IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sheila Beverly,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 201 C.D. 2010
	:	
Unemployment Compensation Board of Review,	:	Submitted: June 25, 2010
	:	
	:	
Respondent	:	

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

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: July 27, 2010**

Sheila Beverly (Claimant), pro se, petitions for review of an order of the Unemployment Compensation Board of Review (Board), affirming the order of the Unemployment Compensation Referee (Referee), which found Claimant ineligible to receive unemployment compensation benefits under Section 402(e) of the Pennsylvania Unemployment Compensation Law (Law).[1] T. Frank McCalls, Inc. (Employer) terminated Claimant's employment shortly after it discovered that

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

Claimant had purchased thousands of dollars worth of products with her employee discount, distributed the products to clubs with which she was affiliated, and used some of the products in her side business, allegedly violating company policy. Claimant contends that the Board erred in denying her unemployment compensation benefits because her conduct did not rise to the level of willful misconduct.

Employer discharged Claimant from her employment as a store manager on July 1, 2009, and she filed for unemployment benefits shortly thereafter. On July 16, 2009, the Scranton Unemployment Compensation Service Center (Service Center) issued a determination denying Claimant benefits under Section 402(e). Claimant appealed this determination and, on September 10, 2009, a Referee held a hearing at which Claimant and Employer's president and vice-president testified. On September 11, 2009, the Referee issued a decision affirming the Service Center's denial of benefits. (Referee's Decision/Order, September 11, 2009.) Claimant appealed that order to the Board. The Board made the following findings of fact:

1. The claimant was last employed as a store manager by T[.] Frank McCalls, Inc. from May 11, 2000, at a final rate of $12.75 per hour and her last day of work was July 1, 2009.

2. The employer sells commercial building maintenance supplies.

3. The employer had an employee discount policy (policy) that provided that employees could purchase merchandise at cost for their personal use.

4. The claimant was aware of the policy.

5. On or about June 29, 2009, an employee reported that the claimant was selling thousands of dollars worth of merchandise at cost.

6. The employer investigated and determined that over a 24 month period the claimant had purchased 23 cases of cocktail napkins (92,000 napkins), 13 cases of C-fold towels (31,200 towels), 12 cases of 40-gallon trash bags (3,000 trash bags), and 23 gallons of ant and roach killer.

7. The claimant purchased the cocktail napkins, C-fold towels and trash bags for use at parties at clubs with which the claimant was either affiliated or president.

8. The claimant purchased the ant and roach killer for use in her side business of treating her customer's houses.

9. On July 1, 2009, the employer discharged the claimant for misuse of her employee discount.

(Board Decision and Order, Findings of Fact (FOF) ¶¶ 1-9.) Based on these findings, the Board affirmed the Referee's decision on December 10, 2009. (Board Decision and Order at 3, December 10, 2009.) Claimant petitions this Court for review of the Board's decision denying benefits.[2]

Claimant raises three issues on appeal. She argues that there is not substantial evidence in the record to support the existence of the policy, that she did not understand what "personal use" meant as used in the policy, and that Employer singled her out for discipline even though several employees used the

[2] This Court's scope of review is limited to determining whether constitutional rights were violated, errors of law were committed, and whether essential findings of fact are supported by substantial evidence. Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). "Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion." American General Life and Accident Insurance Company v. Unemployment Compensation Board of Review, 648 A.2d 1245, 1248 (Pa. Cmwlth. 1994).

discount in a manner similar to Claimant's use of the discount. Claimant argues, for the foregoing reasons, her violation of the work policy did not amount to willful misconduct under Section 402(e).

A claimant is not eligible for unemployment compensation benefits when the claimant's "unemployment is due to [her] discharge or temporary suspension from work for willful misconduct connected with [her] work." 43 P.S. § 802(e). Courts have defined the term "willful misconduct" as:

> 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.

Caterpillar, Inc. v. Unemployment Compensation Board of Review, 550 Pa. 115, 123, 703 A.2d 452, 456 (1997).

When a claimant is discharged for failure to comply with a work rule or policy, the employer has the burden of proving that the rule or policy existed, the claimant was aware of the rule or policy, and the claimant violated the rule or policy. Bishop Carroll High School v. Unemployment Compensation Board of Review, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989). If the employer can meet this burden, the burden then shifts to the claimant to prove that there was good cause to violate the rule or policy. Id. There is good cause if a claimant's actions are "justifiable and reasonable under the circumstances." Docherty v. Unemployment Compensation Board of Review, 898 A.2d 1205, 1208-09 (Pa. Cmwlth. 2006).

The Board is the "ultimate finder of fact, and questions of credibility and evidentiary weight to be given to conflicting testimony which was found to be credible are matters for the Board as fact finder." Stringent v. Unemployment Compensation Board of Review, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). This Court must accept the findings of the Board on appeal when supported by substantial evidence. Id. Additionally, this Court "must view the record in a light most favorable to the party which prevailed before the Board, giving that party the benefit of all logical and reasonable inferences deducible from the evidence." Id.

Claimant first argues that the policy's existence is not supported by substantial evidence. The Board found that Employer had an employee discount policy that limited use of items purchased with the discount to the employee's personal use. (FOF ¶ 3.) In the hearing conducted by the Referee, Employer's president, Lisa Witomski, testified as follows:

> R: Okay. And does the Employer offer its employees a discount?
>
> E: We do.
>
> R: What is the employee discount the Employer offers?
>
> E: The employee may purchase for their own personal use, none other, at cost, at McCalls [sic] cost of goods sold, in other words, with no profit.
>
> R: And how were employees made aware of this discount?
>
> E: Well, when they are originally employed, they're given a list of their employee benefits of which that is one.

(Referee Hr'g Tr. 7-8.) Later in the hearing, Claimant testified as to the existence of the employee discount policy:

R: Okay. All right. Ms. Beverly, did the Employer go over a list of employee benefits that you had available to you?

C: Yes.

R: And was one of those an employee discount?

C: Yes.

R: And were you permitted to purchase items at cost for your personal use?

C: Yes.

(Referee Hr'g Tr. 18.) Therefore, there is substantial evidence to support the Board's finding that the policy existed.[3]

Employer must also show that Claimant was aware of the policy. Bishop Carroll High School, 557 A.2d at 1143. In its opinion, the Board found that Claimant knew of the policy. (FOF ¶ 4.) At the Referee's hearing, in the above quoted testimony, Claimant answered in the affirmative when the Referee asked her if she was "permitted to purchase items at cost for [her] *personal use*." (Referee Hr'g Tr. 18 (emphasis added).)[4] Claimant's testimony is substantial evidence to support the Board's finding that Claimant was aware of the policy.

[3] Claimant also argues that she was fired for a policy requiring managerial approval of employee purchases. All of Employer's employees received a letter setting forth this policy with their paychecks the day Claimant was fired. (Referee Hr'g Tr. 21.) However, even though this was stated as one of the reasons for termination in the Employment Separation Information provided by Employer, Employer abandoned this reason in later proceedings and focused on Claimant's violation of the policy regarding personal use of an employee discount. (Employer Questionnaire Attachment, SC Exhibit 11.) We, therefore, do not address this argument.

[4] Additionally, while not considered by the Referee, in Claimant's Petition for Review, Claimant acknowledges that the "[e]mployee manual indicates 'items for personal use.'" (Petition for Review at 2, February 5, 2009.) Furthermore, Employer's president's testimony,

Claimant's testimony also provides substantial evidence to support the Board's finding that she violated the policy. Claimant admitted that she purchased the merchandise for use at parties hosted by clubs with which she was affiliated and for her side business:

> R: And for what purpose did you buy 92,000 napkins?
>
> C: Because I'm in a club that we use – I'm the president of the Ladies Auxiliary. I'm also the steward and own a building (inaudible).
>
> R: Okay. So you purchased them for use for your club?
>
> C: Yes.
>
> . . . .
>
> R: Did you purchase 13 cases of C-fold towels?
>
> C: I believe it was about that many. Yes.
>
> R: And for what purpose did you purchase those for?
>
> C: For use for the same thing, parties.
>
> R: But that was for the clubs?
>
> C: Yes. All of it, yes.
>
> . . . .
>
> R: Okay. You needed 3,000 40-gallon trash bags?
>
> C: Not just for home. I said for home and my club.
>
> . . . .

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quoted above, that each new employee is given a list of benefits that includes the discount policy, if found credible, would be sufficient to support the Board's finding that Claimant knew of the policy.

R: And what was the basis for you purchasing 23 gallons [of ant and roach killer]?

C: Sometimes I would do people's houses. I would spray people's houses on the side…

R: So…

C: …to make extra money.

R: So you were using that to make a profit?

C: Exterminating. Exterminating. Yes. We are allowed to have our own businesses.

(Referee Hr'g Tr. 19-20.) The evidence in the record supports the Board's findings that Claimant violated the policy.

Claimant also argues that she did not violate the policy because she believed that once she purchased the merchandise, she could do whatever she wanted with it. The Board concluded "that the claimant's use of the products was not for her personal use." (Board Decision and Order at 3, December 10, 2009.) By distributing goods bought with her discount to potential customers, Claimant prevented Employer from potentially selling those goods for a profit of $2,478.30. (Referee Hr'g Tr. 14.) If "personal use" could be interpreted so broadly that it could include supplying thousands of dollars worth of merchandise to clubs that Claimant is a member of and supplying Claimant's extermination business with its insect spray, then there would be nothing to stop an employee from selling such merchandise purchased with an employee discount for a profit, in direct competition with Employer. Such conduct would not be "personal use" as an

employer would define the term; Claimant's large-scale[5] purchase and distribution of merchandise bought with her employee discount is surely outside the scope of "personal use." If Claimant could do whatever she wanted with the merchandise once she paid for it, then Employer would not need to limit the discount to personal use, as such limitation would be meaningless. Therefore, we agree with the Board's finding that the term "personal use" in Employer's policy does not include supplying multiple clubs with cases of merchandise or running an extermination business using the merchandise acquired with the discount. These are activities that would fall outside "personal use." Because Employer established that the policy existed, Claimant knew of the policy, and she violated it, Employer has satisfied its burden and the burden shifts to Claimant to show that Employer's policy was either "unreasonable or that good cause existed to violate the rule." Docherty, 898 A.2d at 1208.

Claimant does not argue that Employer's policy was unreasonable and introduced no evidence to that effect. Therefore, Claimant must show that she had good cause to violate the discount policy. Claimant contends that she had good cause because she was unaware of the policy. This argument, however, is contradicted by Claimant's testimony at the hearing and in her Petition for Review, as previously discussed. From the transcript of this testimony and the record, the Board made a finding that "[t]he claimant was aware of the policy." (FOF ¶ 4.) There is certainly substantial evidence to support the Board's finding.

[5] We note that in the 24 months prior to her termination, Claimant purchased 92,000 napkins, 31,200 C-fold towels, 3,000 40-gallon trash bags, and 23 gallons of ant and roach killer.

Claimant also asserts in her brief that several other employees used their discounts to purchase items for non-personal use, but only she was singled out and discharged for violating the policy. However, Claimant did not raise this argument before the Referee and did not provide any evidence to support such a claim at the hearing. The Board correctly found that Claimant did not establish that she was discriminated against by Employer in being disciplined for her violation of the discount policy. Therefore, Claimant has provided no convincing argument that the work policy was unreasonable or that she had good cause to violate the policy.

Moreover, this Court has previously held that an employee's violation of a company policy by misusing an employer-sanctioned discount constituted willful misconduct under Section 402(e). In Taylor v. Unemployment Compensation Board of Review, 420 A.2d 1360 (Pa. Cmwlth. 1980), the employer offered discounts to certain non-profit organizations. Id. at 1360. The claimant was discharged for giving those discounts to other employees and for also receiving such discounts from fellow employees. Id. This Court held the misuse of the discount to be willful misconduct since it was against the employer's policy and was inimical to the employer's interests because it cost the employer revenue. Id. at 1361. In the present case, while Claimant was entitled under Employer's policy to purchase items for her personal use, she misused that discount and violated the policy when she purchased merchandise for other than her personal use. This violation of the policy cost Employer up to $2,478.30 in potential revenue. As in Taylor, this is inimical to Employer's interests and constitutes willful misconduct. Because Claimant has not met her burden, her violation of the work policy

constitutes willful misconduct under Section 402(e) of the Law and she is ineligible for benefits.

For the foregoing reasons, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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	:	
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O R D E R

NOW, July 27, 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge