

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marie Watkins, :
Petitioner :
 :
v. : No. 1854 C.D. 2010
 : Submitted: March 11, 2011
Unemployment Compensation Board :
of Review, :
Respondent :

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: June 15, 2011

Marie Watkins (Claimant) petitions, *pro se*, for review of an adjudication of the Unemployment Compensation Board of Review denying her claim for benefits under the Unemployment Compensation Law (Law).¹ In doing so, the Board affirmed the Referee's determination that Claimant was ineligible for benefits under Section 402(e) of the Law, 43 P.S. §802(e),² by reason of her willful misconduct, *i.e.*, sleeping on duty. Finding no error by the Board, we will affirm.

Claimant was last employed by Vitas Healthcare Corporation (Employer) as a nurse assistant at Mercy Fitzgerald Hospital in Lansdowne, PA.

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

² Section 402(e) provides, in relevant part, that "[a]n employe shall be ineligible for compensation for any week ... [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." 43 P.S. §802(e).

Claimant was discharged on February 5, 2010, for unprofessional conduct. She applied for unemployment compensation benefits, which were granted by the UC Service Center. Employer appealed, and the Referee conducted a hearing.

Claimant's supervisor, Christine Martyniuk, appeared on behalf of Employer. Martyniuk testified that when Claimant was hired she received a copy of the employee handbook, which contains Employer's disciplinary rules. *Inter alia*, those rules state that an employee can be immediately discharged for "unprofessional conduct, conduct which violates technical or ethical standards of the profession." Notes of Testimony, May 28, 2010, at 7 (N.T. ___).³

Martyniuk testified that on January 28, 2010, several staff members observed Claimant sleeping on duty. Martyniuk did not directly observe Claimant sleeping but learned about the incident from Meg Barry, the nurse in charge on Claimant's shift on the night in question. Martyniuk met with Claimant on February 5, 2010, to discuss the allegation, at which time Claimant denied that she had ever slept on duty and accused her co-workers of lying and "ganging up on her." N.T. 11.

Meg Barry also testified for Employer. Barry testified that Claimant went into the lounge area at approximately 1:00 a.m. on January 28 to take her break.⁴ Over the course of the next few hours, Barry noticed several times that Claimant had not moved from the lounge chair she was sitting in. At approximately 4:00 a.m., Barry went in to the lounge and saw that Claimant's eyes

³ Martyniuk read from Employer's employee handbook, which was offered into evidence. *See* Exhibit E-1. Claimant also acknowledged that she was aware that unprofessional conduct could lead to disciplinary action, including termination. N.T. 16.

⁴ Barry testified that Employees are allowed one 15-minute break and one 30-minute meal period during a shift, which can be combined for a total of 45 minutes.

were closed. Barry stated that she called to Claimant, “and she did not hear me. And I turned off the TV and called to her again, and that’s when I woke her up.” N.T. 12. According to Barry, she told a startled Claimant that her behavior was inappropriate and she should be making rounds and checking on patients at least every half hour. Claimant angrily responded that she did not need to make rounds more than every two hours.

Claimant offered a different version of the events that transpired on January 28. Claimant testified that Barry called to her in the lounge at around 1:30 a.m. Claimant stated that she did not answer Barry “because she picks with me constantly.” N.T. 16. At that point, Barry came in and “smacked the TV off,” and the two got into an argument about the frequency of rounds. *Id.* Claimant testified that she resumed working with her assigned nurse at approximately 1:45 a.m. When asked about the inconsistencies between her version of events and Barry’s, Claimant stated that Barry had fabricated her entire story. Claimant maintained that she had never fallen asleep in the lounge and was working at 4:00 a.m. on the night in question.

The Referee resolved all conflicts in the testimony in favor of Employer, specifically crediting Barry’s testimony that she observed Claimant sleeping for approximately three hours during her work shift. The Referee found that Claimant’s conduct violated Employer’s work rule prohibiting unprofessional conduct, which is punishable by disciplinary action up to and including termination. The Referee held that Claimant’s violation of Employer’s work rule without good cause constituted disqualifying willful misconduct under Section 402(e) of the Law, 43 P.S. §802(e). Claimant appealed, and the Board affirmed on

the basis of the Referee's findings and conclusions. Claimant now petitions for this Court's review.⁵

On appeal, Claimant argues that the Board erred in finding that she committed willful misconduct. Claimant contends that Meg Barry was not a credible witness and that Employer failed to follow its own established disciplinary procedures when it terminated her. Claimant's arguments lack merit.

We begin with a review of the legal principles applicable to a denial of unemployment benefits because of willful misconduct. Although the Law does not define the term "willful misconduct," it has been judicially defined as follows:

- a) wanton or willful disregard for an employer's interests;
- b) deliberate violation of an employer's rules;
- c) disregard for standards of behavior which an employer can rightfully expect of an employee; or
- d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

Bruce v. Unemployment Compensation Board of Review, 2 A.3d 667, 671 (Pa. Cmwlth. 2010). Where a claimant's willful misconduct is alleged to be the result of a violation of a work rule, the burden is on the employer to prove that the claimant was aware of and violated the rule. *Id.* Once the employer meets its burden of showing willful misconduct, the burden shifts to the claimant to establish good cause for her actions. *Id.* A claimant has good cause if her actions are "justifiable and reasonable under the circumstances." *Id.*

⁵ This Court's scope of review in an unemployment compensation case is limited to determining whether an error of law has been committed, or whether necessary findings of fact are supported by substantial evidence. *Blue v. Unemployment Compensation Board of Review*, 616 A.2d 84, 86 n.4 (Pa. Cmwlth. 1992).

It is well settled that the Board is the ultimate finder of fact and arbiter of witness credibility. *Peak v. Unemployment Compensation Board of Review*, 509 Pa. 267, 269-70, 276-77, 501 A.2d 1383, 1385, 1388 (1985). Thus, as long as the Board's factual findings are supported by substantial evidence, those findings are conclusive on appeal. *Bruce*, 2 A.3d at 671. That the claimant may have given "a different version of the events, or ... might view the testimony differently than the Board, is not grounds for reversal if substantial evidence supports the Board's findings." *Tapco, Inc. v. Unemployment Compensation Board of Review*, 650 A.2d 1106, 1108-1109 (Pa. Cmwlth. 1994).

Here, Claimant challenges the Board's adjudication primarily by attacking Meg Barry's credibility. Claimant asserts that if she had really been sleeping on duty, then Barry, as the charge nurse, should have woken her up and sent her home. Claimant alleges that this was the procedure for dealing with sleeping employees explained to her by a different charge nurse, Donna Wint, when she first started working for Employer. Claimant also suggests that this is the procedure contained in Employer's employee handbook. Because Barry did not follow that procedure, Claimant asserts that Barry must have been lying.

Claimant's challenges to Barry's credibility are simply beyond the scope of this Court's review. *Bruce*, 2 A.3d at 671. Her credibility challenges also rest on a flawed premise: that Employer has a policy for dealing with sleeping employees that mandates some form of discipline short of termination. Claimant did not call Donna Wint as a witness at the Referee's hearing or offer any evidence of such a policy. We have reviewed Employer's employee handbook and find no progressive discipline procedure such as that suggested by Claimant. Rather, the handbook states that "[v]iolation of Company policies and rules, including

unsatisfactory job performance and conduct violations, may result in disciplinary action up to and including the termination of employment.” Exhibit E-1 at 11. The handbook also classifies “unprofessional conduct,” for which Claimant was terminated, as a “major rule violation” that “may necessitate the immediate discharge of an employee.” *Id.* at 27, 28.

We agree with the Board that Claimant was ineligible for benefits by reason of her willful misconduct. Employer’s witnesses testified credibly that Claimant slept for three hours during her work shift on the night of January 28, 2010. This was a violation of Employer’s work rule prohibiting unprofessional conduct, which Employer proved was a terminable offense.⁶ Claimant acknowledged in her testimony that she was aware that unprofessional conduct could lead to disciplinary action, including termination. Finally, Claimant offered no evidence to establish good cause for violating Employer’s work rule. Accordingly, we affirm the order of the Board.

MARY HANNAH LEAVITT, Judge

⁶ This Court has recognized that sleeping during working hours without permission constitutes willful misconduct. *Kelley v. Unemployment Compensation Board of Review*, 429 A.2d 1227, 1228 (Pa. Cmwlth. 1981).

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ORDER

AND NOW, this 15th day of June, 2011 the order of the Unemployment Compensation Board of Review in the above-captioned matter, dated August 17, 2010, is AFFIRMED.

MARY HANNAH LEAVITT, Judge