on several charges including, *inter alia*, failure to properly supervise inmates, providing inmates unauthorized favors or articles, and possession of contraband.

On August 7, 2009, the Scranton UC Service Center issued a Notice of Determination finding that Claimant was ineligible for benefits pursuant to Section 402(e) of the Law. The Service Center found that Claimant was discharged for being involved in activities that were against Employer's policy.

Claimant appealed the Service Center's determination and attached a letter explaining her reasons for the appeal. Therein, Claimant stated that: (1) she did step out of her office for approximately 30 seconds while the unit orderlies, who were inmates, were stacking supplies under the counter and the desk; (2) she did provide an inmate with photos of exercise equipment from the internet, which equipment was later purchased for use by the entire correctional facility; and (3) she did have superglue in her desk drawer. However, Claimant stated further that she did not commit any of the foregoing allegations with the intent of causing any willful misconduct.

A hearing before a Referee ensued on September 22, 2009. A representative appeared on behalf of Employer along with two witnesses: (1) Lieutenant Thomas Reisinger, Investigator; and (2) Mary Lindenmuth, Employee Services Specialist. Claimant appeared with counsel. Claimant's counsel objected to any hearsay that was in any of the documents already contained in the certified record.

The Referee determined that Claimant should proceed first with her testimony based on her appeal letter from the Service Center's determination. Claimant testified that she was discharged by Employer for a violation of what it claimed was its rules. Certified Record (C.R.), Transcript of September 22, 2009, Hearing at 4.[2] In response to the Referee's question of whether she violated the rules, Claimant responded that she did not "really feel like, sir, that some of the things I did were a violation of a rule. I mean we can discuss each individual one if you would care to." Id. Thereafter, the Referee decided that Employer should proceed with its case but provided Claimant's counsel the opportunity to question Claimant before Employer presented its case. Counsel then asked Claimant why she believed she did not violate Employer's rules and Claimant provided an explanation as to two of the charges – failing to properly supervise the inmates and printing photos of exercise equipment from the internet. Id. at 5-9. At that point, the Referee decided to proceed with Employer's case in chief and Employer's representative cross-examined Claimant. Id. at 10-13. On cross-examination, Claimant continued to testify that she did not perceive any of her actions as a violation of Employer's rules/policies. Id.

[2] Claimant has not provided the first 13 pages of the transcript of the September 22, 2009, hearing in the reproduced record.

Employer then attempted to present certain documents and the testimony of its two witnesses into evidence. However, the Referee determined that Employer was unable to provide a foundation for the documents and further that Employer did not have a competent witness who could testify as to precisely why Claimant was discharged. Reproduced Record (R.R.) at 6a-9a. In addition, the Referee denied Employer's request for a continuance in order to provide a competent witness. Id. at 9a.

By decision issued on October 7, 2009, the Referee stated that "[b]ased upon the competent evidence and the record before him, the referee cannot conclude that the specific reason or reasons for discharge has been proven and the referee cannot conclude that the employer has met its burden of proving that the claimant was discharged for willful misconduct in connection with her work under Section 402(e) of the Law." R.R. at 12a-13a. Accordingly, the Referee reversed the Service Center's determination and approved Claimant's claim for benefits. Id. at 13a.

Employer appealed the Referee's decision to the Board. By order mailed November 24, 2009, the Board remanded the matter to the Referee, acting as Hearing Officer for the Board, to schedule another hearing. R.R. at 16a-17a. The Board stated that the purpose of the hearing was to establish additional testimony regarding the merits of the case. Id. The Board specifically directed the Referee to permit Employer "to present additional testimony, from the witnesses who participated in the September 22, 2009 hearing, regarding the reason for the claimant's discharge." Id. Finally, the Board directed that testimony resulting from the further hearing be transcribed and the entire record returned to the Board for its consideration and such further action as may be deemed appropriate. Id. at 17a.

The first remand hearing was conducted on March 4, 2010. Claimant again appeared with counsel. The same representative appeared on behalf of Employer along with four witnesses: (1) Lieutenant Reisinger; (2) Ms. Lindenmuth; (3) Amy Leonard, Unit Manager; and (4) Thomas Sniezek, Chief Executive Officer for the Warden at FCI-Schuylkill. R.R. at 25a-26a.

Claimant's counsel again objected to any hearsay that was in any of the documents already contained in the certified record. R.R. at 26a. Counsel also objected to any testimony from two of Employer's witnesses, namely Amy Leonard and Thomas Sniezek, on the basis that the Board's November 24, 2009, remand order only permitted Employer to present additional testimony from the two witnesses that originally appeared at the September 22, 2009, hearing. Id. Those two witnesses were Lieutenant Reisinger and Ms. Lindenmuth.

In response, Employer's representative stated that Employer believed, based on a conversation with an unknown unemployment person, that it was permitted to present additional witnesses; therefore, Employer requested a continuance. R.R. at 28a-29a. The Referee informed Employer that the Board's remand order was controlling and as such, he was only going to permit the testimony from the witnesses that were present at the September 22, 2009 hearing. Id. at 29a. Accordingly, the Referee denied Employer's request for a continuance. Id.

At that point, Employer's representative informed the Referee that while Employer did receive notice of the March 4, 2010, remand hearing, Employer did not receive a copy of the Board's November 24, 2009, remand order. Thus, Employer argued that it was not notified that there was going to be an issue with who could testify and again requested a continuance. Id. at 32a. The Referee granted Employer's request for a continuance but warned Employer that unless it

received a different order from the Board, Employer would only be permitted to present the testimony from the witnesses who originally appeared at the September 22, 2009, hearing. Id. at 32a-33a.

By notice mailed March 16, 2010, the continued March 4, 2010, remand hearing was rescheduled for March 30, 2010, before the Referee. R.R. at 35a. Claimant's counsel requested permission to participate via telephone and also requested a continuance of the March 30th hearing on the basis that counsel was unavailable. The Referee denied both requests. Claimant's counsel sent a letter to the Referee informing him that Claimant would be attending the March 30, 2010 hearing without representation. Id. at 36a. In addition, Claimant's counsel informed the Referee that: (1) Claimant objected to any attempt by Employer at the March 30, 2010 hearing to introduce testimony from witnesses who did not participate in the September 22, 2009 hearing; and (2) Claimant objected, on the basis of hearsay, to any and all additional evidence presented by any witnesses who participated in the September 22, 2009 hearing if said witnesses do not have first-hand knowledge of the reason for Claimant's discharge. Id.

At the March 30, 2010 hearing, Claimant informed the Referee that she was unrepresented due to his denial of her counsel's requests to participate via telephone and for a continuance. C.R., Transcript of March 30, 2010 Hearing at 2. Claimant further informed the Referee that she did not want to be at the hearing without her attorney. Id. Employer's representative again appeared with the original two witnesses: (1) Lieutenant Reisinger; and (2) Ms. Lindenmuth. Both of Employer's witnesses were permitted by the Referee to testify. In accordance with the Board's original remand order of November 24, 2009, the Referee returned the entire record to the Board following the March 30th hearing for the Board's consideration.

Based on the testimony and evidence presented at the September 22, 2009, March 4, 2010, and March 30, 2010, remand hearings, by decision and order mailed April 27, 2010, the Board reversed the Referee's original October 7, 2009, decision and denied Claimant benefits. R.R. at 38a. By letter dated May 10, 2010, Claimant, through her counsel, requested that the Board reconsider its April 27, 2010, decision and order due to the fact that she was unrepresented through no choice of her own but due to the Referee's denial of the requests for a hearing via telephone and for a continuance of the hearing. Id. at 42a-43a.

By order mailed May 27, 2010, the Board vacated its April 27, 2010, decision and order, reopened this matter, and remanded for further hearing on the merits before the Referee to allow Claimant to be represented by counsel. R.R. at 47a. The Board stated further that "[g]iven that the claimant did not wish to proceed without counsel present, the Board will nullify the March 30, 2010, hearing. The Referee is directed to conduct this Remand hearing as if the March 30, 2010, hearing did not occur." Id. at 48a. Finally, the Board stated that "[i]n accordance with the Board's November 24, 2009, remand order, the employer is limited to presenting testimony from the witnesses who participated in the September 22, 2009, hearing." Id.

By notice mailed June 22, 2010, a third remand hearing was scheduled for July 6, 2010, before the Referee. Claimant and her counsel appeared at the appointed time; however, Employer did not appear nor did any witnesses appear to testify on Employer's behalf. Claimant presented brief testimony regarding her employment history and the fact that she was still ready, able and willing to work. C.R., Transcript of July 6, 2010, Hearing at 3-4. In addition, the Referee sustained Claimant's counsel's objection to any hearsay contained in the documents which were submitted into the certified record. Id.

The Board issued its final decision and order in this matter on August 6, 2010. Therein, the Board stated that it had given consideration to the entire record of the prior proceedings, with the exception of the nullified March 30, 2010, hearing transcript. Based on the record, the Board made the following findings of fact.

> 2. Before the claimant's last day of work [on July 8, 2009], employer conducted an investigation upon receiving reports that claimant violated several employer policies by, among other things: failing to properly supervise inmates and providing inmates with unauthorized favors or articles.
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> 3. The claimant was aware that the employer's policy prohibited correctional officers from moving inmates before the completion of an official count.
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> 4. The claimant was also aware that the employer's policy prohibited correctional counselors from providing inmates with unauthorized favors or articles.
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> 5. The claimant admitted that, on several occasions, she had released 2 or 3 prisoners from their cells to perform cleaning duties before the completion of a final count.
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> 6. The claimant admitted that she had left these inmates unsupervised for a short period while they were cleaning the case managers' offices.
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> 7. The claimant also admitted that, in response to an inmate's request, she had printed pictures of recreational equipment from the Internet, which the inmate then took to another staff member for the purpose of purchasing items for the inmate rec yard.
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> 8. The employer discharged the claimant for violating multiple employer policies.

R.R. at 54a-55a. The Board resolved all conflicts in the testimony in favor of Employer and concluded that Claimant's behavior rose to the level of willful

misconduct. The Board stated that Claimant admitted that she was aware of Employer's policies and that she admitted that she released 2 or 3 prisoners from their cells to perform cleaning duties before completion of a final count, that she had left these inmates unsupervised for a short period, and that she had printed pictures of recreational equipment from the internet pursuant to a request from an inmate. In addition, the Board credited Employer's testimony that Claimant's actions were in violation of Employer's policies. Finally, the Board determined that Claimant did not demonstrate good cause for her intentional violation of Employer's reasonable policies. Accordingly, the Board denied Claimant unemployment compensation benefits. This appeal followed.

In support of this appeal, Claimant argues that Employer failed to prove the existence of the work policy/rule and further failed to prove that she violated said policies/rules. Employer's attempt to offer evidence that there was in fact a policy was objected to because of the lack of a foundation. As a result of this objection being sustained, Employer was unable to provide any proof that Claimant violated its policies and thus could not prove that Claimant was terminated from her employment for willful misconduct. Claimant argues that her testimony alone is not enough to satisfy Employer's burden of proving that a policy existed and that she violated the alleged policy.

Claimant also argues that the Board's findings are not supported by substantial evidence. Contrary to the Board's findings, Claimant contends that, at best, she indicated that she was aware that she was terminated for violations of Employer's policies; however, she did not believe that she violated the policies nor did she admit to violating any said policies. Claimant argues that reasonable minds

could not base a conclusion on Claimant's testimony alone that she committed willful misconduct by violating Employer's policies.[3]

Initially, we note that this Court's review of the Board's decision is set forth in Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704, which provides that the Court shall affirm unless it determines that the adjudication is in violation of the claimant's constitutional rights, that it is not in accordance with law, that provisions relating to practice and procedure of the Board have been violated, or that any necessary findings of fact are not supported by substantial evidence. See Porco v. Unemployment Compensation Board of Review, 828 A.2d 426 (Pa. Cmwlth. 2003). 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). Substantial evidence is relevant evidence that a reasonable mind might consider adequate to support a conclusion. Hercules v. Unemployment Compensation Board of Review, 604 A.2d 1159 (Pa. Cmwlth. 1992). The Board is the ultimate fact finder and is, therefore, entitled to make its own determinations as to witness credibility and evidentiary weight. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985).

Willful misconduct has been judicially defined as that misconduct which must evidence the wanton and willful disregard of employer's interest, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from his employee, or negligence which manifests

[3] We note that the Board indicates in its brief in response to Claimant's appeal that the order being appealed from is the Board's April 27, 2010, order and has attached that order as an appendix to its brief. However, Claimant is clearly appealing from the Board's final August 6, 2010, order in this matter.

culpability, wrongful intent, evil design, or intentional substantial disregard for the employer's interest, or the employee's duties and obligations. Frumento v. Unemployment Compensation Board of Review, 466 Pa. 81, 351 A.2d 631 (1976). Whether an employee's conduct constituted willful misconduct is a matter of law subject to this Court's review. Miller v. Unemployment Compensation Board of Review, 405 A.2d 1034 (Pa. Cmwlth. 1979). The burden of proving willful misconduct rests with the employer. Brant v. Unemployment Compensation Board of Review, 477 A.2d 596 (Pa. Cmwlth. 1984).

Where, as is here, a claimant is discharged for violation of a work rule or policy, the employer must establish both the existence of the reasonable work rule and its violation. Brunson v. Unemployment Compensation Board of Review, 570 A.2d 1096 (Pa. Cmwlth. 1990). Where the employer proves the existence of a rule, the reasonableness of the rule and the fact of its violation, the burden shifts to the claimant to prove that she had good cause for her action. Guthrie v. Unemployment Compensation Board of Review, 738 A.2d 518 (Pa. Cmwlth. 1999).

An employer "must present evidence indicating that the conduct was of an intentional and deliberate nature" in order to prove willful misconduct. Grieb v. Unemployment Compensation Board of Review, 573 Pa. 594, 600, 827 A.2d 422, 426 (2003). The deliberate violation of an employer's rules or policies is generally considered to be willful misconduct. Navickas v. Unemployment Compensation Review Board, 567 Pa. 298, 304, 787 A.2d 284, 288 (2001). Critically, to be disqualifying, the employee's violation of a rule must be knowing and deliberate. An inadvertent rule violation is not willful misconduct. BK Foods, Inc. v. Unemployment Compensation Board of Review, 547 A.2d 873 (Pa. Cmwlth. 1988).

In the instant matter, we must first determine whether Employer sustained its burden to establish a *prima facie* case of willful misconduct in light of the facts and totality of the circumstances. Upon review, we conclude that Employer failed to sustain its burden.

As stated previously herein, Employer did not offer any documents or testimony, during the three valid hearings conducted before the Referee, establishing the existence of a reasonable work policy/rule and a deliberate violation by Claimant of Employer's rules or policies. The Board found, presumably based on Claimant's testimony, that Claimant was aware of Employer's policies and that Claimant violated those policies. However, Claimant did not testify that she deliberately violated any of Employer's policies. Claimant maintained throughout this matter, beginning with her appeal letter and ending with her testimony, that she did not commit any of the alleged violations with the deliberate intent of committing willful misconduct. Moreover, Employer offered no evidence to refute Claimant's assertions.

In making its findings, the Board specifically credited Employer's testimony that Claimant's actions were in violation of Employer's policies. The Board also resolved all conflicts in the testimony in favor of Employer and concluded that Claimant's behavior rose to the level of willful misconduct. Again, Employer did not present any testimony regarding Claimant's actions nor did Employer present any specific testimony or evidence that its policies were reasonable and that Claimant's actions were a deliberate or intentional violation of Employer's policies. Accordingly, we have no choice but to conclude that Employer failed to meet its burden that Claimant deliberately violated its reasonable policies and that the Board's findings, that purportedly support the

Board's conclusion that Claimant committed willful misconduct, are not supported by substantial evidence.

The Board's order is reversed.

JAMES R. KELLEY, Senior Judge

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v.	:	No. 1807 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 14th day of April, 2011, the August 6, 2010, order of the Unemployment Compensation Board of Review in the above captioned matter is reversed.

JAMES R. KELLEY, Senior Judge